

CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 163/MP/2012

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Date of Order: 10.6.2016

In the matter of

Petition under section 79(1) (f) of the Electricity Act, 2003 read with Regulation 20 of the CERC (Open Access in Inter-State Transmission) Regulations, 2008 towards unpaid unscheduled Inter-change charges for the period ranging from 28.8.2005 to 31.12.2006.

And

In the matter of

Bhushan Power and Steel Limited
4th Floor, Tolstoy Marg,
Connaught Place, New Delhi

.....Petitioner

Vs

1. GRIDCO Ltd.
Janpath, Bhubaneswar-751 022, Odisha
2. Orissa Power Transmission Corporation Ltd.
Janpath, Bhubaneswar-751 022

....Respondents

Parties present:

Shri Sanjay Sen, Senior Advocate, BPSL
Shri Rajiv Yadav, Advocate, BPSL
Shri R.K. Mehta, Advocate, GRIDCO
Shri Abhishek Upadhaya, Advocate, GRIDCO
Ms. Himanshi Ahdley, Advocate, GRIDCO
Shri A Sethy, GRIDCO
Shri S.R. Sarangi, GRIDCO
Shri Shyam Kejriwal, ERPC
Shri R.B. Sharma, Advocate, SLDC Odisha
Shri S.K. Das, SLDC, Odisha



ORDER

The petitioner, Bhushan Steel and Power Ltd., has filed the present petition under clause (f) of sub-section (1) of Section 79 of the Electricity act, 2003 (hereafter 'the Electricity Act'), with the following prayers:

- “(a) Direct Respondent No. 1 and Respondent No. 2 to release the payment of ₹5,75,76,584 along with interest @ 18% per annum calculated from the due date of pending UI bills and up till the actual payment thereof; and
- (b) Pass such other and further order(s) as this Hon'ble Commission may deem appropriate under the facts and circumstances of the present case.”

2. The petitioner has set up an integrated steel plant in Sambalpur District of the State of Odisha and a captive power plant (CPP) with a total capacity of 100 MW consisting of two units of 40 MW and 60 MW. Before the steel plant was commissioned, the petitioner had surplus power available with it and intended to sell to buyers outside the State of Odisha. The petitioner made an application, being Petition No. 174/2003, before the Odisha Electricity Regulatory Commission (hereafter OERC') for grant of open access for sale of available surplus power outside the State of Odisha by utilising the transmission network of GRIDCO, the first respondent, and others. Learned OERC in its order dated 27.2.2004 recorded the petitioner's no objection to accept the UI pricing mechanism applicable to inter-State transactions for open access customer. Learned OERC further noted the submission made on behalf of the petitioner that the application for inter-State transmission of electricity would be made to the nodal agency in accordance with the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004 (hereafter 'the 2004 Open Access Regulations'). After taking note of the above submissions of the petitioner and the unwillingness of GRIDCO to purchase the surplus power, the learned OERC in the said order dated



27.2.2004 permitted the petitioner to sell its surplus power in accordance with the Electricity Act, 2003. The State Commission while granting permission observed that the tariff for inter-State transmission of electricity would be determined by CERC.

3. The petitioner entered into an arrangement for sale of power upto 64 MW with Reliance Energy Trading Limited which sold the power outside the State to its committed customers by availing the short-term inter-State open access from time to time after obtaining clearances from the State Load Despatch Centre, Odisha, the third respondent, (hereafter 'SLDC Odisha'). GRIDCO by its letter dated 25.8.2005 advised the petitioner to open irrevocable Letter of Credit (LC) for ₹10.00 lakh, towards payment security mechanism for realization of UI charges, if any, for mismatch between the scheduled export and actual export of power. The petitioner has stated that it opened irrevocable LC in favour of GRIDCO immediately on receipt of the letter dated 25.8.2005.

4. GRIDCO in its letter dated 25.8.2005 also agreed to issue weekly bills for payment of the UI charges. The petitioner has alleged that no bills for UI charges receivable by it were ever issued. The petitioner in its letter dated 24.10.2005 addressed to Director (Finance), Orissa Power Transmission Corporation Ltd, (hereafter 'OPTCL'), the second respondent, pointed out that the bills for payment of the UI charges were not received and requested him to consider the Secure Meter data of WESCO which is of 0.2 accuracy class for the purpose the UI billing since the apex meters installed at Budhipadar sub-station were not set for 15 minutes integration data. A similar letter dated 29.10.2005 was written by the petitioner to the General Manager, OPTCL.



5. On 5.7.2006, the petitioner executed a Short Term Open Access Commercial Agreement with GRIDCO. The said agreement acknowledged the fact that the petitioner had been selling about 64 MW of power through the electricity trader. With respect to the UI charges applicable to the sale of electricity by the petitioner, the said agreement provided as follows:

"2. ABT will be applicable to BPSL for above short-term transactions and will be guided by CERC Open Access Regulations, 2004 with its amendments issued from time to time. For smooth operations of transactions, however, as embedded customer, following commercial/stipulations are agreed.

3. (A) BPSL will endeavour to inject as per daily schedules as advised by SLDC.

(B) Any mismatch between the schedule and actual injection accepted by SLDC shall be governed by UI pricing mechanism. Such UI bills shall be prepared by SLDC on weekly basis. In the case of under/over injection the UI payable/receivable will be settled after taking care of STU losses and wheeling charges.

(C) In the event of zero scheduling by BPSL/ ERLDC, no UI mechanism shall be operative.

(D) When the frequency falls below 49.4 Hz, BPSL shall endeavour to maximize its injection at least up to the level, which can be sustained, without waiting for the instructions of SLDC. Under ABT regime such injection shall be covered under UI mechanism.

(E) In the event of mismatch between the schedule and actual injection, the matter will be governed by UI regulation applicable..... "

6. The petitioner has alleged that since the bills for the UI charges were not issued, it started raising the bills on the respondents for recovery of the UI charges receivable, the first such bill being for ₹1,31,59,525.77 for the period 28.8.2005 to 30.12.2005. Thereafter, the petitioner claims to have raised a number of bills for the UI charges. The petitioner has alleged that it did not receive any response, despite repeated cautions that the delay in payment of the UI charges would attract levy of the Delayed Payment Surcharge. The petitioner vide its letter dated 6.2.2006 addressed to OPTCL cancelled all the previous UI bills and issued a fresh bill for ₹1,92,67,450 for the period 28.8.2005 to 8.1.2006. The petitioner has claimed to



have issued a number of bills thereafter to OPTCL asking for payment of the outstanding UI charges. The petitioner vide its letter dated 22.7.2006 addressed to GRIDCO, forwarded a statement of the pending UI bills and sought its intervention for clearance of the outstanding bills. The petitioner followed up with GRIDCO vide its letters dated 26.10.2006, 8.12.2006, 12.3.2007. The petitioner has alleged that no response was received from the respondents. The petitioner has submitted that the outstanding amount for the period starting 28.8.2005 to 3.12,2006 stands at ₹5,75,76,584.

7. The petitioner has submitted that GRIDCO sent a letter dated 17.4.2008 to SLDC, with a request to verify and certify the UI claims of the petitioner. However, OPTCL by its letter dated 18.4.2008 informed GRIDCO that it did not have any historical record of scheduling by short-term open access customers and was, therefore, unable to verify the petitioner's UI bills. However, the petitioner has averred that an Internal Audit Report dated 25.7.2009 prepared by the Central Internal Audit Cell of OPTCL with respect to the pending UI bills of the petitioner admits that the petitioner is entitled to the UI charges being claimed. The Internal Audit Report a copy of which has been obtained by the petitioner under the Right to Information Act admits as under:

"Bhushan Steel & Power has taken Short-Term Open Access in Inter in Inter State Transmission w.e.f 28.8.2005. It has furnished implemented schedule to ERLDC daily & got its payment from Trader on final schedule basis. But the shortfall or excess injection over final schedule had been met from Grid for which it is eligible to get it in the form of unscheduled interchange charge. The total UI for the State as a whole including Open Access has come to Gridco."

8. In the Internal Audit Report it was concluded that the Unscheduled Interchange for the period 21.10.2005 to 1.1.2006 were required to be recalculated after putting actual export figure with import data and after verification of Reserved



Transmission Charges, Scheduling and Operating Charges as per the 2004 Open Access Regulations. The petitioner has further alleged that the continued retention of the UI charges received by GRIDCO from ERLDC amounts to its unjust enrichment at its expense. The petitioner vide its letters dated 4.11.2009, 10.12.2009 and 5.1.2010 has reiterated its request to the respondents for payment of UI charges totalling ₹5,75,76,584 alongwith 18% interest per annum without any response. The petitioner has submitted that the bills for over-injection of power had already been accounted for in the UI pool account of the State whereby GRIDCO had received payments from Eastern Regional Load Despatch Centre. However, the petitioner has been deprived of its share of the UI charges. In the above background, the petitioner has approached the Commission for direction to the respondents to release the UI charges of ₹5,75,76,584 alongwith 18% interest per annum.

9. Replies to the petition were filed by GRIDCO and OPTCL/SLDC Odisha. GRIDCO in its reply dated 9.10.2012 (filed on 10.12.2012) took the preliminary objection with regard to maintainability of the petition before the Commission under section 79(1)(f) of the Act stating that the dispute between the petitioner and GRIDCO is not covered under the said section. GRIDCO further submitted that Open Access Regulations of CERC was notified in 2008 and therefore cannot have retrospective application to the present dispute. GRIDCO also submitted that in terms of Regulation 35 of Central Electricity Regulatory Commission (Open Access in inter-State transmission) Regulations, 2004, the petitioner was required to approach the Member Secretary, Eastern Region Electricity Board or Eastern Region Power Committee in the first instance and if the dispute was not resolved, then the matter could be reported to the Commission. Another objection taken by



GRIDCO was that the dispute related to segregation of UI charges between the embedded entities in the State which fell within the jurisdiction of OERC. OPTCL and Odisha SLDC in their combined reply dated 23.10.2012 submitted that in terms of Regulation 34 of the 2004 Open Access Regulations, the petitioner should have approached the Member Secretary EREB/ERPC for resolution of the dispute and in the event, the dispute was not resolved, the matter should be reported to the Commission. However, the petitioner has approached the Commission after a gap of 6 years bypassing the Member Secretary EREB/ERPC.

10. The Commission after hearing the parties, vide order dated 9.5.2013 decided that the petition was maintainable and admitted the petition. Relevant portion of the said order dated 9.5.2013 is extracted as under:

“42. Based on the above discussion, we hold that the present petition is neither barred by limitation nor does it suffer from delay or laches. We further hold that this Commission is the only forum having jurisdiction to adjudicate the issues raised in the petition.

43. We find that there is a controversy regarding availability of data for working out and verifying the data needed for adjudication of the petitioner’s claim. For this purpose, we consider it appropriate to take assistance of the technical experts in the investigation of the petitioner’s claim. Member Secretary, Eastern Regional Power Committee who is responsible for maintenance of the UI energy accounting at Regional level is considered to be most appropriate authority for this purpose. Accordingly, we direct the Member Secretary to investigate the petitioner’s claim and submit a report to this Commission latest by 20.6.2013 for its consideration. The Member Secretary shall investigate the UI charges recoverable and payable by the petitioner for the entire period during which short-term inter-State open access was availed by the petitioner. The parties are directed to render necessary assistance to the Member Secretary in investigation. For this purpose, the parties shall appear before the Member Secretary on 20.5.2013 along with the available data in their possession in support of their respective claims.

44. The investigation by the Member Secretary ordered by us conforms to the provisions of Regulation 35 of the 2004 Regulations on which heavy reliance has been placed by the respondents, in letter and spirit even though we are of the considered opinion that the assistance of the Member Secretary, and for that matter any other person or authority, can be sought by this Commission without a provision analogous to Regulation 35 of the 2004 Regulations.”



11. Aggrieved by the Commission's order dated 9.5.2013, GRIDCO filed Appeal No. 169 of 2013 before Appellate Tribunal for Electricity. While admitting the appeal, ATE had directed the Member-Secretary, ERPC to continue with the investigation but would not submit the final report to CERC till further order. The Appellate Tribunal for Electricity vide its Judgment dated 1.7.2014 dismissed the appeal filed by GRIDCO and upheld the Commission`s order dated 9.5.2013.

12. Eastern Regional Power Committee (ERPC) vide its affidavit dated 15.9.2014 submitted the "Report in respect of the UI charges for the period from 28.8.2005 to 31.12.2006 between M/s Bhushan Power & Steel Limited and GRIDCO". Perusal of the ERPC report reveals that ERPC held three meetings as per the details given below:

Date	Attended by	Description of activities undertaken
10.6.2013	OPTCL, GRIDCO, SLDC Odisha, ERLDC, BPSL, ERPC	Requirement and availability of data for UI calculation
5.8.2013	OPTCL, GRIDCO, SLDC Odisha, ERLDC, BPSL, ERPC	Methodology discussed
30.9.2013	GRIDCO, ERLDC, BPSL, ERPC	Meeting to reconcile final data.

13. In the Report, the following methodology was adopted to work out the UI charges payable to the petitioner:

(a) The scheduled figures furnished by ERLDC for the period 28.8.2005 to 31.10.2006 were taken for computation of UI. For the period from 1.11.2006 to 31.12.2006, the schedule figures furnished by BPSL were considered.

(b) For the period 28.8.2005 to 21.10.2005, half hourly actual injection figures at Budhipadar as furnished by SLDC Bhubaneswar was considered and the figures were divided by 2 to arrive at the 15 minutes time block. For



the remaining period, 15 minutes actual injection figure as recorded in the SEM at Budhipadar were taken into computation.

(c) ERLDC vide its letter dated 3.10.2013 confirmed that the schedule figures were at the Odisha-CTU periphery. The actual injection figure of BSPL were found to be at Budhipadar bus. These figures were reduced by 4% to account for the STU loss in Odisha system as per the decision in the meeting taken on 10.6.2013. The actual injection figures were multiplied by 0.96 to arrive at the actual injection by BPSL at Odisha ER-CTU periphery.

(d) Since GRIDCO has received UI for excess injection by BPSL based on the reading at Odisha/CTU-ER periphery, UI payable to BPSL was calculated at this point.

(e) As per clause 3(C) of Commercial Agreement between GRIDCO and BPSL, in the event of zero scheduling in any time block by BPSL/ERLDC, UI charge receivable by BPSL has been made zero.

(f) The UI vector for the purpose of calculation was taken based on the CERC Notification No. L-7/25(5)/2003-CERC date 3.9.2004.

14. In Annexure XXV of the Report, the total UI amount receivable by the petitioner from GRIDCO for the period 28.8.2005 to 31.12.2006 has been calculated. Total injection during the period has been calculated as 1221051.024 MW and UI charge payable as ₹2,94,27,375.02.

15. GRIDCO, vide its affidavit dated filed on 30.9.2014 has submitted that since BPSL did not have any infrastructure for data communication to SLDC, SLDC could



not undertake proper monitoring in respect of power injection by BPSL. GRIDCO has further submitted that BPSL has taken undue advantage of UI mechanism and has indulged in 'Gaming'. GRIDCO has alleged that the BPSL took advantage of prevailing low frequency and injected power into the grid at its will for commercial gain through UI mechanism without adhering to its schedule of open access transaction. GRIDCO has submitted that report of ERPC is erroneous as Regulation 24 (2) (i) of the 2004 Tariff Regulations has not been considered by ERPC while calculating the UI charges.

16. The petitioner vide its rejoinder dated 24.11.2014 to the reply of GRIDCO has submitted that the Commission vide order dated 2.7.2009 in Petition No. 24/2007 (order dated 7.3.2007) held that the provision regarding gaming is applicable to transactions where the beneficiaries have long term lien over the power plant capacity. None of the respondents had ever denied the UI claims of the petitioner. The petitioner has submitted that it has never indulged in gaming, and GRIDCO's belated allegations to the contrary are an unscrupulous attempt to unlawfully misappropriate UI proceeds payable to the petitioner.

17. ERPC was directed vide ROP for the hearing dated 10.11.2014 to submit minutes of meetings held on 10.6.2013, 15.8.2013 and 30.9.2013 regarding finalisation of UI calculations which were placed on record by ERPC vide letter dated 24.11.2014. During the hearing on 9.12.2015, ERPC was directed to submit its views on the allegation of gaming made by GRIDCO in its affidavit dated 30.9.2014 and also to convene a meeting of the concerned parties for reconciliation of data and submit the reconciled data alongwith minutes of the meeting. ERPC convened a meeting on 5.1.2015 which was attended by GRIDCO, SLDC Odisha, BPSL, ERLDC



and ERPC. In the said meeting, it emerged that data taken by ERPC for computation of UI are acceptable to all stakeholders. It was decided that SLDC Odisha would scrutinise and analyse the time block wise data regarding BPSL's injection (Schedule and Actual) and establish and certify gaming if any and submit its observations to the Commission.

18. SLDC Bhubaneswar in its affidavit dated 4.3.2015 has submitted that SLDC Odisha has analysed the schedule and injection data considered by ERPC for computation of UI charges payable/receivable by M/s BPSL for the period from 28.8.2005 to 31.12.2006 which has conclusively proved the provisions of gaming by petitioner. SLDC has submitted the copy of its report to ERPC for further scrutiny and has also enclosed copy of the said report as Annexure I to the affidavit dated 9.4.2015. SLDC has made the summary of analysis of its report as under:

Ser No	Percentage Deviation from Schedule	Total No. of blocks from August 2005 to December 2005	Percentage (%) of blocks where deviation has taken place
1.	< 5%	7860	17.70
2.	5 to 10%	6372	14.35
3.	10 to 20%	8972	20.21
4.	20 to 50%	10996	24.76
5.	50 to 100%	6250	14.08
6.	100 to 200%	2148	04.84
7.	> 200%	1806	04.07
8.	Total scheduled blocks	44404	100.00

SLDC has submitted that as per the above data, it is clearly established that the activities of the petitioner in the ABT regime of system operation cannot be considered as legitimate by any stretch of imagination and the act of the petitioner is solely guided by profit motive by indulging in unfair gaming. SLDC has further submitted that the act of the petitioner was intentional for two reasons, namely, to



pay less on transmission charges as no transmission charge is payable on UI, and UI pricing is frequency linked and is normally priced higher.

19. In order to get an independent verification of the allegation of gaming against the petitioner, the Commission in the Record of Proceedings for the hearing dated 31.3.2016 directed ERPC to examine in consultation with ERLDC the data submitted by SLDC, Odisha and submit its report on the issue of gaming. In response, ERPC vide its letters dated 24.4.2015 and 2.7.2015 has submitted as under:

- (a) ERPC and ERLDC convened a meeting with SLDC Bhubaneswar on 23.4.2005. Since the period of dispute was from 28.8.2005 to 31.12.2006, exhaustive checking of 15 minutes time block data was not possible. Random checking of data was resorted to and the same was also done in the presence of SLDC Engineers and the data were found to be in order. A copy of the Minutes of the meeting signed by Member Secretary of ERPC, DGM of ERLDC and GM of SLDC/OPTCL has been placed on record.
- (b) In the process of random checking, no discrepancy with respect to the data submitted by SLDC Bhubaneswar vis-à-vis the data accepted in the joint meeting held on 7.1.2015 could be found.
- (c) ERPC and ERLDC are of the opinion that during the period under consideration i.e. from 28.8.2005 to 31.12.2006, the word gaming was referred to as the intentional mis-declaration by an ISGS in Regulation 24(2)(i) and (ii) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment) Regulations, 2004. This was done to protect the

interests of the beneficiaries of ISGS. There was no bar on over-injection or under-injection by any entity supplying power. Over-injection and under-injection used to be settled in the light of the relevant settlement mechanism prevalent at that time. Further BSPL was a CPP and an embedded entity of Odisha system. After meeting its own requirement, surplus power available with it was traded through Short Term Open Access. Scheduling of export of power by BSPL was within the purview of SLDC Bhubaneswar. Therefore, gaming, if any, by BSPL in the matter of export of power could be identified and checked by SLDC Bhubaneswar in the light of relevant CERC/OERC Regulations.

- (d) During the preliminary checking of data, it emerged that the petitioner had over-injected beyond its schedule in the following manner in the 44,404 time blocks for which export schedule was approved:

S. No.	Range of Deviation	No of Time Blocks (As per SLDC Bhubaneswar)	% of Total Scheduled Blocks (As per SLDC Odisha)	No of Time Blocks (As per ERPC)	% of Total Scheduled Blocks (As per ERPC)*
1	5 to 10%	6372	14.35	3554	8
2	10 to 20%	8972	20.21	5238	11.8
3	20 to 50%	10996	24.76	6212	13.99
4	50 to 100%	6250	14.08	3379	7.61
5	100 to 200%	2148	4.84	2141	4.82
6	>200%	1806	4.07	1806	4.07

It has been explained that while arriving at the above figures, ERPC Secretariat have considered only those time blocks when there is over-injection beyond schedule by BPSL whereas SLDC Bhubaneswar has considered both over-injection as well as under-injection. Further, all time blocks where there was zero

schedule have not been considered and hence, the range from 0 to 5% of deviation has been eliminated.

20. ERPC vide its letter dated 2.7.2015 reiterated its findings as discussed in para 19 above with the addition of the following two paras:

“We, at ERPC Secretariat, have completed the verification of authenticity of analysed data submitted by SLDC Bhubaneswar on the direction of the Hon’ble Commission and have found that there is no discrepancy of this data vis-à-vis the data reconciled in the joint meeting held on 07.01.2005.

As per CERC (Terms and Conditions of Tariff) (First amendment) Regulations, 2004 prevalent during the period of dispute, the alleged ‘gaming’ by M/s BPSL is neither proved by SLDC, OPTCL through submission of mis-declaration of generation capacity nor is evident from their data.”

21. The petitioner, SLDC Odisha and GRIDCO were directed vide Record of Proceedings for the hearing dated 7.7.2015 to file their responses on ERPC’s report dated 2.7.2015. SLDC Odisha was directed to clarify whether the issue of gaming as alleged vide its affidavit dated 4.5.2015 was ever raised by the SLDC in the year 2005-06 as the case pertained to over/under injection during 2005-06.

22. The petitioner vide its affidavit dated 6.7.2015 has submitted that UI amount received by GRIDCO from the regional pool represents ‘funds held in trust’ on behalf of embedded entities. Such funds are liable to be distributed after segregation at the State level in accordance with Regulation 21 of the Open Access Regulations, 2004. Despite the clear mandate of the said Regulations, the petitioner has been denied its legitimate UI dues since 2005-06 and such withholding of UI payments renders the respondents liable to penal proceedings under Section 142 of the Electricity Act, 2003. The petitioner has further submitted that the allegation of gaming is purely misconceived, as the petitioner has over-injected in 16710 time blocks of 15 minutes during non-peak hours having lower average UI rate as compared to over-injection



during 8815 time blocks during peak hours, when the average UI rate is typically higher. The petitioner has submitted that quantum of over-injection during non-peak hours at average UI rate of ₹2.50/kWh is more than double the quantum of over-injection during peak hours when average UI rate was ₹2.87/kWh. Such a pattern clearly proves that the petitioner was not indulging in gaming activity, as its over-injection during peak hours has been significantly lower than its over-injection during non-peak hours. The petitioner has submitted that ERPC vide submission dated 24.4.2014, has categorically stated that “there was no bar on over-injection or under-injection by an entity supplying power.” Further under the extant tariff regulations of the Commission, the allegations of gaming were required to be investigated by RLDC and since no such investigation was undertaken by RLDC, the petitioner cannot be accused of gaming at this belated stage.

23. SLDC Odisha vide its affidavit dated 22.7.2015 has submitted that ERPC in its report dated 2.7.2015 has added two more paras which were not there in the earlier report dated 24.4.2015 which was a joint report of ERPC, ERLDC and SLDC. SLDC Bhubaneswar has no objection with regard to first para. But with regard to the second para, SLDC Bhubaneswar has dubbed it as misleading and misconceived since the gaming has been viewed by the ERPC in the context of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 which is not applicable in the case of the petitioner. In this connection SLDC Bhubaneswar has relied upon the order of the Commission dated 2.7.2009 in Petition No. 24 of 2007 wherein it was held that “the limits of 105% and 101% have been specified by the Commission in the context of gaming in availability declaration where the beneficiaries have long term lien over the power plant capacity. These



limits have no relevance where no availability linked capacity charges are being paid, and the State Utilities only provide open access". SLDC Bhubaneswar has submitted that the totality of the circumstances clearly and conclusively proves that the petitioner was indulging in the 'gaming' while operating in an ABT regime. As regards the query whether the issue of gaming as alleged vide affidavit dated 4.3.2015 was ever raised by SLDC in the year 2005-06, SLDC, Bhubaneswar has stated that the SLDC is responsible to carry out its operation in accordance with the provisions of Section 32 of the Electricity Act, 2003. As per the above provision, the scheduling and dispatch of electricity is to be conducted in accordance with the contract entered with the generating companies. Since in the present case, there was no commercial agreement till 5.7.2006 in respect of UI, the question of raising the issue of 'gaming' till 5.7.2006 did not arise. SLDC Odisha has further submitted that besides the Grid Code, Regulation 6.4 (15) of the Odisha Grid Code clearly recognized unfair gaming or collusion when the generating station is operating in the ABT regime. As the electricity from the captive power plant is transmitted through the grid, the captive generating plant is required to be regulated in the same manner as the generators of the generating company.

24. GRIDCO in its affidavit dated 7.8.2015 has submitted that the data given by SLDC and verified by ERPC clearly proves beyond any doubt that the petitioner had indulged in gaming during the relevant period. GRIDCO has further submitted that even though Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 were framed for inter-State Generating Stations, the principle contained in Regulation 24(2) will apply to the case of the petitioner particularly in view of the proviso of Section 9 (1) of the Electricity Act, 2003.



GRIDCO has further submitted that the report ERPC dated 2.7.2015 appears to be based on the premise that the provision regarding gaming contained in the Central Electricity Regulatory Commission (Term and condition of Tariff) (First Amendment), 2004 was only applicable to inter-State generating stations (ISGS). GRIDCO has further submitted that para 6.4.15 of Odisha Grid Code provides as under:

“SLDC shall periodically review the actual deviation from the dispatch and net drawal schedule being issued to check whether any of the beneficiaries/ISGS/SGS who are allowed open access are indulging in unfair gaming or collusion. In case any such practice is detected, the matter shall be reported by the SLDC to the Member Secretary for further investigation/action”.

GRIDCO has submitted that as per the Odisha Grid Code, BPSL is under the purview of scrutiny by SLDC. The numerical data regarding crossing of gaming limits as been authenticated by ERPC and in the report dated 24.4.2015, ERPC has observed that gaming, if any, by BPSL in the matter of export of power could be identified and checked by SLDC, Bhubaneswar in the light of relevant CERC/OERC regulations. GRIDCO has submitted that gaming by BPSL is clearly proved and the observations of ERPC in the report dated 2.7.2015 that “the alleged gaming by M/s BPSL is neither proved by SLDC, OPTCL through submission of mis-declaration of generation capacity nor is evident through their data” are unjustified and misconceived.

Submissions during the hearing

25. During the hearing of the petition, leaned senior counsel for the petitioner submitted that OERC in its order dated 27.2.2004 recorded GRIDCO's statement that GRIDCO had no objection to the wheeling of power from the captive power plant of M/s BPSL by utilizing the GRIDCO's transmission system. An agreement entered into between GRIDCO and the petitioner acknowledged the fact that the petitioner



had been selling about 64 MW power through the electricity trader and with regard to the UI charges applicable to sale of electricity by the petitioner, the said agreement provided that Availability Based Tariff would be applicable to the petitioner for short term transactions and guided by CERC Open Access Regulations, 2004. Further, the petitioner and GRIDCO agreed to be bound by the applicable UI mechanism for commercial settlement of any mismatch between the schedule and actual generation by the petitioner. Learned senior counsel submitted that the Internal Audit Report of the Respondents admits that the petitioner has a legitimate UI claim which has been confirmed by the report of ERPC. Learned senior counsel sought directions to the respondents to settle the UI claims of the petitioner.

26. Learned counsel for SLDC Bhubaneswar submitted that the petitioner is a captive generator and is governed by the provisions of section 9 of the Electricity Act, 2003 which provides that every person who has a captive generating plant has the right to open access for the purpose of carrying electricity from his captive generating plant to the destination of his use. In the present case, OERC granted permission to the petitioner vide its order dated 27.2.2004 to wheel 12 MW of power from its captive power plant in Odisha to its factory at West Bengal. Therefore, there is a clear distinction between right to open access under section 9 of the Act and grant of non-discriminatory open access in accordance with the CERC Open Access Regulations, 2004. Learned counsel further submitted that as per the OERC order, the petitioner confirmed about its proposal for long term inter-State transmission of power by utilizing the transmission systems of GRIDCO and others. Though the petitioner was to apply for long term LTA to the nodal agency, the petitioner has not applied for the LTA. Learned counsel further submitted that GRIDCO advised the



petitioner to open LC towards payment security mechanism for realization of UI charges. The petitioner opened an LC on 25.8.2005 and entered into a Short Term Open Access Agreement with GRIDCO on 5.7.2006. Learned counsel submitted that the period under dispute can be divided into two periods i.e. the first period from 25.8.2005 to 4.7.2006 where the power is to be supplied on net exchange basis; and the second period is from 5.7.2006 to 31.12.2006 which is based on the UI Agreement. Learned counsel submitted that in case of net exchange basis, gaming is not applicable. Though gaming arises in case of ABT, the petitioner has not entered into any long term agreement during the second period. With regard to the report of ERPC, learned counsel submitted that the report is irrational and illogical as gaming has been viewed by ERPC in the context of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) (First Amendment) Regulations, 2004 which is not applicable in case of the petitioner in view of the ruling of the Commission in order dated 7.3.2007 in Petition No. 24/2007. With reference to the query whether SLDC Bhubaneswar raised the issue of gaming in the year 2005-06, learned counsel submitted that in accordance with the provisions of Section 32 of the Act, SLDC is required to carry out scheduling and dispatch of electricity in accordance with the contract entered into with the generating company. In the instant case since there was no commercial agreement till 5.7.2006 in respect of UI, the question of raising the issue of gaming till 5.7.2006 did not arise as there was no need to monitor the deviation. Learned counsel for SLDC has submitted that in the present case, there is deviation of 67% of the time blocks ranging from 10-200% of the time blocks of approved schedule which establishes a conclusive case of gaming against the petitioner. Learned counsel submitted that if the petitioner's deviation during the period of transaction is not treated as gaming, this will



encourage all the CGPs in the State to inject power for commercial gain with a nominal contract through open access transaction, as they are having sufficient reserve capacity with them and this would also cause threat to grid security as well.

27. Learned counsel for GRIDCO submitted that on 5.7.2006, the petitioner executed a Short Term Open Access Commercial Agreement with GRIDCO which acknowledged that the petitioner had been selling about 64 MW of power from its CPP through an electricity trader, and both the petitioner and GRIDCO agreed to be bound by the applicable UI mechanism for commercial settlement of any mismatch between the schedule and actual injection by the petitioner. Learned counsel submitted that the Central Electricity Regulatory Commission (Unscheduled Interchange charges and related matters) (Amendment) Regulations, 2010 defined gaming as “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.” Learned counsel submitted that UI mechanism is essentially a disciplinary mechanism to ensure grid discipline and if the UI mechanism is misused for commercial gain, it amounts to gaming. Learned counsel submitted that there is no question of payment of UI charges prior to 5.7.2006 as there was no agreement to that effect. As regards the ERPC report, learned counsel submitted that ERPC proceeded on the basis of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff)(First Amendment) Regulations, 2004 which was applicable to ISGS and secondly, ERPC opined that it was for SLDC Bhubaneswar to check and give a report whether there was gaming or not. Learned counsel submitted that during the preliminary checking of the data, it emerged that the petitioner had over-injected beyond its schedule (details extracted in 19(g) of this order) and the



quantum of over-injection clearly justified that same was intentional and the petitioner has used the surplus power for gaming so as to get undue gain through UI. Learned counsel further submitted that as per Regulation 24(2) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff)(First Amendment) Regulations, 2004, generation upto 105% of the declared capacity in any time block is not to be construed as gaming and above this limit, it is to be treated as gaming. Learned counsel submitted that if gaming is found on the basis of generation, then the extra-generation beyond the schedule shall be reduced to zero. Learned counsel further submitted that the petitioner was not having any infrastructure for sending data to SLDC till April/May 2012, as a result of which proper monitoring by SLDC in respect of injection during the period under dispute could not be done.

Analysis and Decision:

28. We have considered the submissions of the petitioner, the respondents and reports of ERPC and the documents available on record. The petitioner is a Captive Generating Plant and is an embedded entity inside the State of Odisha. The petitioner has sold surplus power from its Captive Generating Plant from 28.8.2005 to 31.12.2006 outside State of Odisha by availing Short Term Open Access about which there is no dispute among the parties. During the period, the petitioner had made certain over-injection for which the petitioner has been claiming the applicable UI charges for an amount of ₹5,75,76,584 alongwith 18% interest on the ground that GRIDCO has received this amount from ERLDC and retained it without reimbursing the said amount to the petitioner. The petitioner filed the instant petition under Section 79 (1) (f) of the Electricity Act, 2003 read with Regulation 20 of the CERC



(Open Access in Inter-State Transmission) Regulations, 2008 towards unpaid UI charges for the period ranging from 28.08.2005 to 31.12.2006.

29. GRIDCO raised the following preliminary objections to the maintainability of the petition:

(a) The petition is not maintainable under Section 79 (1) (f) of the Electricity Act, 2003 as the said section applies only to the disputes between Generating Companies and Transmission Licensees.

(b) Since the claim of the petitioner involves allocation of the UI charges to the petitioner which is an embedded entity in the State and, therefore, the dispute falls within the jurisdiction of the State Commission and for that reason, the Central Commission does not have any jurisdiction.

(c) In terms of Regulation 35 of 2004 Open Access Regulations, the petitioner had to first approach the Member Secretary, Eastern Regional Electricity Board or Eastern Regional Power Committee as the case may be and in case the Member Secretary was unable to resolve the dispute, then only the Central Commission ought to have been approached by filing the petition. Since the petitioner had not approached the Member Secretary and directly approached the Central Commission by filing the impugned petition, the impugned petition is not maintainable.

(d) The instant petition was time barred because the claim of the respondent no.1/petitioner pertained to the period 2005-06 and the petition was filed in February, 2012 with a delay of nearly six years.



30. OPTCL and SLDC in their common reply had stated that the Special Energy Meters with 0.2 accuracy class were not installed and therefore, the petitioner's claim cannot be verified.

31. The Commission in its order dated 9.5.2013 had rejected the preliminary objections of GRIDCO and OPTCL/SLDC. GRIDCO filed Appeal No.163/2013 before the Appellate Tribunal for Electricity. The Learned Tribunal after considering the contentions of all parties rejected the appeal and upheld the findings of the Commission. Therefore, the claims of the petitioner are to be considered on its merit.

32. The Commission vide order dated 9.5.2013 had directed the Member Secretary Eastern Regional Power Committee to verify the necessary data for adjudication of the petitioner's claim for UI receivables. Relevant paras of the order dated 9.5.2013 have been extracted in para 10 of this order.

33. In compliance with our directions, ERPC held three meetings with ERLDC, GRIDCO, SLDC Odisha/OPTCL and the petitioner on 10.6.2013, 5.8.2013 and 30.9.2013. In the first meeting held on 10.6.2013, sources of data to be considered for calculation of UI charges were unanimously decided. In the second special meeting held on 5.8.2013, ERPC informed that it had calculated the UI charges for the period 28.8.2005 to 31.12.2006 in accordance with the decision taken in the first special meeting. Since GRIDCO and SLDC/OPTCL pointed out that the results obtained by them were not tallying with that of ERPC Secretariat, it was decided that ERPC, ERLDC, GRIDCO, SLDC, OPTCL and BPCCL would sit together and reconcile the data and calculation. Further, certain broad consensus was arrived at for considering the schedule figure, injection figure and UI vector for the purpose of UI

calculation. Third meeting was convened on 30.9.2013 for reconciliation of data. In the said meeting, doubt was raised about the point of scheduling as per figure furnished by ERLDC for power transaction between BPSL and GRIDCO i.e. whether scheduling was at ER-NR periphery or Odisha-CTU periphery. As there was no consensus, no formal minutes were issued. However, members present in the meeting requested ERPC to first ascertain the point of scheduling from ERPC. Accordingly, ERPC Secretariat requested for confirmation of point of scheduling from ERLDC who confirmed that the point of scheduling was Odisha-CTU periphery. Based on the above exercise, ERPC Secretariat submitted its report to the Commission on 15.9.2014. The methodology adopted by ERPC has been discussed in para 13 of this order. Further, ERPC concluded in the report that the total injections during the period were 1221051.024 MW and UI charge payable worked out to ₹2,94,27,375.02.

34. GRIDCO in its affidavit dated 25.9.2014 submitted that though ERPC at Serial No. 9 in Chapter -2 (methodology for calculation) of the Report has calculated the UI charges as per Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment) Regulations, 2004, ERPC has not considered Regulation 24(2)(i) of the said regulations while calculating the UI charges of the petitioner. Regulation 24(2)(i) provides that generation upto 105% of the declared capacity in any time block of 15 minutes and averaging upto 101% of the average declared capacity over a day shall not be considered as gaming and the generator shall be entitled to UI charges. During the hearing of the petition on 9.12.2014, the Commission directed ERPC to submit its views on gaming raised by the petitioner and further directed ERPC to hold a meeting with the stakeholders and submit the



reconciled data alongwith the minutes of the meeting. ERPC held a meeting on 5.1.2015 in which GRIDCO, SLDC Odisha, ERLDC and the petitioner participated. In the said meeting it was unanimously decided that the data taken by ERPC Secretariat for computation of UI were acceptable to all stakeholders. As regards gaming it was decided that SLDC Odisha shall scrutinise and analyse the time block wise data of BSPL's injection (Schedule as well as Actual) and establish and certify gaming if any and furnish its detailed observation to the Commission. SLDC Odisha vide its affidavit dated 4.3.2015 (filed on 9.3.2015) submitted the data and summary of the Abstract of Deviation from Schedule for the period 28.8.2005 to 31.12.2006 has been extracted under para 18 above. The Commission directed ERPC to examine in consultation with ERLDC the data submitted by SLDC Bhubaneswar and submit a report on the issue of gaming. ERPC vide its letter dated 24.4.2015 verified the data and certified the over-injections as per the details extracted in para 19(d) of this order. ERPC vide its letter dated 2.7.2015 has certified that there is no discrepancy between the data certified in the letter dated 24.4.2015 and the data reconciled in the joint meeting held on 7.1.2015. ERPC further clarified that as per Central Electricity Regulatory Commission (Terms and Conditions of Tariff)(First Amendment) Regulations, 2004, alleged gaming by M/s BPSL is neither proved by SLDC/OPTCL through submission of mis-declaration of generation capacity nor is evident through the data.

35. Both GRIDCO and SLDC Odisha have contested the findings of ERPC with regard to gaming and have reiterated that the petitioner indulged in gaming by injecting surplus power from its captive generating plant during low voltage condition.



36. In the light of the above discussion, the following issues arise for our consideration:

(a) Whether the petitioner is entitled for UI charges for over-injection during the period 28.8.2005 to 31.12.2006?

(b) Whether any case of gaming is made out against the petitioner?

(c) Relief to be granted to the petitioner.

Issue No.1: Whether the petitioner is entitled for UI charges for over-injection during the period 28.8.2005 to 31.12.2006?

37. The case of the petitioner is that it had a captive power plant of 100 MW with two units of 60 MW and 40 MW. Since the commissioning of its integrated steel plant was delayed, it intended to sell the surplus power to buyers outside the State of Odisha. The petitioner has submitted that OERC in its order dated 27.2.2004 in Case No.174/2003 granted permission to sell surplus power outside the State of Odisha in accordance with the provisions of the Act. After the issue of the said order, the petitioner started selling 64 MW of power to M/s Reliance Energy Trading Limited on inter-State basis who sold the said power outside the State of Odisha to committed beneficiaries. For executing the said transactions, the petitioner is stated to have availed inter-State Short Term Open Access after clearance from Odisha SLDC.GRIDCO vide its letter dated 25.8.2005 advised the petitioner to open an irrevocable revolving LC for ₹10 lakh towards payment security mechanism for realisation of UI charges, if any, for variation in the schedule. GRIDCO also advised the petitioner to sign an agreement for short term open access with GRIDCO/OPTCL within couple of days. The petitioner opened an LC for ₹10 lakh on 25.8.2005 in



Punjab National Bank. The petitioner entered into a Short Term Open Access Commercial Agreement with GRIDCO on 5.7.2006 which contained provisions for settlement of UI charges. The petitioner supplied power under short term open access from 28.8.2005 to 31.12.2006. Since GRIDCO did not raise any UI bills, the petitioner submitted the bills for UI receivables to GRIDCO for payment. Since payments were not made by GRIDCO, the present dispute has been brought by the petitioner before the Commission.

38. Let us consider these three documents first. OERC vide its order dated 27.2.2004 in Case No.174/2004 issued the following directions:

“Heard Shri Bipin Jain, General Manager (Project) representing M/s Bhushan Ltd. and the respondent GRIDCO represented through Shri B M Das, Sr. G. M. (Power Purchase). Shri Jain pleaded before the Commission to pass the following order:

- (i) M/s Bhushan Limited may be permitted to wheel 12 MW of power from their captive power plant at Rengali, Jharsuguda to their factory at Bangihati, Mallickpara, Dist-Hoogly (West Bengal).
- (ii) M/s Bhushan Ltd may be permitted to sell power on net exchange basis.
- (iii) The tariff for inter-State transmission of electricity may be determined by the Central Electricity Regulatory Commission.

2. He also stated that he had no objection to accept the UI pricing mechanism applicable to all inter-State transactions for open access customers.

3. In response, Gridco stated that it had no objection to the wheeling of power from the captive power plant of M/s. Bhushan Limited by utilizing Gridco's Transmission System to the captive power plant of the applicant located at Bangihati in West Bengal.

4. Gridco did not agree to the proposal of purchase of surplus power from the captive power plant of M/s. Bhushan Limited. As such, the principle of net exchange of power may not be applicable.

5. On the query from the Commission, Mr. Jain confirmed that their proposal for wheeling of power is a long term inter-state transmission of power utilizing the transmission system of Gridco and others. As such, in accordance with CERC (Open Access Inter-state Regulation, 2004 dt.30.1.2004), the application for such long term access shall have to be submitted to the Nodal agency, as defined in the aforesaid Regulation.



6. As Gridco is unwilling to give any commercial assurance regarding purchase of surplus power, M/s. Bhushan Limited is free to sell its surplus power in accordance with the relevant provisions of Act, 2003.

7. Any power supply for meeting emergency requirement of the captive power plant shall have to be made in accordance with the Reg.80, the OERC, Distribution (Condition of Supply) Code, 1998. As such, there shall not be any net exchange of power between captive power plant and Gridco.

8. The determination of inter-State transmission tariff will be done by the Central Electricity Regulatory Commission in accordance with The Electricity Act, 2003”

39. Perusal of the above order of OERC shows that the petitioner made an application for permission to wheel 12 MW of power from its captive power plant to its factory in West Bengal. The petitioner also sought permission to sell power on net exchange basis. GRIDCO did not have objection to the wheeling of power by the petitioner to its facility in West Bengal. Further GRIDCO did not agree to the proposal for purchase of surplus power from the captive power plant of the petitioner. Considering these aspects, OERC ruled that there would not be any net exchange power between captive power plant and GRIDCO. OERC also made two important observations. Firstly, the petitioner was free to sell its surplus power in accordance with the provisions of the Act. Secondly, the petitioner had conveyed no objection to the UI pricing mechanism applicable to all inter-State transactions for open access customer. From the order of OERC, it emerges that concerned parties namely, the petitioner and GRIDCO were aware that the petitioner would sell its surplus power in accordance with the provisions of the Act which inter alia includes the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2004 and in the course of inter-State transactions, UI pricing mechanism applicable to inter-State transactions for open access customers would be acceptable to the petitioner. Subsequently, GRIDCO in its letter dated 25.8.2005 advised the petitioner as under:



“With reference to the letter cited above, you are requested to open an irrevocable, revolving LC for ₹10 lakh towards payment security mechanism for realisation of UI charges, if any, for variation in the schedule with the following terms and conditions:

1. GRIDCO shall prefer bill to M/s Bhushan towards UI charges on weekly basis payable within 48 hours.

.....
You are requested to sign an agreement with GRIDCO/OPTCL towards short term open access within a couple of days. On receipt of LC and signing of the agreement, the transaction would commence.”

The petitioner opened the LC on 25.8.2005 but signed the Short Term Open Access Commercial Agreement on 5.7.2006 with GRIDCO. It is pertinent to mention that even though signing of the agreement regarding short term open access was a condition precedent for commencement of transaction as per the letter of GRIDCO dated 25.8.2005, the short term open access transactions commenced with effect from 28.8.2005 even in the absence of the said agreement. In other words, GRIDCO and OPTCL permitted open access transaction even in the absence Short Term Open Access Commercial Agreement. Learned counsel for OPTCL has argued that Short Term Open Access Commercial Agreement dated 5.7.2006 contained provisions regarding UI settlement. However, prior to the said period, there was no agreement between the parties regarding UI, the petitioner’s claim for UI cannot be considered for the said period. We do not agree with the submission of OPTCL. Deviation from schedule through the mechanism of UI in the course of short term transactions is governed by the provisions of 2004 Open Access Regulations. Absence of agreement between parties providing for UI settlement mechanism will not render the provisions of the regulations regarding settlement of deviation through UI mechanism inoperative. In the case of the petitioner, acceptance of the UI mechanism as per the regulations of the Commission for settlement of deviation has been affirmed in the OERC order dated 27.2.2004 and the GRIDCO’s letter dated



25.8.2005. Therefore, the 2004 Open Access Regulations of the Commission, OERC order dated 27.2.2005 and GRIDCO letter dated 25.8.2005 formed the basis of the UI settlement between the petitioner and GRIDCO from 28.8.2005 till 4.7.2006.

40. The petitioner entered into the Short Term Open Access Commercial Agreement on 5.7.2006 with GRIDCO. The provisions of the said agreement are extracted as under:

- “1. BSPL is already selling surplus power through a trader for trading from its 1st CGP and 2nd CGP which will be 64 MW in total.
2. ABT will be applicable to BPSL for such term transactions and will be guided by CERC Open Access Regulations, 2004 with its amendments issued from time to time. For smooth operation of transactions, however, as embedded customer, following commercial/operational stipulations are agreed.
3. (A) BPSL will endeavour to inject as per daily schedules as advised by SLDC.

(B) Any mismatch between the schedule and actual injection accepted by SLDC shall be governed by UI pricing mechanism. Such UI bills shall be prepared by SLDC on weekly basis. In case of under/over injection, UI, payable/receivable will be settled after taking care of STU losses and wheeling charges.

(C) In the event of zero scheduling by BPSL/ERLDC, no UI mechanism shall be operative. Any drawal by BPSL shall be in accordance with applicable regulations to the consumers of the DISCOMs.

(D) When the frequency falls below 49.4 Hz, BPSL shall endeavour to maximise its injection at least up to the level, which can be sustained, without waiting for the instructions of SLDC. Under ABT regime such injection shall be covered under UI mechanism.

(E) In the event of mismatch between the schedule and actual injection, the matter will be governed by UI regulations applicable. SLDC if required may ask BPSL to explain the situation with necessary back up data.

(F) Notwithstanding the UI mechanism, when the system frequency falls below 49.0Hz, STOA customer i.e. BPSL shall cooperate & comply to the RLDC/SLDC directions and increase their injection more than schedule. Under-injection, if any, at frequency 49.0 Hz or below shall be treated as violation to Grid Code. In case of non-compliance with SLDC directions, SLDC may curtail/suspend the schedule. Such action shall be final and binding.

4. The final day-wise schedule declared by ERLDC shall be considered for calculation of UI charges. As an embedded customer, BPSL will make good the STU loss and wheeling charges. Losses in STU will be compensated with additional injection.”

From the above agreement between the petitioner and GRIDCO, it emerges that the parties have agreed that the petitioner was selling 64 MW to a trader through inter-State open access. The parties have also agreed that ABT shall be applicable for such inter-State transactions and parties shall be governed by 2004 Open Access Regulations. BPSL being an embedded customer, certain commercial/operational stipulations have been agreed. The parties have agreed that the final day-wise schedule declared by ERLDC shall be considered for UI calculations. Both GRIDCO and the petitioner have agreed that BPSL being the embedded customer shall make good the STU losses and wheeling charges. Sub-para D under para 3 of the Agreement clearly provides that “when the frequency falls below 49.4 Hz, BPSL shall endeavour to maximise its injection at least up to the level, which can be sustained, without waiting for the instructions of SLDC. Under ABT regime such injection shall be covered under UI mechanism.” In other words, over-injection by BPSL in order to improve the frequency upto 49.4 Hz is permitted without waiting for the instruction of SLDC and such over-injection has been agreed to be covered under UI mechanism.

41. The order of OERC, the letter of GRIDCO dated 25.8.2005 and the Short Term Open Access Commercial Agreement dated 5.7.2006 as discussed above which formed the basis for sale of surplus power by the petitioner from its captive generating plant during the period under dispute contained clear provisions that any mismatch between the schedule and actual injection in the course of sale of surplus power by the petitioner through inter-State open access including settlement of mismatches the UI mechanism shall be governed by regulations of this Commission.



Therefore, the contention of GRIDCO and OPTCL that there were no commercial agreements between the parties providing for settlement of mismatches through UI mechanism cannot be sustained. Further, the submission of OPTCL that sale of power during the period from 25.8.2005 to 4.7.2006 was on net exchange basis and therefore, UI mechanism is not applicable cannot be accepted as OERC in its order dated 27.2.2004 in Case No.174/2004 has clearly ruled that there shall not be any net exchange of power between GRIDCO and OPTCL. Similarly, the contention of OPTCL that during the period 5.7.2006 to 31.12.2006, UI mechanism cannot be made applicable as the petitioner did not have agreement for long term sale of power cannot be accepted since the order of OERC dated 27.2.2004 permitted the petitioner to sell its surplus power in accordance with provisions of the Act which included sale of power through long term as well as short term open access.

42. Section 9 of the Electricity Act, 2003 deals with captive generation. The said section is extracted as under:

“Section 9. (Captive generation):

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made hereunder and to any consumer subject to the regulations made under subsection(2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:



Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”

This section deals with open access by the captive generating plant under two circumstances. First is that the captive generating plant has the freedom to supply power to any licensee or consumer and for this purpose, supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company. Second is the right of open access vested in a captive generating plant to carry electricity from its plant to the destination of its use subject to availability of adequate transmission facility. In the present case, the dispute involves supply of electricity by the petitioner to a trading licensee through short term inter-State open access and therefore, the petitioner shall be governed by the provisions of the Act and the regulations made thereunder by this Commission for facilitating short term open access to inter-State transmission of electricity.

43. Since the period of dispute is from 28.8.2005 to 31.12.2006, the applicable regulation is the Central Electricity Regulatory Commission (Open Access to inter-State transmission) Regulations, 2004(2004 Open Access Regulations). Regulation 21 of the said Regulation deals with unscheduled interchange charges as under:

“UNSCHEDULED INTER-CHANGE (UI) CHARGES:

21. (i) The mismatch between the scheduled and the actual drawal at drawal point (s) and scheduled and the actual injection at injection point (s) shall be met from the grid and shall be governed by UI pricing mechanism applicable to the inter-state transactions:

(ii) A separate bill for UI charges shall be issued to the direct customers and in case of the embedded customers, a composite UI bill for the State as a whole shall be issued, the segregation for which shall be done at the State level.”

As per the above regulations, the mismatch between the scheduled and the actual drawal at the drawal point and the scheduled and the actual injection at the



injection point shall be met from the grid and shall be governed by UI pricing mechanism applicable to the inter-State transaction. It further provides that separate bill shall be issued to the direct customers. Direct Customer has been defined as “a person directly connected to the system owned or controlled by the Central Transmission Utility.” However, a composite UI bill shall be issued in respect of a State as a whole and segregation of the UI charges shall be done at the State level.

44. It is not in dispute that the petitioner is not a direct customer. The petitioner which is a captive generating plant is an embedded customer of Odisha. Therefore, the segregation of UI charges had to be carried out at the State level. GRIDCO has not denied having received the UI charges for the period 28.8.2005 to 31.12.2006 from the Regional Pool Account. In terms of Regulation 21(ii) of the Open Access Regulations, GRIDCO was under statutory obligations to segregate the UI charges among the various embedded customers in the State who have participated in the transactions involving inter-State short term open access. The letter dated 25.8.2005 written by GRIDCO to the petitioner advising the petitioner to open the LC for settlement of UI charges clearly provides that “GRIDCO shall prefer bill to M/s Bhushan towards UI charges on weekly basis payable within 48 hours.” In compliance with the said letter, the petitioner has opened the LC. Therefore, there is a reciprocal obligation on the part of GRIDCO to raise the UI bills on weekly basis which should contain both amount payable for under-injection and amount receivable for over-injection. Similarly, the Short Term Open Access Commercial Agreement between GRIDCO and the petitioner clearly provides that any mismatch between the schedule and actual injection accepted by SLDC shall be governed by UI pricing mechanism. Such UI bills shall be prepared by SLDC on weekly basis. In case of



under/over injection, UI payable/receivable will be settled after taking care of STU losses and wheeling charges. Further, the said agreement provides that the final day-wise schedule declared by ERLDC shall be considered for calculation of UI charges. Thus the Short Term Open Access Commercial Agreement between the petitioner and GRIDCO contained a framework dealing with the commercial and operational aspects of the transactions of the petitioner as an embedded customer. In our view, it was incumbent on GRIDCO in terms of its letter dated 25.8.2005 and Short Term Open Access Commercial Agreement dated 5.7.2006 to ensure that the UI charges of the petitioner for both receivable and payable are settled in consultation with SLDC Odisha. In the view of the Commission, the petitioner is entitled to receive and GRIDCO is under an obligation to pay the UI charges for the over-injection of power by the petitioner during the period 28.8.2005 to 31.12.2006.

Issue No.2: Whether any case of gaming is made out against the petitioner?

45. GRIDCO in its affidavit dated 25.9.2014 raised the issue of gaming against the petitioner as under:

“11. The conduct of the petitioner was against the spirit and object of the UI mechanism. The petitioner took advantage of prevailing low frequency and injected power into the Grid at its will for the commercial gain through UI mechanism, without adhering to its schedule of Open Access transaction. The petitioner did not even seek permission of SLDC for such over-injection during the relevant period. In the absence of data communication facility, SLDC could not take any corrective action during the said period. With marginal quantum of scheduled transactions for a short period (less than one and half years), yielding huge UI receivable amount of UI charges, as claimed by the petitioner, clearly proves the misuse by the petitioner of UI mechanism in a calculated manner for its commercial gain.”

The petitioner in its rejoinder has submitted that the petitioner had never made any intentional mis-declaration of schedule with the intention of making any undue commercial gain through the UI mechanism. The petitioner has submitted that the contention regarding gaming has been belatedly raised only with the object of



misappropriating the petitioner's UI receivables which GRIDCO had been withholding for more than 8 years. The petitioner has further submitted that as per the order of the Commission dated 2.7.2009 in Petition No.24/2007, the provision regarding gaming is applicable to transactions where the beneficiaries have long term lien over power plant capacity.

46. During the hearing of the petition on 9.12.2014, the Commission directed ERPC to submit its views on gaming raised by GRIDCO and further directed ERPC to hold a meeting with the stakeholders and submit the reconciled data alongwith the minutes of the meeting. ERPC reconciled data in the meeting held on 5.1.2015 which was attended by the representatives of BPSL, GRIDCO, ERLDC and OPTCL. In the said meeting it was decided that SLDC, Odisha would scrutinize and analyze time block-wise data of the petitioner's injection (Schedule and Actual) and establish and certify gaming, if any and shall submit its submission before the Commission during the on 29.1.2015.

47. SLDC, Odisha vide its affidavit dated 9.3.2015 has submitted the total number of blocks for which export schedule was approved and deviation from schedule as under:

S. No.	Deviation	No. of blocks	% age
1	0to 5%	7860	17.70
2	5 to 10%	6372	14.35
3	10 to 20%	8972	20.21
4	20 to 50%	10996	24.76
5	50 to 100%	6250	14.08
6	100 to 200%	2148	04.84
7	>200%	1806	04.07
Total number of blocks		44404	

According to SLDC, Odisha, the above data would clearly show that the activities of the CGP in the ABT regime of system operation cannot be considered



legitimate by any stretch of imagination and the act of the petitioner is solely guided by his profit motive by indulging in the unfair gaming. OPTCL has submitted that the act of the petitioner is intentional as the petitioner would be required to pay less on transmission charges as no transmission charge is payable on UI and UI pricing is frequency linked and normally priced higher.

48. In order to independently verify the allegation of gaming against the petitioner, ERPC was directed to examine in consultation with ERLDC the data submitted by SLDC and submit its report on the issue of gaming to the Commission. ERPC after verification of data has given a comparative statement vide its letter dated 24.4.2015 as under:

Total no. of time blocks for which export schedule approved: 44, 404

Deviation from Scheduled between:

S. No.	Range of Deviation	No of Time Blocks (As per SLDC Bhubaneswar)	% of Total Scheduled Blocks (As per SLDC Bhubaneswar)	No of Time Blocks (As per ERPC)	% of Total Scheduled Blocks (As per ERPC)
1	5 to 10%	6372	14.35	3554	8
2	10 to 20%	8972	20.21	5238	11.8
3	20 to 50%	10996	24.76	6212	13.99
4	50 to 100%	6250	14.08	3379	7.61
5	100 to 200%	2148	4.84	2141	4.82
6	>200%	1806	4.07	1806	4.07

ERPC has submitted that while arriving at the above figures, ERPC Secretariat have considered only those time blocks when there is over-injection beyond schedule by BPSL whereas SLDC, Odisha has considered both over-injection as well as under-injection. Further, in case of all the time blocks, when there was zero schedules, ERPC has not considered the same and accordingly, the range 0 to 5% of deviation has been eliminated.



49. ERPC, vide its letter dated 24.4.2015 has submitted its views regarding gaming as under:

“ERPC & ERLDC are of the opinion that during the period under consideration i.e. from 28.08.2005 to 31.12.2006 the word “Gaming” referred to intentional mis-declaration of Generation Capacity by an ISGC (Clause No. 24 (2) (i) & (ii) of CERC (Terms and Condition of Tariff) (First Amendment) Regulations, 2004). This was done to protect the interests of the beneficiaries of ISGS. There was no bar on over-injection or under-injection by an entity supplying power. Over-injection or under-injection used to be settled in light of the relevant settlement mechanism prevalent at that time. Further, BPSL was a CPP and an embedded entity of Orissa system. After meeting its own requirement, surplus power available with it was traded through Short Term Open Access. Scheduling of export of power by BPSL is within the purview of SLDC, Bhubaneswar. Therefore, gaming if any, by BPSL in the matter of export of power could be identified and checked by SLDC, Bhubaneswar in light of relevant CERC/OERC Regulation.”

Subsequently, ERPC vide its letter dated 2.7.2015 concluded as under:

“We, at ERPC Secretariat, have completed the verification of authenticity of analyzed data submitted by SLDC, Bhubaneswar on the direction of Hon’ble Commission and have found that there is no discrepancy of this data vis-à-vis the data reconciled in the joint meeting held on 07.01.2015.

As per CERC (Terms and Conditions of Tariff) (First Amendment) Regulations, 2004 prevalent during the period of dispute, the alleged ‘Gaming’ by M/s BPSL is neither proved by SLDC, OPTCL through submission of mis-declaration of generation capacity nor is evident through their data.”

50. The petitioner in its affidavit dated 6.7.2015 has submitted that the allegation of gaming is purely misconceived as the petitioner has over-injected in 16710 time block of 15 minutes during non-peak hours having lower average UI rate as compared to over-injection during 8815 time blocks during peak hours when average UI rate is higher. The petitioner has submitted that even within peak hours, the petitioner has actually under-injected power at times when the average UI rate is higher than the periods during which it has over-injected the power in the grid. The petitioner has submitted that if it intended to benefit by gaming in the UI market, it would have over-injected power at higher UI rate. The petitioner has supported its contention on the basis of the data culled from the details of scheduled and actual



injection of power submitted by SLDC Odisha as well as UI rates prevailing during the relevant period.

51. In response to ERPC's letters dated 24.4.2015 and 2.7.2015 and the petitioner's affidavit dated 6.7.2015, SLDC, Odisha and GRIDCO vide their affidavits dated 22.7.2015 and 7.8.2015 respectively have submitted that the petitioner had indulged in gaming during the relevant period due to the following reasons:

(a) SLDC is responsible to carry out its operation in accordance with the provisions of Section 32 of the Electricity Act, 2003. As per Section 32 of the Act, SLDC is required to carry out scheduling and dispatch of electricity in accordance with the contract entered with the generating companies. Since, in the present case, there was no commercial agreement till 5.7.2006 in respect of UI, the question of raising the issue of 'gaming till 5.7.2006 did not arise as there was no need to monitor the deviation.

(b) The observations of ERPC appear to be based only on the premise that 2004 Tariff Regulations were framed for inter-State Generating Stations. The principle contained in Regulation 24 (2) of the 2004 Tariff Regulations would apply to the case of the petitioner particularly in view of the proviso of Section 9(1) of the Electricity Act, 2003 which provides that "the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company."

(c) 2nd additional para of report dated 2.7.2015 is irrational and illogical as the gaming has been viewed by ERPC in the context of the 2004 Tariff

Regulations which is not applicable in terms of the Commission`s order dated 2.7.2009 (7.3.2007) in Petition No. 24 of 2007.

(d) Clause 6.4 (15) of the prevailing Odisha Grid Code dealing with 'Demarcation of responsibilities' details out the problems of unfair gaming or collusion. Clause 6.4 (15) clearly recognized unfair gaming or collusion when the generating plant is operating in the ABT regime. Since, the petitioner is under the preview of scrutiny by SLDC, Odisha, "gaming" by the petitioner is clearly proved as per Odisha Grid Code while operating in the ABT regime.

(e) The petitioner has tried to mislead the Commission by providing the power injection detail in peak hours and non-peak hours. The explanation based on peak and non-peak hours has got no relevance to the principle of UI Mechanism, as the calculation is based on frequency in 15 minutes interval.

52. In order to examine the issue of gaming by BPSL, it would be useful to refer to regulations governing UI and gaming as were in force during the period under dispute. Regulation 24 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (First Amendment) Regulations, 2004 (Tariff Regulations) provides as under:

"24. Unscheduled Interchange (UI) charges: (1) Variation between actual generation or actual drawal and scheduled generation or scheduled drawal shall be accounted for through unscheduled interchange (UI) Charges. UI for a generating station shall be equal to its actual generation minus its scheduled generation. UI for a beneficiary shall be equal to its total actual drawal minus its total scheduled drawal. UI shall be worked out for each 15 minute time block. Charges for all UI transactions shall be based on average frequency of the time block and the following rates shall apply with effect from 1.4.2004.

Average Frequency of time block	UI Rate (Paise per kWh)
50.5 Hz and above	0.0
Below 50.5 Hz and up to 50.48 Hz	8.0
Below 49.04 Hz and up to 49.02 Hz	592.0

Below 49.02 Hz	600.0
Between 50.5 Hz and 49.02 Hz	linear in 0.02 Hz step

(Each 0.02 Hz step is equivalent to 8.0 paise /kWh within the above range).

Note:

The above average frequency range and UI rates are subject to change through a separate notification by the Commission.

(2) (i) Any generation up to 105% of the declared capacity in any time block of 15 minutes and averaging upto 101% of the average declared capacity over a day shall not be construed as gaming, and the generator shall be entitled to UI charges for such excess generation above the scheduled generation (SC).

(ii) For any generation beyond the prescribed limits, the Regional Load Despatch Centre shall investigate so as to ensure that there is no gaming, and if gaming is found by the Regional Load Despatch Centre, the corresponding UI charges due to the generating station on account of such extra generation shall be reduced to zero and the amount shall be adjusted in UI account of beneficiaries in the ratio of their capacity share in the generating station.”

53. Regulation 24(1) deals with the UI rate linked to the average frequency in a time block prevailing at the time of over-injection/under-injection or over-drawal/under-drawal from the grid. ERPC in its report has submitted that the UI vector as per the above provision was adopted to work out the UI charges. Regulation 21(i) of the 2004 Open Access Regulations provides that “the mismatch between the scheduled and the actual drawal at drawal point (s) and scheduled and the actual injection at injection point (s) shall be met from the grid and shall be governed by UI pricing mechanism applicable to the inter-state transactions”. The UI pricing mechanism in respect of inter-State transaction was provided for only in Regulation 24(i) of the Tariff Regulations. In our view, ERPC has correctly applied the UI vector as per Regulation 24(1) of Tariff Regulations. OPTCL and GRIDCO have submitted that ERPC should have considered the provisions of Regulation 24(2) of Tariff Regulations while working out the UI charges payable/receivable by the petitioner. In other words, GRIDCO and OPTCL are of the view that gaming by the petitioner should have been considered with reference to limits prescribed in Regulation



24(2)(i) of the Tariff Regulations. ERPC in its report has submitted that the limits of restriction prescribed in Regulation 24(2)(i) was meant for protecting the interest of the beneficiaries of ISGS only and as such there was no restriction on under-injection or over-injection. The petitioner has relied upon the order of the Commission dated 7.3.2007 in Petition No. 24/2007 and has contended that the provisions of Regulation 24(2)(i) of Tariff Regulations is not applicable in case of short term transactions. GRIDCO and OPTCL have contended that in terms of proviso under sub-section (1) of section 9 of the Act, the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company and accordingly, Regulation 24(2)(i) should also be applicable in case of the captive generating plant of the generator. We have gone through the submissions of the parties. Tariff Regulations is applicable in cases of the generating stations whose tariff is determined by the Commission. The tariff of the captive generating plant of the petitioner is not determined by the Commission. The UI pricing mechanism provided under Regulation 24(1) has been applied only on account of the specific stipulation in Regulation 21(i) of 2004 Open Access Regulations that pricing mechanism applicable for inter-State transaction shall be applicable for mismatched between the scheduled and the actual drawal at drawal point (s) and scheduled and the actual injection at injection point in the course of inter-State transaction. The provisions of Regulation 24(2) have not been extended in case of short term transactions. Further, the Commission in its order dated 7.3.2007 in Petition No.24/2007 (Nava Bharat Ventures Limited and Anr. Vs. Western Regional Load Despatch Centre &Ors) has clarified that limits of 101% and 105% have no relevance in case where availability



based capacity charges are not being paid. Relevant observations of the Commission in the said order are extracted as under:

“(e) We have also noted references to ABT, injection limit of 105% and disallowance of UI under certain conditions in the “Short-term open access commercial agreement” dated 5.6.2006 referred to in para 2 above. We must point out that the limits of 105% and 101% have been specified by the Commission in the context of gaming in availability declaration where the beneficiaries have long-term lien over the power plant capacity. These limits have no relevance where no availability linked capacity charges are being paid, and the State utilities only provide open access.”

Since availability based capacity charges are not paid in case of transactions through short term open access, the limits of 105% and 101% specified in the context of gaming in availability declaration would not be applicable in case of the transactions executed by the petitioner during the period of dispute by availing short term open access. Regulation 5(1) of OGC Regulations provides for generation scheduling within the State. The said regulation is extracted as under:

“(1) All Generators shall provide the fifteen minutes block MW / MVAR availability (00.00 - 24.00 hours) of all Generating Units, to SLDC on the day ahead basis by 10.00 hours. CGPs shall provide the fifteen minutes block import/export figures on the day ahead basis by 10.00 hours.”

It may be observed that as per OGC regulations, all generators are required to provide 15 minute block MW/MVAR availability of all generating units on day ahead basis whereas the CGPs are required to provide 15 minute block export or import figures on day ahead basis. Since CGP is not required to give availability declarations, the provisions of Regulation 24(2) shall not be applicable in case of CGP.

54. Both OPTCL and GRIDCO have relied on the provisions of Regulation 6.4.12 of Odisha Grid Code (OGC) Regulation 2006 in support of their contention that SLDC has the mandate to go into the instances of gaming by the petitioner. It is pertinent to mention that OGC Regulations were published in Odisha Gazette on 14.6.2006.



Therefore, part of the disputed period i.e. from 28.8.2005 to 13.6.2006 is not governed by the OGC Regulations. Regulation 6.4.12 of the OGC Regulations provides as under:

“12. It shall be incumbent upon the SGS/ISGS to declare the plant capabilities faithfully, i.e., according to their best assessment. In case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviations from schedule), the SLDC may ask the SGS/ISGS to explain the situation with necessary backup data.

15. SLDC shall periodically review the actual deviation from the despatch and net Drawal Schedules being issued, to check whether any of the Beneficiaries / ISGS / SGS who are allowed open access are indulging in unfair gaming or collusion. In case any such practice is detected, the matter shall be reported to the SLDC for further investigation / action. (emphasis added)”

On perusal of the above regulations, it emerges that these provisions are applicable in case of State Generating Stations, Inter-State Generating Stations and beneficiaries. State Generating station has been defined as “a generating station whose entire generation is dedicated to the State”. Further, Captive Generating Plant has been defined in the OGC Regulations as a power plant set up by any person to generate electricity primarily for its own use. Therefore, Captive Generating Plant is not covered under the definition of State Generating station. In other words, the above provisions of OGC Regulations are not applicable in case of Captive Generating Plant. We are unable to appreciate as to how SLDC Odisha can examine the charges of collusion or gaming against Captive Generating Plant under the above quoted provisions when the provisions are not applicable to Captive Generating Plants.

55. Regulation 6.4(6) and 6.4(7) OGC Regulations provides that CGPs shall be responsible for power generation/injection as per the schedule advised to them by SLDC on the basis of the requisitions received from distribution licensees or



beneficiaries. It further provides that CGP may deviate from a given schedule depending on the plant and system conditions. It has been provided that the CGP would be allowed or encouraged to generate beyond a given schedule under deficit conditions and such deviation would be appropriately priced through UI mechanism.

The relevant provisions are extracted as under:

“(6) The SGS/CGP shall be responsible for power generation / injection generally according to the daily schedules advised to them by the SLDC on the basis of the requisitions received from the Distribution Licensees and Beneficiaries, and for proper operation and maintenance of their generating stations, such that these stations achieve the best possible long-term availability and economy.

(7) While the SGS and CGP would normally be expected to generate power according to the daily schedules advised to them, it would not be mandatory to follow the schedules tightly. The SGS and CGP may also deviate from the given schedules depending on the plant and system conditions. In particular, they would be allowed/encouraged to generate beyond the given schedule under deficit conditions. Deviations from the Ex-power Plant generation injection schedules shall, however, be appropriately priced through the UI mechanism.”

There is nothing on record to suggest that SLDC Odisha had advised the petitioner to back down because it had exceeded the limit required to meet deficit conditions. When the OGC Regulations encourages the CGPs to generate beyond the given schedule under deficit conditions and provides that such deviation would be appropriately priced through UI mechanism, we find no merit in the contention of GRIDCO and OPTCL that the petitioner had taken advantage of the deficit conditions and over-injected power because surplus power was available with it.

56. The Short Term Open Access Commercial Agreement between GRIDCO and the petitioner provides for the mechanism of UI calculation for embedded customers. Some of the relevant features of the said agreement are noted below:

- (a) Any mismatch between the schedule and actual injection accepted by SLDC shall be governed by UI pricing mechanism. In case of under/over injection, UI, payable/receivable will be settled after taking care of STU losses and wheeling charges.
- (b) In the event of zero scheduling by BPSL/ERLDC, no UI mechanism shall be operative.
- (c) When the frequency falls below 49.4 Hz, BPSL shall endeavour to maximise its injection at least up to the level, which can be sustained, without waiting for the instructions of SLDC. Under ABT regime such injection shall be covered under UI mechanism.
- (d) In the event of mismatch between the schedule and actual injection, the matter will be governed by UI regulations applicable. SLDC if required may ask BPSL to explain the situation with necessary back up data.
- (e) Notwithstanding the UI mechanism, when the system frequency falls below 49.0Hz, STOA customer i.e. BPSL shall cooperate and comply to the RLDC/SLDC directions and increase their injection more than schedule. Under-injection, if any, at frequency 49.0 Hz or below shall be treated as violation to Grid Code.
- (f) The final day-wise schedule declared by ERLDC shall be considered for calculation of UI charges. As an embedded customer, BPSL will make good the STU loss and wheeling charges. Losses in STU will be compensated with additional injection.

It may be seen from the above that SLDC if required may ask the petitioner about the situation of mismatch with necessary back up data. The contention of OPTCL/SLDC Odisha is that the petitioner has over-injected much beyond its schedule. In that event it was incumbent of SLDC to ask for explanation with back-up data. No such exercise has been undertaken by SLDC Odisha during the relevant period. Further, the Agreement says that when the unit frequency falls below 49.4 Hz, the petitioner shall maximise its injection upto that level without waiting for the instruction of SLDC and such injection shall be accounted for in UI mechanism. The Agreement also says that when the frequency falls below 49.0 Hz, the petitioner shall respond to RLDC/SLDC directions and increase its injection more than the schedule. Only in case of under-injection below 49.0 Hz, it would be treated as violation of the Grid Code. There is no provision in the Agreement which provides for the definition of gaming or investigation into the instances of gaming by the petitioner.

57. Analysis of the 2004 Open Access Regulations, 2004 Tariff Regulations of the Commission, OGC Regulations and the Commercial Agreement between the petitioner and GRIDCO reveals that there was no provision during the relevant period of time to investigate into the instances of gaming against CGP. On the other hand, OGC Regulations and the Commercial Agreement clearly establish that CGPs were encouraged to inject beyond schedule in situations of low frequency to assist the grid and such over-injections were allowed to be accounted for under UI mechanism.

58. On perusal of the petitioner's deviation profile during the relevant period, it also emerges that allegation of intentional mis-declaration with the object of gaining



financially through the UI mechanism cannot be established. The petitioner, vide its affidavit dated 1.7.2015 has submitted that it has, in fact, over-injected in 16710 time blocks of 15 minutes during non-peak hours (when the average UI rate is typically lower) as compared to over-injection during 8815 time blocks during peak hours (when the average UI rate is typically higher). The petitioner has further submitted that even during peak hours, the petitioner has not only under-injected power during periods of higher UI rate, but also over-injected during periods of lower UI rates. The petitioner has placed on record the following summary of under/over injection at different average UI rates:

S. No.	Particulars	Deviation (Kwh)	Amount (₹)	Average UI rate (₹/kwh)
1.	Over Injection During Peak Hours	1 39 67 306	4 00 17 005	2.87
2.	Under Injection during Peak Hours	- 84 87 415	-2 90 99 333	3.43
3.	Over Injection during Non Peak Hours	3 12 81 641	7 80 76 377	2.50

The above table demonstrates that over-injection during non-peak hours at average UI rate of ₹2.50/kWh is more than double the over-injection during peak hours when average UI rate was ₹2.87/kWh. Further, there has been considerable under-injection during such phases in peak hours when the average UI rate was relatively higher at ₹3.43/kWh. Based on the above data, which has not been disputed by the respondents, the petitioner has contended that had it been indulging in intentional mis-declaration, its over injection would have been considerably higher during periods of high UI rates, and considerably lower during periods of low UI rates. We find merit in the petitioner's contention, as over-injection during non-peak hours (low UI rates) is more than twice the petitioner's over injection during peak hours (high UI rates). There is also considerable under-injection of 84,87,415 units

during peak hours when the UI rates are relatively higher at ₹3.43/kWh. It cannot be denied that had the petitioner been intentionally mis-declaring schedules with a view to profiteer through UI, its over-injection would ordinarily have been considerably higher at high UI rates as compared to over-injection at lower rates. In light of the above discussion, we are of the view that the charge of gaming is not established against the petitioner.

Issue No.3: Relief to be granted to the petitioner

59. In the absence of gaming, the petitioner is entitled to receive the UI amount of ₹2,94,27,375 as determined by ERPC in its report dated 16.9.2014. The petitioner shall also be entitled to 9% simple interest per annum on the said amount from the date of filing of the petition before the Commission i.e. 23.7.2012 till the date of payment.

60. The petition is disposed of in terms of the above.

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

