CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 14/MP/2011 with IA No 21/2011

Coram:
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member

Date of Hearing: 29.3.2012
Date of Order : 9.5.2013

In the matter of:

Gaming by M/s Gujarat Fluorochemicals Limited, NOIDA (misuse of grant of open access) and violation of Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009

And in the matter of:

Rajasthan Rajya Vidyut Prasaran Nigam Ltd — Petitioner

Vs

Gujarat Fluorochemicals Ltd — Respondent

Present

1. Shri Aditya Madan, Advocate for RRVPNL
2. Shri V. K. Gupta, RRVPNL
2. Shri S. K. Jain, RRVPNL
3. Shri Dinesh Khandelwal, RRVPNL
4. Shri Venkatesh, Advocate, GFL
5. Shri Ambica Garg, Advocate, GFL
6. Ms Joyoti Prasad, NRLDC

ORDER

The petitioner is the State Transmission Utility in the State of Rajasthan and has been authorized to operate the State Load Despatch Centre. The respondent owns a wind farm with an installed capacity of 12 MW at Jaisalmer and the power generated by the said generating station is injected at 132 kV GSS Jaisalmer through 33 kV Sadia II feeder.

2. The petitioner has submitted that the respondent has been seeking No Objections Certificate for short term transaction on monthly basis for which daily schedule is being processed by National Load Despatch Centre/Northern regional Load Despatch Centre. The petitioner has submitted that though it had raised certain objections in granting no objection certificate for grant of open access to the petitioner, but in accordance with the order of this Commission dated 27.8.2008 in Petition No.60/2008, the petitioner has been issuing No Objection Certificate to the petitioner. Based on the energy injection by the petitioner for the period 1.4.2009 to 31.3.2010, the petitioner has alleged that the respondent has been resorting to 'gaming' by selling power more than its generation capacity in kWh and making undue commercial gain through unscheduled interchange charges. The petitioner has explained that during the period, the respondent is selling power to the tune of two to three times the acual generation and creating gross under-injection as a result of which the petitioner is forced to overdraw from the grid which amounts to indiscipline. The petitioner has further explained that as per the procedure followed by NRLDC, the electricity as per the schedule of the respondent is reduced from the drawal schedule of the State and the under-injection by the respondent is reflected as the overdrawal by the State. The under-injection caused by the respondent is charged from the respondent at the UI rate whereas the distribution companies of the State are required to purchase power at higher cost to avoid overdrawal. The petitioner has submitted the following data in support of its contention:

Month	Scheduled Injection (LU)	Actual Injection (LU)	Under Injection (LU)	Amount of UI		Average rate of UI	Highest rate of purchase by DISCOMs
				period	Amount (Rs)		
April 2009	79.13	20.02	59.11	30.3.2009 to 26.4.2009	28494038.52	4.82	9.99
May 2009	78.11	32.73	45.38	27.4.2009 to 31.5.2009	24673402.48	5.44	8.65
June 2009	52.07	23.85	23.22	1.6.2009 to 28.6.2009	13399753.96	5.77	6.87
July 2009	78.39	24.17	54.22	29.6.2009 to 2.8.2009	23715201.31	4.37	6.95

August 2009	75.26	35.29	39.97	3.8.2009 to 30.8.2009	25453737.21	6.37	7.35
September 2009	62.24	35.13	27.11	31.8.2009 to 27.9.2009	11657546.28	4.30	7.41
October 2009	56.90	8.91	47.99	28.9.2009 to 1.11.2009	23811276.41	4.96	7.23
November 2009	44.86	11.43	33.43	2.11.2009 to 29.11.2009	8722393.302	2.61	9.56
December 2009	51.17	13.67	37.50	30.11.2009 to 27.12.2009	10609944.15	2.83	7.05
January 2010	55.52	11.93	43.59	28.12.2009 to 31.1.2010	18445730.99	4.23	0.7
February 2010	51.39	12.09	39.30	1.2.2010 to 28.2.2010	11576655.16	2.95	0.9
March 2010	40.70	14.41	26.29	1.3.2010 to 28.3.2010	15626292.74	5.94	1.03
Total	**725.74**	**248.63**	**477.11**				

3. The petitioner has further submitted that the respondent has been violating the limit of under-injection on time block basis as well as on daily aggregate basis as specified in Regulation 7(2) of the Central Electricity Regulatory Commission (Unscheduled Inter-change Charges and related matters) Regulations, 2009 (hereinafter "UI Regulations") which provides that under-injection by a seller shall not exceed 12% of the scheduled injection when the frequency is below 49.5 Hz and 3% on dailt aggregate basis for all time blocks when the frequency is below 49.5 Hz (prior to 3.5.2010). The petitioner has also placed on record the details of alleged violations by the respondent at Annexure V to the petition.

4. The petitioner has submitted that the issue of gaming by the respondent was brought to the notice of the Appellate Tribunal during the hearing in Appeal No 66/2009. The Appellate Tribunal vide order dated 3.8.2010 advised the petitioner to bring the instances of gaming by the respondent to the notice of this Commission for necessary action. The present petition has been filed accordingly with the following prayers:

"(a) To penalize the respondent for violation of CERC (UI charges and related matters) regulations 2009 and resorting to deliberate gamming.

(b) *Pass appropriate order allowing the petitioner to refuse the open access for inter-State open access to the respondent whenever there is variation of more than 30 % from the schedule.*

(c) *To limit the total energy sale by the respondent as per the capacity utilization factor (CUF) for wind farms.*

(d) *Pass such other and future orders as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."*

Report of NRLDC

5. The petition was listed for hearing on admission on 19.5.2011 and was admitted by order dated 8.6.2011. While admitting the petition, this Commission directed NRLDC to investigate, in consultation with National Load Despatch Centre (NLDC), the petitioner's allegations and submit its report. NRLDC submitted its report dated 30.6.2011, covering the period from 1.4.2009 to 31.3.2010. When the petition was again heard on 21.7.2011, this Commission noticed that the report was incomplete as it did not cover the entire period given in the petition, that is, 1.4.2009 to 31.7.2010. It was also noted that the extent of losses suffered by the petitioner for the alleged acts of the respondent through over-drawl from the grid and the frequency at the time of over-drawl were also not reported. Accordingly, this Commission directed NRLDC to submit a fresh report covering the above aspects also. In compliance with the direction, NRLDC submitted a comprehensive report dated 8.8.2011 covering the period 1.4.2009 to 31.7.2010. Later on, NRLDC filed its report dated 14.9.2011 containing the details of losses suffered by the petitioner on account of under-injection vis-à-vis scheduled injection.

6. NRLDC has stated that it wrote letters to the petitioner as also the respondent to submit certain details to facilitate investigation as directed by this Commission. The

details were furnished by the petitioner except the information relating to the scheduled injection at IEX. The details of transactions and Market Clearing Price for the period 1.4.2009 to 31.7.2010 were obtained by NRLDC directly from IEX. The respondent initially did not respond to the requests made by NRLDC. Subsequently, the respondent submitted the total injection schedule, actual injection and UI for the period 1.4.2009 to 31.5.2010. Therefore, NRLDC finalized the report dated 8.8.2011 based on the information received from the petitioner, respondent and IEX and submitted the report on 9.8.2011.

7. NRLDC has submitted the details of the injection schedule, actual generation and deviation from injection schedule in the report as under:-

Month	Injection Schedule		Actual Injection		Actual Generation in % of Schedule	Deviation from Injection Schedule
	MWh	% of Installed Capacity	MWh	% of Installed Capacity	%	%
	(1)	(2)	(3)	(4)	(5)	(6)
April 2009	7913	92%	2002	23%	25%	75%
May 2009	7811	87%	3273	37%	42%	58%
June 2009	5207	60%	2885	33%	55%	45%
July 2009	7841	88%	2063	23%	26%	74%
August 2009	7526	84%	3529	40%	47%	53%
September 2009	6224	72%	3377	39%	54%	46%
October 2009	5690	64%	891	10%	16%	84%
November 2009	4486	52%	1143	13%	25%	75%
December 2009	5117	57%	1367	15%	27%	73%
January 2010	5552	62%	1193	13%	21%	79%
February 2010	5139	64%	1209	15%	24%	76%
March 2010	4253	48%	1430	16%	34%	66%
April 2010	3698	43%	1915	22%	525%	48%
May 2010	4199	47%	3092	35%	74%	26%
June 2010	1207	14%	3415	40%	283%	-183%
July 2010	2466	28%	7201	81%	292%	-192%
Total/ Average	84328	60%	39981	29%	47%	53%

8. Further, NLDC in its report has submitted the details of its UI transactions in the IEX and bilateral transactions carried out by the respondent as under:

Month	UI-MWh	UI Amount Paid by GFL	Sale in IEX during Injection	Amount received by GFL from	Sale Through Bilateral	Amount Received by GFL due to	Total Amount Received	Net Gain by GFL

		due to under-injection	by GFL	IEX		bilateral		
	(+)- Over Injection, (-) – Under Injection	Rs. Lakh	MWh	Rs. Lakh	MWh	Rs. Lakh	Rs. Lakh	Rs. Lakh
	(1)	(2)	(3)	(4)	(5)	(6)	(4) + (6)	(4)+(6)-(2)
Apr-09	-5911	357	5924	634	0	0	634	276
May-09	-4539	193	4617	331	0	0	331	138
Jun-09	-2322	183	2812	234	0	0	234	51
July-09	-5778	246	2075	108	3703	213	321	75
Aug-09	-3997	271	2003	174	1994	115	288	18
Sep-09	-2847	160	680	36	2167	125	161	1
Oct-09	-4799	207	0	0	4799	293	293	86
Nov-09	-3343	94	0	0	3343	204	204	110
Dec-09	-3749	122	0	0	3749	229	229	107
Jan-10	-4359	170	0	0	4359	266	266	96
Feb-10	-3931	135	0	0	3931	240	240	105
Mar-10	-2823	150	225	10	2598	159	168	18
Apr-10	-1783	148	1629	126	154	6	132	-16
May-10	-1107	84	320	20	787	47	67	-17
Jun-10	2208							
Jul-10	4735							
Total/Avg	-51289	2520	20286	1673	31584	1895	3568	1048

9. Based on the above data, the findings of NRLDC in the final report dated 8.8.2011are as under:

(a) The respondent generated 39981 MWh. Considering the auxiliary consumption as Nil, the capacity utilization factor of the wind firm of the respondent was 29%. Considering the generation of 39981 MWh as against the scheduled injection of 84328 MWh for the period April 2009 to July 2010, the respondent has generated in the range of 16% to 292% of the schedule which works out to average of 47% of the scheduled generation.

(b) The injection schedule of the respondent varied from 14% to 92% of the wind farm capacity with annual average injection schedule being equal to 60% of the wind farm capacity. But the actual injection was 10% to 81% of the wind farm capacity, with annual average actual injection being equivalent to 29%.

(c) Consideration of the total injection schedule (bilateral injection schedule + injection schedule with IEX) and the actual injection during April 2009 to July 2010 revealed that at times the respondent was unable to generate to meet its bilateral commitments. However, the respondent was found to sell power at the IEX.

(d) The total UI volume of the respondent for under-injection from April 2009 to July 2010 was 51289 MWh against which the volume presumed to have been sold at IEX and through bilateral transactions was 20286 MWh and 31584 MWh respectively. While doing the UI volume bifurcation between IEX and bilateral, IEX quantum has been considered first followed by bilateral quantum for the balance UI.

(e) The rates for sale of power at IEX were higher than the average UI rates while the rates for sale through bilateral transactions were sometimes higher and sometimes lower than the average UI rates.

(f) The total amount paid by the respondent to the UI account during the period April 2009 to July 2010 was ₹ 2520 lakh whereas the amount received by the respondent from IEX was ₹1673 lakh and from bilateral transactions was ₹1895 lakh. The net gain by the respondent in the process of declaring excessive injection schedule and under-injection was about ₹1048 lakh.

(g) The number of time blocks in which the petitioner exceeded over-drawl limit specified under Regulation 7 of the UI Charges Regulations varied from NIL to 16 in a month. The total number of such time blocks during the period under investigation was 89.

(h) The respondent might have gained Rs.1048 lakh extra by selling power through IEX as well as bilateral on one hand and carrying out under-injections to the grid on the other hand. NLDC has observed that had the respondent done some periodical checks in between and moderated its forecasting of scheduled energy, such large deviations could have been avoided.

10. During the hearing of the petition on 11.8.2011, we had directed NRLDC to calculate the losses suffered by the petitioner due to under-injection by the respondent. We had also directed the petitioner to file with NRLDC the data regarding the rate at which power was purchased by the distribution companies/power procurement agency of the State of Rajasthan to meet out the under-injection by the respondent. Based on the data supplied by the petitioner, NRLDC has calculated the month-wise summary of the UI implication for Rajasthan due to under injection by respondent as under:

Month	UI (MWh) (+)-Over Injection, (-)-Under Injection by respondent	UI Implications for Rajasthan due to under-injection by Respondent **(₹ in lakh)**	Amount paid by Rajasthan Discoms for procurement of power to meet out under-injection by Respondent **(₹ in lakh)**	Approximate gain/ loss of Rajasthan **(₹ in lakh)**
Apr-09	-5911	340	355	14 (Loss)
May-09	-4539	184	272	88(Loss)
Jun-09	-2322	174	139	35 (Gain)
Jul-09	-5778	234	376	142(Loss)
Aug-09	-3997	258	260	2(Loss)
Sep-09	-2847	152	185	33(Loss)
Oct-09	-4799	197	312	115(Loss)
Nov-09	-3343	90	217	128(Loss)
Dec-09	-3749	116	244	128(Loss)
Jan-10	-4359	162	283	122(Loss)
Feb-10	-3931	128	255	127(Loss)
Mar-10	-2823	143	184	40(Loss)
Apr-10	-1783	141	116	26(Gain)
May-10	-1107	80	72	8(Gain)
Jun-10	2208	Not applicable	Not applicable	-
Jul-10	4735	Not applicable	Not applicable	-

Total	2400	3270	870 (Loss)

11. Based on the above data, NRLDC has drawn the following inferences:

(a) In the months of November 2009 and December 2009, losses suffered by Rajasthan due to under injections by GFL are maximum i.e. approximately Rs. 128 lakhs each.

(b) In the months of June 2009, April 2010 and May 2010, Rajasthan has gained approximately the net cumulative amount of Rs. 69 lakhs due to under injections by GFL.

(c) In the months of June 2010 and July 2010, there is no under injection by Respondent. Hence no analysis has been carried out for the months of June 2010 and July 2010.

(d) The losses suffered by Rajasthan on account of under injections by GFL are approximately to the tune of Rs. 939 lakhs. The gain made by Rajasthan due to such under injection by GFL is approximately Rs. 69 lakhs.

(e) Total amounts paid by Rajasthan Discoms for procurement of power to meet out the under-injection by Respondent are approximately Rs. 370 lakhs and whereas UI Implications for Rajasthan due to under-injection by Respondent are approximately Rs. 2400 lakhs.

(f) Considering both gains and losses, the net losses suffered by Rajasthan due to under injections by Respondents are approximately to the tune of Rs. 870 lakhs for the period 01.04.2009 to 31.05.2010.

12. Under directions of this Commission, the parties were supplied the copies of the reports of NRLDC dated 8.8.2011 and 14.9.2011 to enable them to file their responses on these reports. The petitioner has not filed its response to the report. The respondent has filed its response vide affidavit dated 5.3.2012.

Submissions of the Respondent

13. The respondent has filed its reply dated 1.8.2011 to the petition. The main contentions of the petitioner in its reply are as under:

(a) The present petition is barred by *Res* Judicata as the grounds urged by the petitioner in the present petition are identical with the arguments made and rejected by this Commission in its order dated 27.8.2008 in Petition No 60/2008 (Gujrat Fluorochemicals Ltd Vs Superintending Engineer (SO & LD), Rajasthan Rajya Vidyut Prasaran Nigam Limited) and another.

(b) The respondent is not governed by the UI Charges Regulations as they are applicable to the generation station, whose tariff is determined by this Commission under clause (a) of sub-section (1) of Section 62 of the Act. The tariff for sale of electricity generated by the respondent is not determined under Section 62 of the Act as it sells electricity at tariff that is either mutually agreed or is determined over a power exchange or is approved as part of the buyer distribution companies' power procurement by the Appropriate Commission under clause (b) of sub-section (1) of Section 86 of the Act.

(c) According to the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009 (Renewable Energy Sources Regulations), only the scheduling of biomass power generating station with an installed capacity of 10 MW and above and non-

fossil fuel based co-generation projects are subjected to scheduling and despatch code specified under the Grid Code and UI Charges regulations, and other renewable sources are subject to Renewable Energy Sources Regulations.

(d) The Operating Procedure for Northern Region ("Operating Procedure") framed by virtue of the IEGC, is applicable only in case ISGS plants and does not apply to the respondent as it is not an ISGS. Therefore, the injection of power by the respondent is not to be included in the drawal schedule of the State prepared by NRLDC and in that case under-injection by the respondent would not affect the petitioner.

(e) "Gaming" as defined under the UI Regulations is an intentional mis-declaration of capacity. In the petition there is no allegation of mis-declaration by the respondent. Moreover, "gaming" assumes that the generator under-declares its capacity and thereby schedules less power than what it is able to generate, but in fact injects power in excess of its declared capacity and schedule, thereby recovering the additional UI Charges and making undue commercial gains. Therefore, a generator cannot make undue commercial gains by under-injecting power and consequently paying UI charges. The respondent has paid heavy amounts as the UI Charges and therefore it cannot be accused of making commercial gains from the UI charges. The respondent has sought to draw sustenance from the following observations of this Commission made in the order dated 27.8.2008 ibid:

> *"Thus, apprehension of the respondents that State distribution companies will have to make up for the deviations in the supply by the generating company or there will be commercial loss to other entities is devoid of merit, based as it is on misconception and lack of understanding of the scheme presently in vogue."*

(f) As regards the allegation regarding violation of the limits of under-injection on time block basis as well as on daily aggregate basis, the petitioner has submitted that since the UI Charges Regulations do not apply to the respondent, the issue of the respondent violating the limit of under-injection does not arise.

14. In response to the reports of the NRLDC, the petitioner has made the following submissions:

(a) The reports only affirm the variable nature of wind generation and the generation of power by the respondent has been purely based on the wind cycle within the State of Rajasthan. It is evident from the report that the generation of power by the respondent has been purely based on wind cycle within the State of Rajasthan.

(b) The unpredictability about wind generation has been appreciated by the Commission in order dated 27.8.2008 in Petition No. 60/2008 wherein the Commission has held that ABT cannot be applied to wind generation because of its inherent nature.

15. During the hearing of the petition, learned counsel for the respondent submitted that Regulation 1 (ee) of the UI Regulations defines gaming as intentional mis-declaration of declined capacity by any generating station or seller in order to make an undue commercial gain through UI charges. Learned counsel submitted that since the wind generator cannot regulate the wind generation, the charge of gaming cannot be sustained against the respondent. Learned counsel further submitted that Regulation 6 (6) of UI Regulations provides for initiation of proceedings against any generating company or seller on the charges of gaming. Since generating station has been defined

to mean a generating station whose tariff is determined by the Commission under Section 62 (1) (a) of the Act, the respondent whose tariff is not determined by the Commission cannot be considered as a generating station for the purpose of Regulation 7 (6) of the UI Regulations.

16. In its rejoinder, the petitioner has submitted that the respondent is covered under the UI Charges Regulations. The petitioner has reiterated that any sale under open access outside the State is deducted by NRLDC while calculating the net drawl schedule of the State. Therefore, any under-injection by the respondent is reflected as over-drawal of the State.

17. We have considered the pleadings of the parties and other material on record. The following issues arise for our consideration:

(a) Whether the petition is barred by *Res Judicata*?

(b) Whether the respondent is governed by the provisions of the UI Regulations in so far as deviation from the schedules is concerned?

(c) Whether the charge of 'gaming' is made out against the respondent?

(d) If so, what directions should be issued in the facts and circumstances of the case?

These issues have been discussed *ad seriatim* in the succeeding paragraphs.

(A) *Res Judicata*

18. The respondent has argued that the present petition is barred by *Res Judicata* on the ground that the issues raised in the present petition were already decided by this Commission in its order dated 27.8.2008 in Petition No 60/2008. The respondent has

submitted that the Commission in the said order dealt with specific objections raised by the petitioner herein that were identical to the grounds raised in the present petition. It has been averred that the Commission in the said petition had held that the argument of the petitioner that "when wind generator is not able to generate upto the schedule, the power to the purchaser outside the State will flow from the State Distribution companies" reflected lack of understanding of the petitioner not only about the UI mechanism but also about the functioning of the integrated system. It has been further averred that the Commission in the said order had explained that under the UI mechanism, deviations by the generator from the generation schedule as well as deviations from the drawal schedule by the open access customer are to be adjusted based on the UI charge at the respective ends and thereby the actual injection by the generator and actual drawal by the open access customer would get decoupled and neither the open access customer nor the distribution licensees in whose area the generator or the open access customers are located would suffer any commercial loss. It has been submitted that the Commission in the said order had allayed the apprehension of the petitioner (respondent in Petition No. 60/2008) as under:

> *"……..Thus, apprehension of the respondents that State distribution companies will have to make up for the deviations in the supply by the generating company or there will be commercial loss to other entities is devoid of merit, based as it is on misconception and lack of understanding of the scheme presently in vogue."*

The respondent has submitted that the petitioner also filed two review petitions before the Commission bearing Petition Nos. 109/2008 and 110/2008 raising the identical issues which were dismissed by the Commission vide order dated 3.2.2009. Even the appeal filed by the petitioner has been dismissed by the appellate Tribunal for

Electricity (hereinafter "Appellate Tribunal"). Therefore, the issues have attained finality and the present petition is barred by *Res Judicata*.

19. The petitioner has argued that the issue of gaming was raised by it before the Appellate Tribunal in Appeal No. 66/2009. The Appellate Tribunal while dismissing the appeal observed that the matter can be raised before this Commission. Accordingly, the petitioner has filed the present petition.

20. We have considered the submission of the respondent and the petitioner. Section 11 of the Code of Civil Procedure, 1908 deals with *Res judicata.* The said section reads as under:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The doctrine of *Res Judicata* in substance means that an issue or point decided and attaining finality should not be allowed to be re-opened and re-agitated twice over. Hon'ble Supreme Court in the Escorts Farms Ltd. Vs Commissioner, Kumaon Divison, Nainital {AIR 2004 SC 2186} has explained the purpose of the doctrine of *Res Judicata* as under:

> "A final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."

21. In the light of the above principle, we need to consider whether the claim or demand or cause of action in Petition No. 60/2008 are the same as agitated in the present petition and if so, whether the same claim or demand or cause of action has been decided on merit so as to constitute a bar on the further proceedings. Petition

No.60/2008 was filed by the respondent seeking directions to the petitioner to grant open access for inter-State transactions. During the hearing of the said petition, the petitioner had expressed the concern that due to variability of the wind generation, there would be slippage in the injection schedules and in that event, power to the purchasers outside the State would flow from the State distribution companies. It was in that context, the Commission explained the working of the mechanism of UI to allay the apprehension of the petitioner. The observation in that order cannot be construed as the final decision on the dispute regarding actual loss to the distribution companies of the State due to consistent under-generation and slippage of schedules by the respondent. Moreover, at that point of time, the UI Regulations had not come into force and deviation under the UI was being governed by the provisions of 2004 Open Access Regulations. UI Regulations which came into force with effect from 1.4.2009 sought to put certain restrictions on the volumes of over-injection and under-injection during a time block or during the day. Therefore, the dispute between the parties with regard to schedule and deviation from schedule needs to be considered in accordance with the UI Regulations. That being the case, it cannot be said that the observation of the Commission in the order dated 27.8.2008 in Petition No.60/2008 settled the issues regarding scheduling and deviation from schedules which would constitute a bar against subsequent agitation of the issue before this Commission. In the present petition, denial of open access is not an issue which has been granted by the petitioner in compliance with our order abid. The allegations in the present petition against the respondent are that it misused the facility of open access and infringed the UI Charges Regulations for undue financial gains. Moreover, the allegations relate to the post-2008 period. The dispute presently raised could not have been raised in the earlier proceeding. Therefore, it cannot be said that the matter directly and substantially in issue in the present proceeding has been directly and substantially in issue in the former proceeding. In our view, the present

petition raises new cause of action which has to be adjudicated afresh and the petition is not barred by *Res Judicata.*

22. It is also pertinent to observe that when the petitioner raised the issue of gaming before the Appellate Tribunal in Appeal No.66/2009, the petitioner was directed to raise the issue before this Commission. The Appellate Tribunal in its order dated 3.8.2010 in Appeal No.66/2009 observed as under:

> "After hearing the learned counsel for both the parties, we do not think it fit to interfere with the impugned Order, especially when the order that was passed by the Central Commission directing the Appellant to grant open access to the Respondent has been said to be complied with. The grievance of the Appellant now presented before this Tribunal would relate to the alleged subsequent instances, which we are not concerned with in this Appeal. These are all the things, which may be brought to the notice of the Central Commission for necessary action."
>
> x x x x x
>
> Therefore, it is for the Appellant to approach the Central Commission and seek for necessary action by placing the materials to prove its plea. In that event, the Central Commission may give an opportunity of hearing to both the Appellant and respondent No. 2 before considering the said issues and pass orders in accordance with law."

The respondent has never taken the defence before the Appellate Tribunal that the issues raised in the petitioner's grievance have been decided by the Commission and therefore, the petitioner should not be granted liberty to approach the Commission on the same issues. The Appellate Tribunal has clearly observed that the grievances of the appellant (petitioner in this petition) presented before it would relate to alleged subsequent instances with which the Tribunal is not concerned in the appeal. In our view, the issues raised by the petitioner are fresh issues independent of the issues raised in Petition No.60/2008 and the present petition is not barred by *Res Judicata*.

(B) Applicability of UI Charges Regulations in case of the Petitioner

23. The petitioner has filed this petition alleging that the respondent has violated the limit of under-injection on time block basis as well as on daily aggregate basis as

specified in Regulation 7(2) of the UI Regulations. The respondent has submitted that the UI Charges Regulations do not apply in its case since it is neither a generating station nor a seller and therefore, the respondent cannot be penalized for gaming.

24. We have considered the above submissions of the respondent. As regards the contention of the non-applicability of the UI Regulations in case of the respondent, we need to consider the provisions of the UI Regulations. The objective and scope of the UI Regulations as pecified in Regulation 3 and 4 thereof are extracted as under:

> **"3. Objective**
>
> The objective of these regulations is to maintain grid discipline as envisaged under the Grid Code through the commercial mechanism of Unscheduled Interchange Charges by controlling the users of the grid in scheduling, dispatch and drawl of electricity.
>
> **4. Scope**
>
> These regulations shall be applicable to –
>
> (i) the generating stations and the beneficiaries, and
>
> (ii) sellers and buyers involved in the transaction facilitated through short term open access or medium term open access or long-term access in inter-State transmission of electricity."

25. From Regulation 3 above, it is clear that the objective is to maintain grid discipline through the commercial mechanism of the UI Charges by controlling the "users" of the grid in scheduling, dispatch and drawl of electricity. Therefore, all users of the grid are regulated by the UI Regulations. Regulation 4 provides that these regulations apply to the generating stations and the beneficiaries on the one hand, and the sellers and buyers involved in the transactions facilitated through short-term open access or medium-term open access or long-term access in inter-State transmission of electricity. The terms "generating station", "beneficiary", "seller" and "buyer" are defined in Regulation 2 as under:

*“(d) **‘beneficiary’** means the person purchasing electricity generated from the generating station.”*

*“(e) **‘buyer’** means a person, other than the beneficiary, buying electricity, through a transaction scheduled in accordance with the regulations applicable for short term open access, medium term open access and long term access.”*

*“(f) **‘generating station’** means a generating station whose tariff is determined by the Commission under clause (a) of sub-section (1) of Section 62 of the Act.”*

*“(m) ‘**seller**’ means a person, other than a generating station, supplying electricity, through a transaction scheduled in accordance with the regulations applicable for short term open access, medium term open access and long term access.”*

26. In terms of clause (d), the beneficiary is the person who purchases electricity generated at a generating station, whereas in terms of clause (e), ‘generating station’ has been defined as a generating station whose tariff is determined by this Commission. It is admitted position that the tariff of the respondent’s wind farm is not determined by this Commission, Therefore, the respondent is not a generating station as defined under the UI Charges Regulations. Similarly, the seller is the person, other than a generating station, who supplies electricity through a transaction scheduled in accordance with the regulations for long term access, medium term open access and short term open access. The term “supply” is defined under sub-section (70) of Section 2 of the Act as “the sale of electricity to a licensee or consumer”. Thus, under the UI Regulations, the seller is the person who sells electricity to the licensee or the consumer and avails open access for this purpose. The respondent is supplying electricity by availing short term open access at the power exchange and through bilateral transactions. Therefore, the respondent is a seller under the UI Regulations and accordingly, falls within the scope of these regulations under Regulation 4 thereof.

27. The respondent has submitted that the concept of 'seller' was introduced through amendment dated 28.4.2010. The respondent has argued that even though it is assumed that the respondent is a seller, it cannot be retrospectively applied in case of the respondent since the time period of the alleged gaming by the respondent is from 1.1.2009 till 31.7.2009 and the respondent cannot be penalised for gaming in terms of Regulation 6(6) of the UI Regulations. The contention of the respondent is not correct. The term 'seller' was defined in the UI Regulations (which came into force with effect from 1.4.2009) as under

> "(m) 'seller' means a person, other than a generating station supplying electricity through a transaction scheduled in accordance with the regulations specified by the Commission for open access, medium term access and long term access;"

Subsequently, the definition was amended vide amendment dated 28.4.2010. The amended definition reads as under:

> "(m) 'seller' means a person, other than a generating station, supplying electricity, through a transaction scheduled in accordance with the regulations applicable for short term open access, medium term open access and long term access;"

It may be seen that in the amended definition, the term 'open access' has been qualified by the words 'short term' for the purpose of clarity. Even without the amendment, the term 'seller' would include the case of the respondent as it is not a generating station in the sense that its tariff is not being determined by the Commission and it sells electricity through bilateral transactions and at the power exchange by availing open access. Therefore, the contention of the petitioner that it is not a seller prior to 26.4.2010 and hence gaming cannot be applied in its case cannot be sustained.

28. The next contention of the respondent is that UI Regulations is not applicable in case of renewable energy projects like that of the respondent where scheduling is not possible due to inherently unpredictable nature of generation. The respondent has

submitted that the Commission has issued separate regulations for determination of tariff of renewable energy generation projects, namely, Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2009 (RE Regulations) which also includes the provisions for scheduling and scheduling and dispatch of renewable generating stations, including wind. According to the said regulations, the scheduling and dispatch from the respondent's power plant will not be subjected to Grid Code and UI Regulations.

29. Regulation 11 of the RE Regulations which deals with the dispatch principles of the renewable energy sources, provides as under:

> "11. Despatch principles for electricity generated from Renewable Energy Sources:
>
> (1) All renewable energy power plants except for biomass power plants with installed capacity of 10 MW and above, and non-fossil fuel based cogeneration plants shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch' principles.
>
> (2) The biomass power generating station with an installed capacity of 10 MW and above and non-fossil fuel based co-generation projects shall be subjected to scheduling and despatch code as specified under Indian Electricity Grid Code (IEGC) and Central Electricity Regulatory Commission (Unscheduled Interchange and related matters) Regulations, 2009 including amendments thereto."

In accordance with the above regulations, biomass power plant with installed capacity of 10 MW and above and non-fossil fuel based cogeneration plants shall be subjected to scheduling and dispatch in accordance with the Grid Code and UI Regulations and other renewable energy power plants would be treated as 'MUST RUN' power plants and shall not be subjected to merit order principle. According to the above provision, the respondent being renewable power project based on wind is a MUST RUN plant and is not subject to merit order principle. However, it is seen that the respondent has been giving regular schedules of injection and there is wide variation between the schedule and actual injection. In that event, if the respondent is not subjected to scheduling and dispatch code, it will lead to grid indiscipline. Further, the respondent has been paying to

the petitioner the UI charges for the under-injection which means that the respondent has subjected itself to the scheduling and dispatch as per the UI Regulations and Grid Code. In our view, the respondent cannot be permitted to claim selective applicability of the regulations to its generating station as per its convenience. Since both Grid Code and UI Regulations are concerned with grid discipline, the said regulations are applicable in case of the respondent in the interest of ensuring grid discipline.

(c) Whether charge of gaming has been made out against the respondent?

30. The petitioner has alleged that the respondent has indulged in gaming by under-injecting the power and should be penalised. The respondent has denied the allegation of gaming on the ground that there was no mis-declaration of schedule. "Gaming" has been defined under sub-clause (ee) of clause (1) of Regulation 2 of the UI Regulations as under:

> "(ee) 'gaming' in relation to these regulations, shall mean an intentional mis-declaration of declared capacity by any generating station or seller in order to make an undue commercial gain through Unscheduled Interchange charges."

Thus, the term "gaming" has following two ingredients namely, mis-declaration by the generating station or seller is intentional; and such mis-declaration is for the purpose of making undue commercial gains through UI charges. Therefore, we need to consider whether there was any intentional mis-declaration by the respondent and whether the respondent has made undue commercial gain through the UI Charges.

31. The Commission directed NRLDC to investigate into the allegations of gaming against the respondent for the period 1.4.2009 till 31.7.2010. NRLDC has submitted reports as directed by the Commission, the gist of which have been discussed in paras 7 to 11 of this order. It is seen from the table at para 7 that the respondent during the

period from 1.4.2009 had given schedule for 84328 MWh which ranged from 14% to 92% of the installed capacity with average of 60%. On the other hand, the respondent generated only 39981 MWh during that period which ranged from 13% to 40% of the installed capacity except in July 2010 when it was 81% of the installed capacity with average being only 29% of the installed capacity. Similarly, actual generation was 47% of the schedule whereas deviation was 53% of the schedule. The respondent has attributed this variation to the variable and unpredictable nature of wind generation. We are unable to agree that the variation between the schedule generation and actual generation can be attributed to unpredictability of the wind generation. NRLDC in its report has observed that at times the respondent was unable to generate to meet its bilateral commitments but the respondent was found to sell power at the IEX. NRLDC has further observed that had the respondent done some periodical checks in between and moderated its forecasting of scheduled energy, such large deviations could have been avoided. It is thus clear that the respondent has been giving schedule of generation more than what it is able to generate which amounts to mis-declaration of schedule. As a result, the total volume of UI for under-injection by the respondent was 51289 MWh from April 2009 to July 2010 which is evident from the table at para 8 of this order. NRLDC has further submitted that the rates for sale of power at IEX were higher than the average UI rates while the rates for sale through bilateral transactions were sometimes higher and sometimes lower than the average UI rates. By apportioning the UI volume between IEX and bilateral, NRLDC has submitted that the respondent might have gained Rs.1048 lakh extra by selling power through IEX as well as bilateral on one hand and carrying out under-injections to the grid on the other hand.

32. It appears from the report of the NRLDC that the petitioner has been giving schedule disproportionate to its actual injection. Since the schedule is prepared by

NRLDC for the State as a whole, the export of power from the State is netted against the import of power by the State. In other words, to the extent of under-injection by the respondent, power is reduced from the drawal schedule of the State. In order to meet the difference, the State distribution companies are required to arrange costly power. Though the respondent is paying for the difference between the scheduled injection and the actual injection at the UI rates, that is not sufficient to enable the distribution companies of the State to buy equal quantity of power. On the other hand, as the price at the IEX is higher than the UI and even under bilateral, it is sometimes higher, the respondent is making commercial gains for the power it never injects. The month-wise summary of the UI implication for Rajasthan due to under injection by respondent as calculated by NRLDC is given at para 11 of this order. NRLDC has found that the total amounts paid by Rajasthan Discoms for procurement of power to meet out the under-injection by respondent are approximately Rs. 3270 lakhs and whereas UI Implications for Rajasthan due to under-injection by Respondent are approximately Rs. 2400 lakhs. Therefore, Rajasthan Discoms have suffered a net loss of Rs.870 lakh on account of the action of the respondent. It therefore conclusively established that the respondent has indulged in gaming by making intentional mis-declaration of its schedule. We therefore direct the respondent to give the injection schedule commensurate with the capacity utilization factor of the wind farm in order to obviate the possibility of under injection of electricity into the grid.

33. The petitioner has also alleged that the respondent has violated the Regulation 7(2) of the UI Regulations which is extracted as under:

> "*(2) The under-injection of electricity by a generating station or a seller during a time-block shall not exceed 12% of the scheduled injection of such generating station or seller when frequency is below 49.7 Hz and 3% on daily aggregate basis for all the time blocks when the frequency is below 49.7 Hz.*"

34. The petitioner has submitted date-wise details of under-injection by the respondent from April 2009 to July 2010 at Annexure VI to the petition. As per the said annexure, under-injection by the respondent has exceeded 3% of the declared capacity at frequency below 49.7 Hz on 357 days during the period 1.4.2009 to 31.7.2010. Moreover during the same period, number of time blocks when injection exceeded 12% of the declared capacity at frequency below 49.7 Hz was 12065. However, NRLDC in its report has submitted that the number of time blocks in which the petitioner exceeded over-drawl limit specified under Regulation 7 of the UI Charges Regulations varied from NIL to 16 in a month and the total number of such time blocks during the period under investigation was 89 as per the details given at Annexure VII and Annexure VIII of the report dated 8.8.2011, which are attributable to the under injection by the respondent. Based on the report of NRLDC, we are inclined to come to the conclusion that the respondent has violated Regulation 7(2) of the UI Regulations by under injection, which has resulted in overdrawal for 89 times by the petitioner.

35. The petitioner has prayed to penalise the respondent for violation of UI Regulations and for resorting to deliberate gaming. It is established that the respondent has violated Regulation 7(2) of the UI Regulations. We therefore direct the staff to draw charge against the respondent under section 142 of the Act for contravention of the regulations of the Commission. It also stands proved that the respondent had indulged in gaming during the period and had made unfair commercial gains. Though the petitioner has not made any prayer for compensation for the loss, the last prayer of the petitioner is to “pass such order and future orders as the Commission may deem appropriate in the facts and circumstances of the case.” Therefore, the Commission will be required to pass appropriate directions on the proven charge of ‘gaming’. Regulation 6(6) of the UI Regulations provides as under:

> “(6) The Commission may, either suo motu or on a petition made by RLDC, initiate proceedings against any generating company or seller on charges of gaming and if required, may order an enquiry in such manner as decided by the Commission. When the charge of gaming is established in the above enquiry, the Commission may, without prejudice to any other action under the Act or regulations thereunder, disallow any Unscheduled Interchange charges received by such generating company or the seller during the period of such gaming.”

36. In this case, after the petition was filed by the petitioner, the Commission in its order dated 8.6.2011 took suo motu cognizance of the allegation of gaming and directed NRLDC to carry out investigations into the allegation and submit its report. NRLDC has submitted its reports and the copies of the reports have been made available to the respondent. We have analysed the report and have come to the conclusion that the charge of gaming stands proved against the respondent. According to Regulation 6(6) of the UI Regulations as quoted above, the Commission has the discretion to disallow the UI charges received by such generating company or seller during the period of gaming. Therefore, we direct the respondent to pay to the petitioner Rs.870 lakh which it has gained during the period due to under-injection, as compensation for the loss suffered by the petitioner within a period of one month from the date of issue of this order.

37. The petitioner has prayed for order to allow the petitioner to refuse the open access for inter-State transactions to the respondent whenever there is violation of more than 30% from its schedule and to limit the total energy sale by the respondent as per the capacity utilisation factor for wind farms. In our view, no such restrictions are permissible under the Open Access Regulations and therefore, the prayers of the petitioner to that effect cannot be granted.

38. During the course of the proceedings, the respondent had filed two Interlocutory applications. I.A. No. 21/2011 was filed for recall of the Commission’s order dated

8.6.2011 on the ground that the Commission had directed NRLDC to investigate into the allegations of gaming without hearing the respondent. As already explained, the Commission has the power to suo motu order for investigation into any allegation of gaming under Regulation 6(6) of the UI Regulations and in exercise of the power thereunder, the Commission had instituted the investigation. It is not necessary to hear the respondent before ordering investigation. The respondent was supplied with the copies of the reports and the respondent has filed its response. Therefore, the principle of natural justice has been complied with. I.A. 11/2012 has been filed seeking an opportunity of hearing on the plea that the learned counsel for the respondent did not get the opportunity to make submission during the hearing on 7.2.2012. It is noted that the petition was listed for further hearing on 29.3.2012 and the learned counsel for the respondent made his submissions at length. In view of the above, both IAs have become infructuous and are accordingly disposed of.

sd/-	sd/-	sd/-
(M Deena Dayalan)	**(V.S. Verma)**	**(S. Jayaraman)**
Member	**Member**	**Member**