CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 154/MP/2015

Coram:
Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A. S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: 31st of July, 2017

In the matter of
Petition under Section 79(1)(f) of Electricity Act, 2003 seeking adjudication of dispute between Adani Power Ltd. and Gujarat Urja Vikas Nigam Ltd. regarding the payment for electricity supplied by Adani Power Ltd. prior to Scheduled Commercial Operation Date.

And
In the matter of

Adani Power Ltd
"Shikhar", Near Mithakhali Circle
Navrangpura, Ahmedabad 380 009 ...**Petitioner**

Vs

Gujarat Urja Vikas Nigam Ltd
Sadder Patel Vidyut Bhawan
Race Course Circle, Vadodra – 390 007 ....**Respondent**

Parties Present:
Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Shri Gaurav Dudheja, Advocate, APL
Shri M.G. Ramachandran, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Ms. Poorva Saigal, Advocate, GUVNL
Shri S.K. Nair, Advocate, GUVNL

ORDER

The Petitioner, Adani Power Limited, has filed the present petition under section 79(1)(f) of the Electricity Act, 2003 for adjudication of the dispute between Adani Power Limited (APL) and Gujarat Urja Vikas Nigam Limited (GUVNL)

regarding payment of electricity supplied prior to the Scheduled Commercial Operation Date (SCOD) of Units 5 and 6 the Mundra Power Project. The petition has also been filed pursuant to the liberty granted by the Appellate Tribunal for Electricity in order dated 12.3.2015 in Execution Petition No.1 of 2014 (Adani Power Limited V. Gujarat Urja Vikas Nigam Limited).

Brief Facts of the Case

2. The Petitioner has set up a 4620 MW thermal power plant within Special Economic Zone at Mundra, Gujarat consisting of four Units of 330 MW in Phase I and II, two Units of 660 MW in Phase III and three Units of 660 MW in Phase IV. The Petitioner entered into a Power Purchase Agreement dated 2.2.2007 with GUVNL for sale of1000 MW of electricity generated from Units 5 and 6 of Phase III (2x660 MW) of Mundra Power Project at tariff discovered through competitive bidding process. The SCOD of the Units under the PPA dated 2.2.2007 was 60 months from the date of the PPA i.e. 2.2.2012. On 7.12.2010, the Petitioner wrote to GUVNL informing that Unit 5 would be in a position to generate electricity by the end of December 2010 and further informed that the Petitioner was not liable to supply electricity prior to SCOD of the Unit. However, GUVNL vide its letter dated 20.12.2010 replied that GUVNL was entitled to electricity from the synchronised units even prior to SCOD. The Petitioner commissioned Units 5 and 6 of Mundra Power Project on 26.12.2010 and 20.7.2011 respectively.

3. In view of the divergent views between the Petitioner and GUVNL regarding Petitioner's obligation to supply electricity before SCOD, a meeting was held between the Petitioner and GUVNL. The Minutes of the Meeting (hereinafter referred to as "MoM dated 31.12.2010) recorded the understanding of the parties as under:

"Minutes of Meeting between Gujarat Urja Vikas Limited (GUVNL) and Adani Power Limited (APL) held on 31st December 2010.

A. A meeting was convened on 31st Dec 2010 in the chamber of PS (EPD),Gandhinagar to discuss various pending issues in respect to Bid 01 and Bid 02 PPAs. Following were present in the meeting:

Shri D.J. Pandian, lAS, Principal Secretary (EPD), GoG & Chairman GUVNL
Shri L Chuaungo, lAS, Managing Director, GUVNL
Shri S B Khyalia, Executive Director (Finance), GUVNL
Shri Gautam.Adani, Chairman, Adani Group
Shri Rajesh Adani, Managing Director, Adani Power Ltd.
Shri Kandarp Patel, Vice President, Adani Power Ltd.

Both parties while agreeing on certain issues in the following paragraphs acknowledges that these decisions are without prejudice to their respective rights and contentions under the PPA.

B. Power supplied prior to SCoD:

APL vide its letter dated 7th Dec. 10 has communicated to GUVNL that APL by deploying extra efforts and cost is in a position to synchronize unit 5 of 660 MW by end of Dec 2010. During the discussion, APL further contended that it is neither obliged to supply power to GUVNL prior to SCoD under the PPA conditions nor in a position to supply power to GUVNL at quoted tariff due to use of imported coal. M/s APL further stated that GUVNL is not entitled to receive any electricity if the appeal in the matter of termination of Bid 02 PPA pending before Hon'ble Appellate Tribunal is decided in APL's favor. However GUVNL vide its letter dated 20th Dec 10 has already communicated its views to APL that GUVNL shall be entitled to electricity from the unit 5 even if synchronized prior to SCoD. In light of the above and as for the present GUVNL is in surplus of power, following was agreed.

- In view of divergent views of both parties in regard to GUVNL's right to avail electricity prior to SCoD, it was agreed that APL may resort to dispute resolution mechanism under the provisions of PPA as M/s APL has indicated their divergent views in regard to GUVNL's right to avail electricity prior to SCoD.

- Till that time and pending final outcome of the dispute relating to termination of PPA.

  - It was decided that if APL opt to generate electricity from unit 5 before its SCOD, APL may sell power from Unit 5 in open market to third party, for and on behalf of GUVNL (in such a way that sale transaction for GUVNL share of power from unit 5 is identified and APL shall give proportionate availability/supply as per PPA). M/s APL will sell such share of GUVNL in consultation with GUVNL to ensure fair price discovery and

  - APL shall pay GUVNL excess realization for such third party sale above tariff receivable under PPA. While calculating this additional realization, all power sale related expenses such as applicable transmission charges and losses, payment of compensation, connectivity charges and trading margin will be adjusted.

  - APL shall make payment of excess realization to GUVNL on back to back basis,

as per payment terms with third party buyer. In case APL requires credit in making payment, APL may opt to pay with maximum credit period of 90 days with interest payable @10% p.a. for the extended credit period availed.

- In case either of the disputes is finally decided in favour of APL, excess realisation paid to GUVNL, along with interest, will be paid back by GUVNL to APL within one month from the date of final judgement. "

4. GUVNL vide its letter dated 1.2.2011 informed the SLDC Gujarat that the Petitioner was entitled to sell electricity only through bilateral arrangement and not through Power Exchanges. The Petitioner wrote letters dated 28.4.2011, 15.6.2011 and 22.10.2011 seeking the consent of GUVNL for selling electricity to third party. As GUVNL did not provide its consent for third party sale, the Petitioner supplied electricity to GUVNL.

5. In view of the agreement in MoM dated 31.12.2010 permitting the Petitioner to resort to dispute resolution mechanism under the PPA, the Petitioner filed Petition No.1093 of 2011 before the Gujarat Electricity Regulatory Commission (GERC) with the following prayers:

> "(a) Declare and direct that the Petitioner is under no obligation to supply contracted capacity to the Respondent prior to Scheduled Commercial Operation Date (SCOD), i.e. 60 months from the execution of the PPA dated 2.2.2007;
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> (b) To declare that the Petitioner is free to sell the power outside the PPA, to any third party prior to Schedule Commercial Operation Date (SCOD) i.e.60 months from the execution of the PPA dated 02.02.2007;
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> (c) To declare that the Petitioner is free to sell power to any third party prior to SCOD pending the adjudication of the present dispute."

6. GERC in order dated 21.10.2011 in Petition No.1093/2011 decided the issue of obligation of the Petitioner to supply power to GUVNL prior to SCOD as under:

> "[10] The above analysis clearly brings out the following aspects.
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> 10.1 A cogent reading of the RFP document, the bid submitted by the Petitioner and the PPA indicates that the Petitioner has to commence supply of power to the Respondent by 2/2/2012 which is 60 months from the date of the PPA. This is

evident from clauses 3.4.1, 3.4.2, and 3.4.3 of the RFP documents and Annexure 9 of the bid document. Though the Petitioner has the option to prepone the SCOD in pursuance of article 3.1.2 (viii) of the PPA, he has not yet done so. There is no dispute regarding the date of SCOD.

10.2 The dispute is regarding the issue whether the Petitioner is mandated to supply power after Commissioning and prior to SCOD. As discussed in paras 9.1and 9.8 the Respondent has not established that the relevant conditions for COD have been fulfilled. Even though the Final Testing Certificate of Independent Engineer has been issued, there is no document to show that the Petitioner has declared to supply electrical output from the contracted capacity on commercial basis. If the COD has not occurred, article 4.4.1 of the PPA cannot be invoked by the Respondent.

10.3 Even if it is presumed - though it is not corroborated by the documents produced–that the COD has occurred, it does not entitle the Petitioner to invoke article 4.4.1 of the PPA prior to SCOD for two reasons.

(a) First, as already mentioned, the intention of both the parties as revealed from the RFP and bid documents is to ensure supply of power from the project in question by 60 months from the date of the PPA or from 2.2.2012. Second, all the provisions of the PPA are to be read in totality and the PPA provides for obligations of both the parties. Each party should have fulfilled his obligation, before he can invoke provisions relating to the obligation of the other party. As provided in article 4.2 (a) of the PPA, the Respondent (procurer) is responsible for the Interconnection Transmission Facilities to enable the evacuation of contracted capacity not later than the Scheduled Connection Date. Furthermore, a combined reading of Article 3.4.3 of the RFP document and the relevant provisions of the PPA relating to obligations of the parties makes it clear that procurement of power earlier than 60 months - and declaration of SCOD before 60 months – is subject to Gujarat STU"s ability to evacuate power from the Delivery Point. As it has been admitted by the counsel for the Respondent and it has been indicated in para 6.6 of this order, the relevant transmission lines are yet to be completed. Hence the Respondent cannot claim his right to the entire contracted capacity till the evacuation system is completed.

[11] In view of the above analysis, we come to the conclusion that the Respondent (procurer) is not entitled to claim that the Petitioner is mandated to supply power to the Respondent prior to the SCOD. Hence we decide that the present petition succeeds. The Petitioner has no obligation to supply the contracted capacity to the Respondent prior to the Scheduled Commercial Operation Date (SCOD) which is 2.2.2012.

[12] We order accordingly."

7. Aggrieved by the said order, GUVNL filed Appeal No.185 of 2011 before the Hon'ble Appellate Tribunal for Electricity (Appellate Tribunal) challenging the said order. The Appellate Tribunal in the judgement dated 4.10.2012 upheld the judgement of GERC. The Appellate Tribunal after examining various provisions of the RfP and PPA made the following observations:

"15…….In a word, the legal obligation commences from the SCOD which means COD of all units, and which means COD in relation to the entire Contracted Capacity. Thus construed, legal obligation on the part of APL commences 60 months from the effective date which is 2.2.2012……..".

"16…….our moot question would be at what point of time the legal obligation on the part of APL to supply contracted capacity would commence in terms of the Power Purchase Agreement. It is 60 months from the effective date. When the Effective Date coincides with the Expiry Date and when the SCOD is commensurate to the Effective Date, then the legal obligation on the part of the APL commences, accordingly, 60 months from the Effective Date. If meanwhile, APL chose to effect sale to any third party during this period, it cannot be said that the terms and conditions of the contract are violated. It is only when SCOD commences, it is only when supply of the contracted capacity to the APL commences on commercial basis in terms of clauses 6.2.6 and 6.4 of the Power Purchase Agreement, then, suspension of third party sale would become a mandate to APL. Upon considerations as above, we are to answer the issue against the appellant."

"17……..In the circumstances, the Commission, in our mind, was not legally unjustified in that in the present case there is no document in terms of the PPA, RFP and the bid documents, which in our opinion are not inconsistent with one another, that would unmistakably show that in compliance with the Articles 6.2.6 and 6.4 of the PPA, there has been COD in respect of the unit no.1. Further, under Articles 3.4.3 of the RFP and the relevant provisions of the PPA make it crystal clear that the procurement of power earlier than 60 months and declaration of SCOD before 60 months are subject to STU's ability to receive power from the Delivery Point."

"22. In ultimate analysis, the appeal does not succeed. It is dismissed without cost."

8. GUVNL filed Civil Appeal No.2567 of 2013 before the Hon'ble Supreme Court challenging the judgement of the Appellate Tribunal dated 4.10.2012. The stay application filed by GUVNL has been dismissed by the Hon'ble Supreme Court vide order dated 2.5.2013.

9. After disposal of the Appeal by the Appellate Tribunal, the Petitioner raised a claim for ₹371.50 crore (excluding interest) towards electricity supplied prior to SCOD vide its letter dated 10.10.2012. The Petitioner followed up with GUVNL by writing various letters. But GUVNL advised the Petitioner to wait till the disposal of the Civil Appeal by the Hon'ble Supreme Court. GUVNL vide its letter dated 24.12.2013 informed the Petitioner about its decision to pay ₹135.20 crore as an interim measure subject to the Petitioner furnishing an undertaking to repay the said

amount with interest in the event Hon'ble Supreme Court holds that the Petitioner was liable to supply electricity to the Petitioner prior to the SCOD. The Petitioner furnished the undertaking vide its letter dated 27.1.2014 and GUVNL made a payment of ₹135.20 crore on 1.2.2014.

10. The Petitioner filed Execution Petition No.1 of 2014 before the Appellate Tribunal for execution of the judgement and order dated 4.10.2012 in Appeal No.185 of 2011 seeking directions to GUVNL to pay the balance amount of ₹236.25 crore, alongwith interest. The Appellate Tribunal in its order dated 12.3.2015 dismissed the Execution Petition with the following directions:

> "6. We find that neither in the State Commission's order impugned before this Tribunal nor in the judgment of this Tribunal dated 04.10.2012, no decision on the monetary claim of Adani Power was made. The monetary claim of Adani Power is disputed both on the admissibility of the claim as well as on the quantum claimed by the Respondent. We are not in a position to pass any order in this execution petition as no finding has been made by this Tribunal regarding monetary claim of Adani Power in the judgment dated 04.10.2012.
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> 7. In view of above, we dismiss the Execution Petition. However, Adani Power is at liberty to seek remedy at the Appropriate Forum."

11. In the meanwhile, the Commission in order dated 16.10.2012 in Petition No.155/MP/2012 decided that the Petitioner has a composite scheme for generation and supply of power to more than one State from Mundra Power Project and accordingly, the Petitioner is amenable to the jurisdiction of the Commission under section 79(1)(b) and (f) of the Act. The Petitioner has accordingly filed the present petition before this Commission under section 79(1)(f) of the Act.

12. During the preliminary hearing of the petition on 6.11.2015, learned counsel for Respondent argued that this Commission is not the "Appropriate Forum" as the Petitioner did not have the composite scheme of generation and sale of electricity in

more than one State. The petition was heard on maintainability on 10.12.2015. The Commission decided the issue of jurisdiction in the order dated 16.6.2016 as under:

> "20. At the preliminary hearing on 6.11.2015 it was urged on behalf of the Respondent that the Appellate Tribunal in the judgment dated 12.3.2015 in the execution petition had granted liberty to the Petitioner to seek remedy at the "appropriate Forum." It was argued that this Commission was not the "appropriate Forum" contemplated in the Appellate Tribunal's judgment. The submission of the learned counsel for the Respondent was based on the plea that the Petitioner did not have the composite scheme of generation and sale of electricity in more than one State. In view of the Full Bench judgment of the Appellate Tribunal referred to above, the Respondent's objection does not survive.
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> 23. The second submission of learned counsel for the Respondent was that order of the Gujarat Commission was non est since the order passed by the Gujarat Commission, as it now emerges, was without jurisdiction. It is settled law under the Doctrine of Merger that the order of the subordinate court merges with the order of the superior court. The principle behind this proposition of law is that at one time there cannot be more than one order in the same matter, capable of execution. In that view of this legal position, the order of the Gujarat Commission dated 21.10.2011 in Petition No 1093/2011 has merged with the Appellate Tribunal's judgment dated 4.10.2012 in Appeal No 185/2012. This Commission as an authority subordinate to the Appellate Tribunal cannot hold the order of the Appellate Tribunal as non est. In that view of the matter we are unable to persuade ourselves to accept the second submission of the learned counsel for the Respondent.
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> 25. Apart from the submission made by the learned counsel for the Petitioner, the judgment dated 12.3.2015 in Execution Petition No 1/2014 (Adani Power Ltd. Vs. Gujarat Urja Vikas Nigam Ltd) unambiguously supports the Petitioner's submission on the matter. The relevant part of the Appellate Tribunal's judgment has already been extracted above. While dismissing the Execution Petition, the Appellate Tribunal observed that the monetary claim of the Petitioner is disputed both on admissibility of the claim and quantum of the claim. Accordingly, the Appellate Tribunal in the judgment dated 4.10.2012 declined to pass any order regarding monetary claim of Petitioner. It is pointed out that the Appellate Tribunal's judgment dated 4.10.2012 is an authority for the decision that the Petitioner did not have the liability to supply power to the Respondent before the SCOD. Further, neither the Gujarat Commission nor the Appellate Tribunal for Electricity have adjudicated the monetary claims regarding the power supplied before SCOD. In view of this, there is no force in the Respondent's contention that adjudication of the Petitioner's claim in the present petition would tantamount to execution of orders of the Gujarat Commission or the Appellate Tribunal. The proceedings in the present petition are independent proceedings before this Commission.
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> 26. In the light of above discussion, we hold that the present petition is maintainable before this Commission."

13. It is pertinent to mention that the Hon'ble Supreme Court in its judgement dated 11.4.2017 in the matter of Energy Watchdog Vs CERC & Other {(2017) SCC

online SC 378} has upheld the jurisdiction of the Commission to regulate the tariff and adjudicate the dispute in respect of Mundra Power Project of the Petitioner.

Consideration of the claims of the Petitioner on merit

14. The Petitioner has submitted that from the dates when Unit Nos. 5 and 6 were commissioned till the SCOD, the Petitioner supplied about 2010.23 MUs of electricity as under:

(a) 759.38 MUs of electricity at APL bus were supplied to UPPCL from March 2011 to October 2011 for and on behalf of GUVNL in terms of the arrangement recorded in MoM dated 31.12.2010;

(b) 1251 MUs of electricity were supplied to GUVNL under compulsion.

15. The Petitioner has submitted that 759.38 MUs of electricity supplied to GUVNL from March 2011 to October 2011 under short-term arrangement was sold at an average tariff of ₹4.61 per unit at UPPCL periphery. The amount of ₹325 crore after adjustment of transmission losses received by the Petitioner from UPPCL was given to GUVNL whereas GUVNL paid an amount of ₹174 crore to the Petitioner at the PPA rate. The Petitioner was entitled to an additional amount of ₹151 crore less OA expenses and other miscellaneous expenses. The Petitioner has submitted that this excess realisation amount of ₹135.20 crore has been paid by GUVNL on 1.2.2014 after adjusting open access charges and other expenses.

16. The Petitioner has submitted that in the MoM dated 31.12.2010, it was agreed that the Petitioner would sell electricity to third parties in consultation with GUVNL to ensure fair price discovery, and in the event dispute is decided in favour of the

Petitioner, GUVNL will return the excess amount with interest. The Petitioner has submitted that GUVNL compelled the Petitioner to supply 1251 MUs to GUVNL and deprived the Petitioner to make profits by selling this electricity in open market. The Petitioner has submitted that since the dispute was pending before the GERC/Appellate Tribunal, GUVNL paid for this electricity at PPA tariff and enjoyed the cheap electricity to it was not entitled. The Petitioner has submitted that even though the prevailing rates were ₹4.28 per unit, the Petitioner has considered the rate of ₹3.93 per unit which is the average rate of sale of electricity by GUVNL, while calculating its claim for supply of 1251 MUs of electricity. As per the calculation of the Petitioner, GUVNL is liable to pay ₹491.11 crore for supply of 1251 MUs of electricity at the rate of ₹3.93 per unit whereas GUVNL has made a payment of ₹288 crore at PPA tariff and is hence liable to pay ₹203 crore to the Petitioner.

17. The Petitioner has submitted that ₹9.24 crore became payable to UPPCL against short supply of electricity during October 2011 due to surrendering of open access by GUVNL. Further, an amount of ₹41.33 crore is payable on account of infirm sale of 156.85 MUs. According to the Petitioner, the total of ₹857.66 crore was payable by GUVNL for a quantum of 2167.08 MUs of electricity (₹325.22 towards sale to UPPCL + ₹491.11 towards sale to Gujarat Urja + ₹41.33 for infirm power).Out of this, the Petitioner has received an amount of ₹495.45 crore (₹483.14 crore for supply of firm and infirm power + ₹12.31 crore as open access charges) with outstanding balance of ₹362.21 crore. After including the penalty amount of ₹9.24 crore (and without interest), the Petitioner raised a bill of ₹371.45 crore on 10.10.2012 after the judgement of the Appellate Tribunal. As against the said claim, the Petitioner has made a payment of ₹135.20 crore on 1.2.2014. The Petitioner has

submitted that GUVNL is liable to pay the balance amount of ₹227.01 crore and interest on ₹362.21 crore till 1.4.2014 and interest on ₹227.01 crore from 1.4.2014 till final settlement.

18. The Petitioner has given the calculation for its claim in the petition as under:

S. No.	Particulars	Quantum of Electricity (MUs)	Amount (₹ in crore)
A.	Infirm sale of power	156.85	41.33
B.	Sale of electricity to UPPCL before SCOD from March, 2011to October, 2011 on behalf of Respondent, GUVNL	759.38	325.22 [371.90 - 46.68]
C.	Sale of electricity to GUVNL before SCOD since March, 2011	1250.86	491.11
D.	Amount received by the Petitioner from GUVNL for supply of electricity before SCOD(@1.3495 ₹/kWh on infirm sale of 156.85 MUs and @2.3495 ₹/kWh for 759.38 & 1250.86 MUs less 2% rebate etc.}	2167.08 which is sum of 156.85, 759.38 and 1250.86	483.14
E.	Open access charges paid by GUVNL (to be borne by the Petitioner)	-	12.31
F.	Total (A+B+C)-(D+E)		362.21
G.	Amount paid by GUVNL on 01.02.2014 to the Petitioner after demand letter dated 10.10.2012 was issued by the Petitioner	-	135.20
H.	Claim of the Petitioner (excluding interest)=(F-G)		227.01
I.	Interest @ rates applicable as per CERC Tariff Regulations upto 31.5.2015. (This does not include interest on ₹135.20 crore w.e.f 01.02.2014 as the said amount was paid.)		200.00
J	Total claim (H + I)		427.01

19. GUVNL has contested the claims of the Petitioner on following counts:

(a) In terms of the MoM dated 31.12.2010, the excess realisation paid to GUVNL alongwith interest is to be paid back by GUVNL to APL within one month from the date of final judgement. Such final decision will be done only when the Civil Appeal No.2567 of 2013 is decided by Hon'ble Supreme Court.

(b) After having agreed to the methodology for sale of power to third parties in the MoM of 31.12.2010, the claims of the Petitioner are in deviation of the said MoM. After the judgement of the Appellate Tribunal, GUVNL has released an amount of ₹135.20 crore against an undertaking dated 27.1.2014 given by the Petitioner subject to final decision of the Supreme Court. After having received the payment as per the undertaking, there cannot be any further claim by the Petitioner.

(c) As regards the claim for interest of ₹200 crore, GUVNL has submitted that it has fully and finally settled the claim and nothing is outstanding. The amount if any being due would only be crystallised after the decision of the Commission.

(d) The Petitioner's claim towards infirm sale of power to GUVNL has not been admitted by GUVNL. It has been argued that the claim made with regard to infirm power has been raised before the Commission for the first time without the claim being made in the earlier proceedings before the GERC or Appellate Tribunal and therefore, the principle of res judicata, waiver, estoppel and acquiescence would apply. GUVNL has submitted that as per the judgement of the Hon'ble Supreme Court in Andhra Pradesh Power Coordination Committee Vs Lanco Kondapalli Power Limited {(2016) 3 SCC 468},a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the Civil Court. Therefore, claim of infirm power made by the Petitioner after a period of three years is time barred. GUVNL has further submitted that CERC Tariff Regulations are not applicable to the Petitioner as the Petitioner was governed by GERC

Regulations at relevant point of time which did not have any provision for sale of infirm power under UI and therefore, the sale of infirm power shall be governed by the provisions of the PPA dated 2.2.2007.

(e) As regards sale to third party, GUVNL has submitted that as per MoM dated 31.12.2010, the Petitioner was to sell power in open market to third party, for and on behalf of GUVNL in such a way that sale transaction to GUVNL is identified. The sale of power through Power Exchange is a collective transaction, involving multiple sale by the generator partly on behalf of GUVNL and partly on behalf of generator itself and it would have been difficult to identify the sale on behalf of GUVNL and therefore, sale through Power Exchange was not allowed. GUVNL has submitted that it has given consent to APL to sell its share of power to JSEB through PTC and to UPPCL but the Petitioner did not give availability declaration in case of sale to JSEB and choose to sell power to UPPCL from its own sources first before selling the share of GUVNL from Unit 5.

(f) As regards the penalty paid to UPPCL, GUVNL has submitted that GUVNL agreed for curtailment and further stated that no take or pay compensation would arise as UPPCL had not made payments. Further UPPCL did not claim the alleged penalty.

(g) As regards the Petitioner's claim for payment for sale of power directly to GUVNL for the period from March 2011 to October 2011, GUVNL has submitted that as per the MoM dated 31.12.2010, the Petitioner was to identify the potential buyers and the consent of GUVNL was required to

ensure fair price discovery. However, the Petitioner failed to identify the buyers as per the MoM and in the absence of buyers, the power was supplied to GUVNL who paid the tariff as per the PPA. MoM dated 31.12.2010 did not provide for compensation to the Petitioner over and above agreed tariff in the PPA for supply to GUVNL. The Petitioner did not come up with any concrete proposal for third party sale during the month of April, May and June 2011 while continuing supply to UPPCL. GUVNL has submitted that it has not restrained the Petitioner from selling power to UPPCL from GUVNL's share in Unit No.5.

(h) The letter dated 1.2.2011 by GUVNL was consistent with the MoM dated 31.12.2010 which provided that sale of power to third party for and on behalf of GUVNL should be done in such a way that sale of GUVNL's share is identified which is not possible in case of sale through Power Exchange. GUVNL has further submitted that the Petitioner has not produced a single letter written to GUVNL opposing the letter dated 1.2.2011 or raised the issue before GERC. Therefore, the Petitioner is debarred from raising the issue at this belated stage.

20. The Commission vide the Record of Proceedings dated 27.9.2016 directed the Petitioner to clarify whether during the period under consideration, the Petitioner supplied power to UPPCL from other units; and the letter dated 1.2.2011 issued by GUVNL debarring the Petitioner to sell power through the Power Exchange was challenged before GERC. The Petitioner in its affidavit dated 18.10.2016 has submitted that the Petitioner has not supplied any power from Units 1 to 4 or from untied capacity of Unit 5/6 to UPPCL. The Petitioner has further submitted that

during the months of July 2011 to October 2011, about 510.9 MUs of power were supplied to UPPCL from Units 1 to 4 and about 258.8 MUs were supplied from merchant capacity of Unit 5 & 6 and 759.38 MW was supplied from the GUVNL share in Unit 5 & 6. The Petitioner has submitted that it has no claim against the supply made to UPPCL from these three sources. But the claim of the Petitioner is limited to 156.8 MUs of infirm power and 1250.86 MUs sale to GUVNL. The Petitioner has submitted that if the Petitioner had supplied the entire power to UPPCL from GUVNL shares in Unit 5 & 6, it would have covered only 759.38 MUs and not the entire quantum of 1250.86 MUs sold to GUVNL. Further it would have increased the liability of GUVNL for compensation beyond ₹135.20 crore as GUVNL has agreed to pay compensation for supply of energy to UPPCL. The Petitioner has submitted that there were various opportunities for the Petitioner to sell power in open market such as Day Ahead transactions/Term Ahead Transactions in Power Exchanges and injection of left over power into the grid which would have yielded a higher revenue to the Petitioner than what has been claimed from GUVNL at the rate of ₹3.98/kWh. As regards the second query, the Petitioner has submitted that GUVNL letter dated 1.2.2011 was not challenged in Petition No.1093 of 2011 as the adjudication was limited to the prayer made in the said petition (extracted in para 5 f this order). The Petitioner has submitted that since it is entitled make the claim in accordance with the MoM dated 31.12.2010, there was no occasion on the GUVNL's letter dated 1.2.2011. After the dismissal of the Execution Petition by Appellate Tribunal, the Petitioner has filed the present petition as per the directions of the Appellate Tribunal. The Petitioner has submitted that the issue as to whether the GUVNL's letter dated 1.2.2011 was challenged or not is not relevant for adjudication of the present petition.

21. GUVNL in its written submission has submitted that GUVNL had granted consent for sale of power to UPPCL and therefore, the Petitioner had the full opportunity to sell GUVNL's share to UPPCL. GUVNL has submitted that the Petitioner could have sold its merchant power from Units 1 to 4 and Unit 5 and 6 at the Power Exchange or through the buyers allegedly identified by the Petitioner for Units 5 & 6 and fulfilled the contractual obligations of UPPCL through GUVNL's share. GUVNL has submitted that the Petitioner found it commercially prudent to sell power to GUVNL from Units 5 & 6 and it is not open to the Petitioner to claim that it was forced to sell power to GUVNL. As regards the letter dated 1.2.2011, the Petitioner has submitted that even though the Petition was filed before GERC in March 2011, the Petitioner chose not to challenge the said letter and therefore, the Petitioner is prevented to raise the issue now. GUVNL has further submitted that the Petitioner could have taken up the matter with GUVNL and by not doing so, GUVNL had no opportunity to consider the views of the Petitioner in this regard.

Analysis and Decision

22. Before we consider the claims of the Petitioner raised in the petition, it is necessary to address the preliminary issues raised by GUVNL.

23. The first preliminary issue is that the claims of the Petitioner are contrary to the settlement reached that the adjustments shall be made only after the issues are finally settled. The last bullet of the MoM dated 31.12.2010 states as under:

> "In case either of the disputes is finally decided in favour of APL, excess realisation paid to GUVNL, along with interest, will be paid back by GUVNL to APL within one month from the date of final judgement."

In the light of the above provisions, GUVNL has submitted that the adjustment

of any excess realisation paid to GUVNL would be refunded to the Petitioner only after the issue is finally decided in favour of the Petitioner. According to GUVNL, such final decision will be done only when Civil Appeal No.2567 of 2013 is decided by the Hon'ble Supreme Court.

24. WE have considered the objections of GUVNL. The parties have agreed in the MoM dated 31.12.2010 that if the issue is finally decided in favour of the Petitioner, excess realisation paid to GUVNL alongwith interest shall paid back within one month from the date of final judgement. The issue that the Petitioner has no obligation to supply power to GUVNL prior to SCOD of Unit 5 & 6 has been decided by GERC in favour of the Petitioner in its order dated 21.10.2011 in Petition No.1093 of 2011 which has been upheld by the Appellate Tribunal by judgement dated 4.10.2012 in Appeal No.185 of 2011. GUVNL filed Civil Appeal No. 2567 of 2013 alongwith IA No.2. In para 9 of the IA, GUVNL had submitted that "pursuant to the order and judgement dated 4.10.2012 of the Appellate Tribunal, Adani Power has raised demand of ₹371.50 crore and interest thereon on GUVNL". GUVNL had sought an interim order staying the judgement and final order dated 4.10.2012 of the Appellate Tribunal in Appeal No.185/2012. Hon'ble Supreme Court by order dated 2.5.2013 in IA 2 in Civil Appeal No. 2567 of 2013 has categorically declined stay and dismissed the application for stay. In the absence of stay on the judgement and final order dated 4.10.2012 in Appeal No.185/2012, the judgement of the Appellate Tribunal shall have to be given effect to. In other words, the claims of the Petitioner will have to be considered in the light of the findings that the Petitioner was under no obligation to supply power to GUVNL prior to SCOD. The present petition has been filed for monetary quantification of the claims. Once the claims are crystallised and

quantified, GUVNL shall be liable to pay the outstanding amounts arising out of the claims. If the contention of GUVNL is accepted and claims are kept pending till the disposal of the Civil Appeal, it will result in grant of stay on the judgement of the Appellate Tribunal which has been refused by the Hon'ble Supreme Court. Needless to say that quantification of the claims and liability of the parties arising out of such quantification shall be subject to the outcome of the Civil Appeal No.2567 of 2013.

25. There is another reason for considering the claims of the Petitioner. GUVNL in para 5 of its reply dated 29.7.2016 has submitted as under:

> "5…….After the decision dated 04.10.2012 passed by the Appellate Tribunal and after second appeal of the Respondent was admitted by the Hon'ble Supreme Court on 08.08.2013, the Petitioner had approached the Respondent for settlement of monetary claim in relation to the generation and sale of power prior to the SCOD. Based on the proposal for settlement given by the Petitioner, the Respondent vide letter dated 24.12.2013 agreed to release the payment of ₹135.20 crore (₹126.89 crore towards excess realisation of sale of power prior to SCOD and ₹8.31 crore towards DPC/interest recovered by GUVNL), as an interim arrangement against an undertaking to be given by the Petitioner and subject to the final decision of the Hon'ble Supreme Court."

Having refunded the excess realisation paid to it from sale of power to UPPCL during the pendency of the Civil Appeal, GUVNL cannot be heard to say that the remaining excess realisation, if any, to be decided by the Commission in the present proceeding shall be implemented after the final decision in the Civil Appeal. Therefore, we overrule the objection of GUVNL on this count.

26. The next preliminary issue raised by GUVNL is that the claims are in deviation of the MoM dated 31.12.2010 between the parties and the undertaking dated 27.1.2014 given by the Petitioner. GUVNL has submitted that the methodology for sale of power to third party was finalised in the MoM dated 31.12.2010 in the meeting convened at Gujarat Government level and the claims are in deviation of the

decision in the said meeting. GUVNL has further submitted that ₹135.20 crore was released to the Petitioner after the Petitioner gave an undertaking and subject to the final decision of the Hon'ble Supreme Court. Having received the payment as per the undertaking, there cannot be any further claim by the Petitioner. The Petitioner has denied GUVNL's contention that the Petitioner is not entitled to get any amount exceeding ₹135.20crore. The Petitioner has further argued that the undertaking dated 27.1.2014provided by it was without prejudice to "all the rights" of the Petitioner including the balance claim. Therefore, the said undertaking has no bearing on the amount claimed by the Petitioner in the present petition. The Petitioner has denied that GUVNL has fully and finally settled the claims of the Petitioner and that there cannot be any payment by GUVNL to the Petitioner.

27. Both the Petitioner and GUVNL agreed to a methodology for sale of power to third party on account of commissioning of the Units 5 & 6 prior to SCOD in the meeting held on 31.12.2010. Relevant excerpts of the MoM dated 31.12.2010 are extracted as under:

> "……..*APL vide its letter dated 7th Dec. 10 has communicated to GUVNL that APL by deploying extra efforts and cost is in a position to synchronize unit 5 of 660 MW by end of Dec 2010. During the discussion, APL further contended that it is neither obliged to supply power to GUVNL prior to SCoD under the PPA conditions nor in a position to supply power to GUVNL at quoted tariff due to use of imported coal….."*
>
> *"In view of divergent views of both parties in regard to GUVNL's right to avail electricity prior to SCoD, it was agreed that APL may resort to dispute resolution mechanism under the provisions of PPA as M/s APL has indicated their divergent views in regard to GUVNL's right to avail electricity prior to SCoD."*

It is evident from the above that the parties to the MoM dated 31.12.2010 have acknowledged the difference in their views with regard to the GUVNL's right to avail electricity generated from Unit 5 & 6 of Mundra Power Project prior to SCOD. The Parties have further agreed that the Petitioner may resort to dispute resolution

mechanism under the PPA and if the issues are decided in favour of the Petitioner, then GUVNL would refund to the Petitioner the excess realisation received. In other words, the arrangement in the MoM dated 31.12.2010 between the Petitioner and GUVNL was provisional in nature, subject to final decision in the matter through the Dispute Resolution Mechanism under the PPA. The PPA dated 2.2.2007 contains the following dispute resolution provisions:

> "17.3 Dispute Resolution
>
> 17.3.1 Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 1.9.1 (d) of Schedule 14 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time"

Pursuant to the above provision and the decision in the MoM dated 31.12.2010, the Petitioner approached GERC for a declaration that it was not obliged under the PPA to supply power to GUVNL prior to SCOD of Unit 5 & 6 of Mundra Power Project. GERC decided the issue in favour of the Petitioner which was upheld by the Appellate Tribunal and the stay application against the judgement of the Appellate Tribunal has been rejected by the Hon'ble Supreme Court. Pursuant to the observation of the Appellate Tribunal in Execution Petition No.1 of 2015, the Petitioner has approached this Commission for quantification of monetary claims. Since the very basis of the MoM dated 31.12.2010 has been obliterated by virtue of the order of GERC as upheld by Appellate Tribunal, the Petitioner is entitled to raise its claims independent of the agreement in MoM dated 31.12.2010. As regards the other contention of GUVNL that the claims are in deviation of the undertaking dated 27.1.2014 given by the Petitioner, it has been submitted that the Petitioner while

giving the undertaking has clarified that the said undertaking was without prejudice to "all the rights" of the Petitioner including the balance claim. The said undertaking is extracted as under:

> "The present undertaking is limited to the interim arrangement of payment with regard to excess realisation for sale of power to third party of ₹135.20 crores, excluding the interest, however, it is without prejudice to legal rights of either party and the balance claims and counter claims of respective parties."

GUVNL has released ₹135.20 crore after accepting this undertaking and has therefore acknowledged the legal rights of either party to pursue the matter and the balance claims and counter claims of respective parties. In our view, the undertaking dated 27.1.2014 given by the Petitioner does not put any embargo on the Petitioner to pursue its legal rights in the present proceeding. Accordingly, this objection of GUVNL is overruled.

Consideration of the Claims on Merit

28. In the present petition, the Petitioner has confined its claims to the following:

(a) Claim for compensation for sale of infirm power to GUVNL;

(b) Sale of electricity to third party;

(c) Compensation payable

(d) Interest payable on the compensation amount

These claims have been examined hereinafter in the light of the judgements of GERC and Appellate Tribunal, provisions of the PPA and other relevant documents and pleadings of the parties.

A. Sale of Infirm Power to GUVNL

29. The Petitioner has submitted that Unit 5 and Unit 6 of Mundra Power Project were synchronised on 22.12.2010 and 3.6.2011 respectively and were commissioned on 26.12.2010 and 20.7.2011 respectively prior to the SCOD of these Units. The Petitioner has submitted that from the date of synchronisation till the date of commissioning of Unit 5, the Petitioner has made infirm sale of power of 134.52 MUs to GUVNL. In case of Unit 6, the Petitioner has made infirm sale of 22.34 MUs of power between the date of synchronisation and date of commissioning to GUVNL. The Petitioner has submitted that GUVNL has paid ₹20.74 crore at PPA energy charge rate of ₹1.3495 per unit less 2% rebate for 156.85 MUs (134.52 MUs + 22.34 MUs) of infirm sale of power. The Petitioner has submitted that the amount payable at the applicable UI rate for 156.85 MUs is ₹41.33 crore which otherwise would have been drawn by GUVNL from the grid by paying UI rates. According to the Petitioner, GUVNL has saved ₹20.59 crore on account of paying only energy charge rate for the electricity received from the Petitioner and therefore, the Petitioner is entitled to the differential amount of ₹20.59 crore.

30. GUVNL has submitted that the claim of the Petitioner for differential amount of ₹20.59 crore on account of sale of infirm power to GUVNL prior to the commissioning of the Units 5 & 6 of Mundra Power Project is not admissible for the following reasons:

(a) In Petition No. 1093 of 2011 filed by the Petitioner before GERC, the Petitioner has not raised the issue of treatment of infirm power, though the said claim relates to the period prior to SCOD. Since the Petitioner did not raise the claim at relevant time, it is debarred from claiming any relief on that

account at this stage being hit by the principles of constructive res Judicata waiver, estoppel and acquiescence.

(b) At the time commissioning of Units 5 and 6, the Petitioner was governed by the Regulations of GERC. The claim for infirm power is not admissible as there was no Regulations of GERC permitting sale of infirm power on UI basis by the generator.

(c) Proviso to Article 11 of the PPA dated 2.2.2007 specifically provides for that the infirm power will be paid at energy charges specified in the PPA and such facility of infirm power having been sought by the Petitioner in terms of Article 4.2 (c), there cannot be any claim other than the energy charges provided in the PPA.

(d) The Petitioner vide letter dated 26.3.2011 requested Gujarat SLDC to compute the infirm energy from Unit 5 and book the same in proportion to 500 MW to GUVNL and 117 MW to the Petitioner. If the infirm power was to be considered under UI, there is no need to identify the share of GUVNL separately. Further, pursuant to the revision of energy account by SLDC Gujarat, the Petitioner had raised invoices and claimed energy charges as per the provisions of the PPA for injection of infirm power. The Petitioner is now estopped from raising the settled issue.

(e) The presumption that GUVNL saved on paying the rate for electricity injected as infirm power which GUVNL otherwise would have paid at UI rates is incorrect as it is not possible after a period of 5 years to speculate what GUVNL would have done or to consider what were the UI rates.

(f) The contention of the Petitioner that supply of power before SCOD would also include infirm power supplied prior to COD is misconceived. Infirm power is generated prior to actual COD whether the actual COD is before or after SCOD. If the contention of the Petitioner is accepted, the Petitioner would never have injected infirm power as per the PPA.

(g) The applicability of the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and subsequent amendment to the said Regulation dated 28.1.2007 has been raised by the Petitioner for the first time in its written submission. However, the said Regulation which was valid till 31.3.2009 is not applicable to the Petitioner's generating station in 2010-11 when the infirm power was injected. Further, the Tariff Regulations also do not apply in case of the Petitioner as its tariff was not determined by the Commission, but was discovered through a competitive bidding process and adopted under section 63 of the Act.

31. The Petitioner in its written submission dated 18.10.2006 has met the objections of GUVNL as under:-

(a) In terms of the Judgement dated 4.10.2012 passed by the Appellate Tribunal in Appeal No. 185 of 2012, GUVNL is not entitled to power from Unit 5 and 6 of Mundra Power Project prior to SCOD and therefore, GUVNL is not entitled to any form of energy from the Petitioner prior to SCOD, be it firm or infirm energy. As per the decision of the Appellate Tribunal, PPA provisions do not apply prior to SCOD. Therefore, there is no force in the argument of GUVNL that it is liable to pay only energy charges as per the PPA from the

infirm energy availed by it prior to SCOD.

(b) The Petitioner has claimed UI rates from GUVNL for infirm energy as per the Statement of Reasons issued for the CERC (Terms and Conditions of Tariff) (Amendment Regulations) dated 7.1.2008 under which infirm energy is to be treated as unscheduled interchange. Had this infirm energy not been accounted as supply by the Petitioner to GUVNL, the said energy would have been booked as UI energy and the Petitioner would have received payment at UI rates for such energy rates.

(c) As per the Statement of Reasons for amendment to CERC (Terms and Conditions of Tariff) Regulations, 2004 dated 7.1.2008, in case of Merchant Power Plant and Merchant Capacity, the infirm power shall be accounted for as UI. In case of the Petitioner, the power generated prior to SCOD is in the nature of Merchant Capacity and accordingly, UI rate is the rate at which the Petitioner would have realised for infirm energy by injecting into the grid if the said energy would not have been booked to GUVNL.

32. We have considered the submissions of the Petitioner and GUVNL with regard to the claims of the Petitioner in respect of infirm supply of power. In the light of the submission of the parties, the issues that need to be decided are: (a) Whether sale of infirm power is covered under the judgements of GERC and Appellate Tribunal; and (b) whether the sale of infirm power shall be governed by the provisions of the PPA or by the provisions of the regulations of the Commission.

33. As regards the first issue i.e. whether the sale of infirm power is covered under the judgements of GERC and the Appellate Tribunal, GUVNL has submitted

that the Petitioner had not raised the issue before GERC in Petition No.1093 of 2011 or before the Appellate Tribunal and for the first time, the Petitioner has raised the issue in this petition. Since the parties have settled their claims in terms of Article 11.1.1 of the PPA dated 2.2.2007, the claim of the Petitioner cannot be entertained in this petition. The Petitioner has submitted that in terms of the judgement dated 4.10.2012 in Appeal No.185/2012, GUVNL is not entitled to power from Units 5 & 6 of the Mundra Power Project prior to SCOD and therefore, the provisions of the PPA does not apply prior to SCOD. Consequently, GUVNL is not entitled for any form of energy, whether firm or infirm, from the Petitioner prior to SCOD.

34. We have gone through the judgements of the GERC and Appellate Tribunal. The Petitioner approached GERC in Petition No.1093 of 2011 for a declaration that the Petitioner was under no obligation to supply contracted capacity to GUVNL prior to SCOD I.e.2.2.2007. In para 10.2, GERC has framed the issue that “the dispute is regarding the issue whether the Petitioner is mandated to supply power after commissioning and prior to SCOD”. In para 11, GERC has concluded that the Petitioner has no obligation to supply the contracted capacity to the respondent prior to the Scheduled Commercial Operation Date (SCOD) which is 2.2.2012”. A harmonious reading of the issue framed and the final decision would reveal that the directions of GERC pertained to the period from the date of commissioning till the SCOD during which the Petitioner has no obligations to supply the contracted capacity to GUVNL. The order is silent as to what will be the treatment of the sale of infirm power from the dates of synchronisation of the units till the date of their commissioning. The Appellate Tribunal in para 15 of the judgement dated 4.10.2012 in Appeal No.185 of 2012 has observed that “therefore, mere commissioning does

not invariably indicate that the unit has been commissioned commercially. Therefore, even when a unit has passed commissioning test there does not arise automatically the legal obligation on the part of the seller to commence supply to the procurer." The Appellate Tribunal has further observed that "the legal obligation commences from the SCOD which means that COD of all the units, and which means that COD in relation to all the contracted capacity. Thus construed, legal obligation on the part of APL commences 60 months from the effective date which is 2.2.2012". The Appellate Tribunal has dismissed the appeal filed by GUVNL. In our understanding, the scope of the proceedings before the GERC and Appellate Tribunal was confined to the period when the Units were commissioned but commercial operation of the units had not taken place and in that context, both GERC and Appellate Tribunal held that the legal obligation commences after SCOD of the units. There is no finding with regard to the sale of infirm power prior to the date of commissioning.

35. The Petitioner has strenuously argued that since as per the judgement of the Appellate Tribunal, the Petitioner is not obliged to supply power before SCOD to GUVNL, the provisions of the PPA prior to SCOD including the provisions for supply of infirm power is not applicable. We are unable to agree with the Petitioner. The provisions of PPA with regard to supply of infirm power prior to the date of commissioning are extracted as under:

> "6.3 Costs Incurred
> The Seller expressly agrees that all costs incurred by him in synchronising, connecting, commissioning and/or testing or Retesting a Unit shall be solely and completely to his account and the Procurer's liability shall not exceed the amount of Energy Charges payable for such power output made available at Delivery Point."
>
> 11. Article 11: Billing and Payment
> 11.1 General
> 11.1.1 From the COD of the first Unit, Procurer shall pay the Seller the Monthly Tariff Payment, on or before the Due Date, comprising of every Contract Year, determined

in accordance with this Article 11 and Schedule 6. All Tariff payments by the Procurer shall be in Indian Rupees.

Provided however, if the procurer avails of any Electrical output from the Seller prior to the Commercial Operation date of a unit made available at the Delivery Point ("Infirm Power") then the Procurer shall be liable to pay only the energy charges (as applicable for the Contract Year in which the Infirm Power is supplied or next contract year in case no energy charges are mentioned in such Contract Year), for Infirm Power generated from such unit, the quantum of infirm power generated by Units synchronised but have not achieved COD shall be computed from the energy accounting and audit meters installed at the Power Station as per the Central Electricity Authority (Installation and operation of meters) Regulations, 2006 as amended from time to time."

As per the above provisions, infirm power refers to the electrical output availed by the Procurer prior to COD of a Unit which has been made available by the Seller at the Delivery Point. Such infirm power shall be computed from the energy accounting and audit meters installed at the power station and the Procurer shall be liable to pay the energy charges applicable for the contract year in which the infirm power is supplied or the next contract year if no energy charges are mentioned for such contract year. If we read Article 6.3 with Article 11.1.1, we find that infirm power consists of two parts, namely (a) the electrical output supplied during synchronisation, testing, re-testing and commissioning, and (b) the electrical output supplied from the date of commissioning till the SCOD. Both GERC and Appellate Tribunal have held that COD of units 5 & 6 had not taken place till the SCOD and therefore, GUVNL is not entitled for supply of power prior to SCOD. After considering the provisions of the PPA, and the judgements of GERC and Appellate Tribunal, we are of the view that the supply of power from Units 5 and 6 from the date of commissioning till SCOD shall only be covered under the directions of the Appellate Tribunal, and not the period prior to the commissioning of the units.

36. Next issue is whether the sale of infirm power shall be accounted for at energy charges as per the provisions of the PPA or at the UI rates specified by this

Commission. According to the Petitioner, the infirm power is to be calculated as per the Tariff Regulations, 2004 [amendment dated 28.12.2007 effective from 7.1.2008] of this Commission as the jurisdiction of the Commission came to be vested in the Commission in the year 2008 when the PPAs with Haryana Utilities were signed. GUVNL has submitted that the Tariff Regulations, 2004 are not applicable in case of the Petitioner as the said regulations were applicable till 31.3.2009 and that too, to the projects whose tariff is determined by the Central Commission, and not cases where tariff is determined through competitive bidding.

37. We have considered the submission of the parties. The Petitioner has submitted that Unit 5 and Unit 6 of Mundra Power Project were synchronised on 22.12.2010 and 3.6.2011 respectively and were commissioned on 26.12.2010 and 20.7.2011 respectively prior to the SCOD of these Units. Therefore, the period of injection of infirm power is after 22.12.2010. The relevant Tariff Regulations of the Commission is Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 which was applicable for the period from 1.4.2009 till 31.3.2014. Clearly, Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 is not applicable in the facts of the case. As regards the applicability of the tariff regulations for the period 2009-14, Regulation 2 of 2009 Tariff Regulations provide as under:

> "**2. Scope and extent of application.**
>
> These regulations shall apply in all cases where tariff for a generating station or a unit threreof (other than those based on non-conventional energy sources) and transmission system is to be determined by the Commission under Section 62 of the Act read with section 79 thereof."

Therefore, 2009 Tariff Regulations is not applicable in case of the Petitioner

as the tariff of Mundra Power Project is not determined by this Commission under section 62 of the Act. Consequently, Regulation 11 which deals with sale of infirm power shall not be applicable in case of Mundra Power Project. The Petitioner has relied upon certain observations in the Statement of Reasons for Central Electricity Regulatory Commission (Terms & Conditions of Tariff)(Fourth Amendment) Regulations, 2007 which came into effect from 7.1.2008 in support of its contention that in case of merchant capacity, the infirm power shall be accounted for as UI. The relevant observations in the Statement of Reasons is extracted as under:

> "A clarification has been sought that the proposed treatment of infirm power as UI shall not apply where the tariff is determined through a transparent process of Competitive bidding. It is, therefore, clarified that Regulations 19 and 35 are applicable only to the generating stations whose tariff is determined by the Commission, starting from the capital cost. These regulations necessarily require capital cost reduction (for subsequent determination of capacity charge of the generating station) to the extent of revenue earned through sale of infirm power, and, therefore, cannot be applied where capital cost does not come in picture for tariff determination. It is further clarified that in case of competitive bidding, the conditions specified in the bidding documents would in any case apply. However, in case of merchant power plants and merchant capacity, the infirm power shall be accounted for as UI."

The Petitioner has submitted that prior to the SCOD of unit 5 & 6 of Mundra Power Project, the Petitioner did not have any obligation to supply power to GUVNL as per the judgement of the Appellate Tribunal and therefore, the capacity available was in the nature of merchant power plant and in terms of the clarification in the statement of reasons as quoted above, the infirm power shall be accounted for as UI. GUVNL has submitted that the Statement of Reasons relied upon by the Petitioner itself provides that proposed treatment of infirm power as UI as per the Statement of Reasons shall not apply where the tariff is determined through competitive bidding and is only applicable to the generating stations where the tariff is determined by the Commission starting from the capital cost. GUVNL has further submitted that once the Petitioner entered into PPA dated 2.2.2007 with GUVNL, the

power project ceased to be a merchant plant and only the capacity not tied up remains merchant capacity.

38. It is pertinent to note that the Commission notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009which came into effect from 1.1.2010. Regulation 8 (7) of Connectivity Regulation which provides for injection of infirm power is extracted as under:

> "(7) A generating station, including captive generating plant which has been granted connectivity to the gird shall be allowed to undertake testing including full load testing by injecting its infirm power into the grid before being put into commercial operation, even before availing any type of open access, after obtaining permission of the concerned Regional Load Despatch Centre, which shall keep grid security in view while granting such permission. This infirm power from a generating station or a unit therof, other than those based on non-conventional energy sources, the tariff of which is determined by the Commission, will be governed by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. The power injected into the grid from other generating stations as a result of this testing shall also be charged at UI rates."

Thus as per the above regulations, infirm power can be injected by a generating station which has been granted connectivity to the grid during testing or full load testing with the prior permission of concerned RLDC. If the tariff of the said generating station is determined by this Commission, the treatment of infirm power shall be made in accordance with the 2009 Tariff Regulations. In case of other generating stations, the power injected into the grid shall be charged at UI rates. In view of the specific provisions in the Connectivity Regulations permitting injection of infirm power into the grid after permission from RLDC and accounting for such infirm power under UI, the reference to the Tariff Regulations for the period 2004-09 and particularly, the observation of the Commission in the SoR to Fourth Amendment has no relevance to the claims of the Petitioner. The case of the Petitioner needs to be

considered in the light of the provisions of Regulation 8(7) of the Connectivity Regulations.

39. The language of Article 3.6 and proviso to Article 11.1.1 of the PPA dated 2.2.2007 clearly shows that there is no compulsion on the Petitioner to supply infirm power to GUVNL. These provisions merely say that if the infirm power is made available to the Procurer, then it shall be paid at the energy charge rate. Admittedly, the Petitioner has injected the infirm power during testing and commissioning of Units 5 and 6 into Gujarat grid. The Petitioner has not sought the permission of WRLDC for injection of infirm power. In other words, the Petitioner has not injected the power into inter-State grid and consequently, the provisions of Regulation 8(7) of the Connectivity Regulations for injection of infirm power and payment for such infirm power as per the provisions of the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 shall not be applicable in the case of the Petitioner.

40. The Petitioner has argued that GUVNL saved on paying the rate for such electricity injected by the Petitioner as infirm power which otherwise would have been drawn by GUVNL at UI rates. GUVNL has submitted that there cannot be any such assumption as it was possible that GUVNL did not require such power and would have had to adjust other sources of injection of power to accommodate the infirm power injected by the Petitioner, possibly resulting in payment of UI for deviation in the schedule. GUVNL has submitted that the assumption of the Petitioner that injection of infirm power would have resulted in UI receivable is not correct and the Petitioner's claim cannot be entertained at this stage. In our view, in the absence of actual data regarding the UI receivable or payable by GUVNL during

the relevant point of time, it is not possible to conclude that GUVNL has saved on paying at UI rate on account of injection of infirm power by GUVNL.

41. GUVNL has argued that as per the letter of the Petitioner dated 26.3.2011, the Petitioner had requested SLDC Gujarat to book infirm energy from Unit 5 in proportion to 500 MW to GUVNL and 117 MW to the Petitioner and to revise the State Energy Account and UI account accordingly to enable commercial settlement between the Petitioner and GUVNL. The Petitioner has submitted that the said letter requires the booking of infirm power to UI. GUVNL has argued that if the infirm power was to be booked to UI, there was no need to identify the share of GUVNL separately. GUVNL has submitted that the request for revising the UI account is for the purpose of reducing such amounts from the UI. Further, the letter says that the issue is to be settled between the Petitioner and GUVNL commercially. In case of UI, payment is made through SLDC, and not by GUVNL to the Petitioner. According to GUVNL, it is clear from the letter that infirm power is to be booked to GUVNL as per the PPA. The letter dated 26.3.2011 written by the Petitioner after the injection of infirm power from Unit 5 is extracted below:

> "Unit – 5 of Mundra TPS of APL synchronized for the first time on 26.12.2010 and declared commercial operation on 27.1.2011 vide APL letter dated 27.1.2011 addressed to GUVNL.
>
> As per the above said PPA, APL has to supply 500 MW to GUVNL from unit-5 of Mundra TPS. Considering the CERC norms of auxiliary consumption of 660 MW units (i.e. 6.5%), the ex-bus generation will be 617 MW, which has been accepted by GUVNL.
>
> Accordingly, the infirm energy from unit-5 should be booked in the following manner:
>
> - Infirm Energy to be booked to GUVNL = Infirm Energy Injected X 500MW / 617 MW.
> - Infirm Energy to be booked to APL = Infirm Energy Injected X 117 MW/ 617 MW

It is requested to computed the infirm energy from unit – 5 to be booked to GUVNL & APL as per above formula and revise the corresponding UI Accounts and State Energy Accounts at the earliest so that the same can be settled commercially between APL &GUVNL."

According to GUVNL, in terms of the said letter, SLDC Gujarat has revised the energy account and accordingly, the Petitioner had raised invoices and claimed energy charges as per the provisions of the PPA and the accounts had been settled. In our view, since the Petitioner has injected infirm power into the Gujarat grid without any compulsion from GUVNL and has sought booking of infirm power to GUVNL in proportion to 500 MW, the infirm power to this extent shall be payable at energy charges in terms of the PPA. As regards the balance power which the Petitioner has sought for booking to UI, the same cannot be done as there was UI mechanism in Gujarat. Consequently, the said power shall be payable as per the provisions of the PPA i.e. at the energy charge rate.

42. In the light of the above discussion, we hold that the judgement of GERC and Appellate Tribunal do not cover the period when the Petitioner injected infirm power into the grid upto the commissioning of the Units 5 and 6. The judgements are applicable for the period from the respective dates of commissioning of the Units 5 & 6 till the SCOD of these units. Consequently, the payment for infirm power shall be settled in terms of the applicable regulations and provisions of the PPA. The Tariff Regulations of this Commission are not applicable in case of the Petitioner since the tariff has been discovered through competitive bidding. As per the Regulation 8(7) of Connectivity Regulations, infirm power during testing and full load testing can be injected into the grid with prior permission of RLDC and such injection shall be settled at UI rates. The Petitioner has neither sought permission of WRLDC nor injected infirm power into inter-State grid. Therefore, the Petitioner shall not be

eligible for UI rates as per the UI Regulations of the Commission for the infirm power injected. The Petitioner has injected infirm power into the Gujarat grid without any compulsion from GUVNL. At that time, there was no UI mechanism in Gujarat. Consequently, the parties have settled the infirm power in terms of the PPA. In our view, the Petitioner is not entitled for any compensation for infirm power.

B. Sale of electricity to Third Party

43. The Petitioner has submitted that from the dates when Unit 5 & 6 were commissioned till the SCOD, the Petitioner supplied 2010.23 MUs of electricity out of which 759.38 MUs were supplied to UPPCL and balance 1251 MUs were supplied to GUVNL under compulsion. The Petitioner has submitted that in the meeting dated 31.12.2010, it was agreed that the Petitioner would sell electricity to third parties in consultation with GUVNL to ensure fair price discovery, and in the event dispute is decided in favour of the Petitioner, GUVNL would return the excess amount with interest. The Petitioner has submitted that GUVNL compelled the Petitioner to supply 1251 MUs to GUVNL and deprived the Petitioner to make profits by selling this electricity in open market. The Petitioner has submitted that since the dispute was pending before the GERC/Appellate Tribunal, GUVNL paid for this electricity at PPA tariff and enjoyed the cheap electricity to which it was not entitled. The Petitioner has submitted that even though the prevailing rates were ₹4.28 per unit, the Petitioner has considered the rate of ₹3.93 per unit which is the average rate of sale of electricity by GUVNL, while calculating its claim for supply of 1251 MUs of electricity. The Petitioner has submitted that GUVNL is liable to pay ₹491.11 crore for supply of 1251 MUs of electricity at the rate of ₹3.93 per unit as against payment of ₹288 crore at PPA tariff and hence is liable to pay ₹203 crore to the Petitioner.

44. GUVNL has submitted that as per the Minutes of the Meeting dated 31.12.2010, the Petitioner was to sell power in the open market to third party for and on behalf of GUVNL in consultation with the Respondent in such a way that the sale transaction to GUVNL is identified. GUVNL has submitted that the Petitioner had contemplated sale of power in the Power Exchanges and sought consent from GUVNL for the same. Since multiple sale by a generator through the Power Exchange on behalf of the other party and partly on behalf of generator itself cannot be identified separately in the names of both entities in the Power Exchange and therefore, identified as a composite sale by the generator, the Petitioner could not have sold at the power exchange without meeting the pre-requisite condition as per the Minutes of the Meeting dated 31.12.2010. GUVNL has submitted that it permitted the Petitioner to sell power whenever the Petitioner came up with a concrete proposal. The Respondent has enumerated the following instances for granting no objections to the Petitioner for sale to third parties:

(a) The Petitioner vide its letter dated 5.2.2011 submitted a proposal for sale of power to Jharkhand State Electricity Board through PTC India Limited during February 2011 for which GUVNL granted concurrence but the Petitioner did not make availability declaration.

(b) The Petitioner sought approval of GUVNL for supply of 400 MW capacity to UPPCL during March 2011 which was accorded by GUVNL vide letter dated 28.2.2011. The Petitioner vide e-mail dated 1.3.2011 intimated GUVNL about counter offer of 300 MW which was granted by GUVNL. On 18.3.2011, the Petitioner sought consent for sale of additional 115 MW which was also granted. The Petitioner sold 300 MW to UPPCL from 1.3.2011 till 21.3.2011

and 415 MW from 22.3.2011 till 31.3.2011.

(c) The Petitioner vide e-mail dated 5.5.2011 intimated GUVNL about the award of contract for supply of 600 MW to UPPCL from July 2011 to June 2012 and sought consent of GUVNL to sell 274 MW of GUVNL's share from Unit 6 which was likely to be commissioned. GUVNL granted consent to the Petitioner to sell 274 MW from GUVNL's pool of generation and if Unit 6 was commissioned before 1.7.2011, the same would be considered as supply from GUVNL's share from Unit 6. The Petitioner sold 274 MW power from GUVNL's share during July 2011 and continued to supply 500 MW to GUVNL from Unit 5.

(d) The Petitioner vide e-mails dated 26.5.2011, 14.6.2011 and 28.7.2011 sought the consent of GUVNL for supply of 283 MW at UP periphery for the months of August 2011, September 2011 and October 2011 from Units 5 & 6. GUVNL vide its letters dated 27.5.2011, 21.6.2011 and 2.8.2011 granted consent for supply from Unit 5 since Unit 6 was not commissioned. GUVNL has submitted that though the Petitioner had a contract for supply of 600 MW to UPPCL, the Petitioner preferred to sell only 283 MW from the share of GUVNL.

(e) During October 2011, GUVNL on account of system requirement requested the Petitioner to cancel open access for sale of 283 MW at UP periphery for the period from 3.10.2011 to 8.10.2011 and from 17.10.2011 to 24.10 2011 and thereby did not allow sale of 95.09 MUs to UPPCL at UP periphery. However, GUVNL had allowed sale of 50.4 MUs to UPPCL from 25.10.2011 to 31.10.2011 when the Petitioner's units were not available. Further, in July

2011 also, GUVNL had supplied 58.04 MUs from its pool of generation when the units of the Petitioner were not available. GUVNL has submitted that it had supplied 109.21 MUs for sale to UPPCL as against the short supply of 95.09 MUs.

(f) In accordance with the MoM dated 31.10.2010, GUVNL has returned the excess realisation alongwith interest to the Petitioner on account supply to UPPCL which amounted to ₹135.20 crore. There can be no further claim for the Petitioner in relation to sale to the third party.

45. The Petitioner has submitted that there is no dispute about the sale of power to UPPCL and the same has been settled. The Petitioner has submitted that it is concerned about the sale of 1250.86 MW for which permission was denied to sell to third parties. In the absence of consent to sell to third parties, the Petitioner had to supply power to GUVNL under compulsion. In this connection, the Petitioner has submitted that GUVNL through is letter dated 1.2.2011 to Gujarat SLDC disallowed the Petitioner to sell power through Power Exchange. The Petitioner has submitted that MoM dated 31.12.2010 does not bar sale either through collective transactions or power exchanges or through traders. The Petitioner has submitted that GUVNL had disallowed sale of power through Power Exchange on the ground that sale of GUVNL share cannot be identified in power exchange transactions. The Petitioner has submitted that identification of sale of GUVNL's share is easily possible in the same manner as it is done for bilateral transactions based on SLDC NOC and Daily Obligation Reports circulated by Power Exchanges to its members. The Petitioner has submitted that apart from disallowing sale through Power Exchange, GUVNL compelled the Petitioner to supply power to itself by choosing not to respond to

proposals for sale made by the Petitioner vide letters dated 28.4.2011, 15.6.2011 and 22.10.2011; and by curtailing power scheduled to UPPCL to zero in contravention of the MoM dated 31.12.2010 and compelling the Petitioner to supply such power to GUVNL vide letters dated 30.9.2011, 10.10.2011 and 14.10.2011.

46. GUVNL has submitted that as per the MoM dated 31.12.2010, the Petitioner was required to identify potential buyers for the entire capacity for the period of March 2011 to October 2011 and the consent of GUVNL was required to ensure fair price discovery. However, the Petitioner failed to identify the buyers as per the agreement and supplied power to the Respondent, in the absence of any other buyer and was accordingly paid at PPA tariff. GUVNL has further submitted that the Petitioner was given the consent for entire quantum of 600 MW for which the LOI was issued by UPPCL from the Respondent's share whereas the Petitioner chose to consider only 283-325 MW from the GUVNL's share and sell balance power from alternative sources. Therefore, the Petitioner cannot claim that it was under compulsion to sell power to GUVNL. As regards the letter dated 1.2.2011, GUVNL has submitted that the same was consistent with the MoM dated 31.12.2010 which required the Petitioner to sell GUVNL's share in the market in such a way that sale transactions for its share is identifiable which is not possible for sale through Power Exchange. GUVNL has submitted that the said letter has been acted upon by the Petitioner and has not been challenged. As regards the letters dated 28.4.2011 and 15.6.2011, GUVNL has submitted that the Petitioner had not given the details of the buyer and counter-party in both these cases and therefore, the request could not be processed. As regards the letter dated 22.10.2011, GUVNL has submitted that the said letter could not be considered as the Petitioner was not implementing the MoM

dated 31.12.2010 after the issue of GERC order on 21.10.2011.

47. We have considered the submissions of the Petitioner and GUVNL.Both GERC and the Appellate Tribunal have held that the Petitioner was not obliged to supply power to GUVNL in terms of the PPA prior to SCOD of Units 5 & 6 of Mundra Power Project. In other words, the Petitioner was free to sell power before SCOD to any third party without seeking the consent of GUVNL. However, generation and sale of power from Units 5 & 6 have taken place prior to the order of GERC. Therefore, the question under consideration is whether the Petitioner was given consent by GUVNL to sell power to third party or the Petitioner was compelled to supply power to GUVNL for which it needs to be compensated. At the core of the dispute are two documents, namely, MoM dated 31.12.2010 and GUVNL's letter dated 1.2.2011 to Gujarat SLDC. MoM dated 31.12.2010 is extracted as under:

> "APL vide its letter dated 7th Dec. 10 has communicated to GUVNL that APL by deploying extra efforts and cost is in a position to synchronize unit 5 of 660 MW by end of Dec 2010. During the discussion, APL further contended that it is neither obliged to supply power to GUVNL prior to SCoD under the PPA conditions nor in a position to supply power to GUVNL at quoted tariff due to use of imported coal. M/s APL further stated that GUVNL is not entitled to receive any electricity if the appeal in the matter of termination of Bid 02 PPA pending before Hon'ble Appellate Tribunal is decided in APL's favor. However GUVNL vide its letter dated 20th Dec 10 has already communicated its views to APL that GUVNL shall be entitled to electricity from the unit 5 even if synchronized prior to SCoD. In light of the above and as for the present GUVNL is in surplus of power, following was agreed.
>
> - In view of divergent views of both parties in regard to GUVNL's right to avail electricity prior to SCoD, it was agreed that APL may resort to dispute resolution mechanism under the provisions of PPA as M/s APL has indicated their divergent views in regard to GUVNL's right to avail electricity prior to SCoD.
>
> - Till that time and pending final outcome of the dispute relating to termination of PPA.
>
> - It was decided that if APL opt to generate electricity from unit 5 before its SCOD, APL may sell power from Unit 5 in open market to third party, for and on behalf of GUVNL (in such a way that sale transaction for GUVNL share of power from unit 5 is identified and APL shall give proportionate availability/supply as per PPA). M/s APL will sell such share of GUVNL in consultation with GUVNL to ensure fair price discovery and

- APL shall pay GUVNL excess realization for such third party sale above tariff receivable under PPA. While calculating this additional realization, all power sale related expenses such as applicable transmission charges and losses, payment of compensation, connectivity charges and trading margin will be adjusted.

- APL shall make payment of excess realization to GUVNL on back to back basis, as per payment terms with third party buyer. In case APL requires credit in making payment, APL may opt to pay with maximum credit period of 90 days with interest payable @10% p.a. for the extended credit period availed.

- In case either of the disputes is finally decided in favour of APL, excess realisation paid to GUVNL, along with interest, will be paid back by GUVNL to APL within one month from the date of final judgement."

Thus, MoM dated 31.12.2010 was an interim arrangement between the Petitioner and GUVNL to regulate generation and supply of power from Unit 5 & 6 during the period prior to SCOD, which was subject to the outcome of the pending appeal with regard to termination of PPA and the dispute resolution mechanism that the Petitioner might pursue with regard to its claim that it was not obligated to supply power to GUVNL prior to SCOD. MoM dated 31.12.2010 recognised that GUVNL was entitled to electricity prior to SCOD of Unit 5 in terms of the PPA, subject to the outcome of the dispute settlement mechanism to be resorted to by the Petitioner. MoM further noted that GUVNL was surplus in power at that point of time and therefore, the Petitioner could sell GUVNL's share of power in open market for and on behalf of GUVNL subject to following conditions:

(a) The Petitioner shall sell share of GUVNL to third party in open market in consultation with the latter for fair price discovery;

(b) Sale to third party shall be conducted in such a way that the sale transaction for GUVNL share of power is identified;

(c) The Petitioner shall give proportionate availability and supply as per the PPA;

(d) Excess realization from such third party sale above tariff receivable under PPA shall be paid by the Petitioner to GUVNL after adjusting all power sale expenses;

(e) In case either of the disputes is finally decided in favour of the Petitioner, excess realisation paid to GUVNL, along with interest, will be paid back by GUVNL to APL within one month from the date of final judgement.

48. One of the conditions for sale of GUVNL's power to third party was that sale transaction of GUVNL's share of power should be identified. There is nothing on record which shows that the parties have agreed to any arrangement of formula for identifying the sale transaction for GUVNL's share of power. However, GUVNL vide its letter dated 1.2.2011 addressed to Gujarat SLDC has instructed to permit sale of power to third party by the Petitioner in case of bilateral transactions only and in case of failure of the Petitioner to arrange bilateral transactions, the power has to be scheduled to GUVNL. The said letter is extracted as under:

> "In this regard, it is to inform you that GUVNL's share from Unit No.5 (660 MW) of Mundra Power Project is allowed to be sold by M/s APL on behalf of GUVNL, but only through Bi-lateral arrangements and not through Power Exchanges, and if M/s Adani cannot sell power of GUVNL's share through bilateral arrangements, in that case it is to be scheduled to GUVNL. Therefore you may allow/grant Open Access for selling GUVNL's share of power only with prior concurrence/consent of GUVNL."

The above instructions clearly puts transactions through power exchange outside the purview of third party sale, thereby impairing the ability of the Petitioner to explore the available mechanisms for third party sale. It is also noted that though the third party sale was agreed in the MoM dated 31.12.2010, no restriction was placed on third party sale through power exchange. It is a unilateral decision by GUVNL and there is nothing on record to show that Petitioner was consulted as to

what would constitute third party sale in terms of the MoM dated 31.12.2010. The letter dated 1.2.2011 debarring the Petitioner from sale through power exchange had huge impact on the ability of the Petitioner to sell power to third party in the open market.

49. GUVNL has submitted that the said letter was neither contested before it by the Petitioner nor challenged before GERC and therefore, it is binding on the Petitioner. The Commission directed the Petitioner to explain as to why the said letter was not challenged before GERC. The Petitioner has explained that GUVNL's letter dated 1.2.2011 was not challenged in Petition No.1093/2011 since the adjudication was limited to the prayers that the Petitioner was not under obligations to supply contracted capacity to GUVNL prior to SCOD and was free to sell such power outside the PPA to any third party. The Petitioner has submitted that since the prayers have been allowed by GERC and the Appellate Tribunal, the issue of challenge to the letter dated 1.2.2011 is no more relevant. In our view, only because the Petitioner did not challenge the letter dated 1.2.2011 cannot be held against the Petitioner to claim compensation on account of restrictions placed by GUVNL on sale to third party except through bilateral transactions. Firstly, GUVNL was aware that the Petitioner was not agreeing to supply power to GUVNL prior to SCOD which has been duly recognised in MoM dated 31.12.2010 and GUVNL's share in power generated prior to SCOD is an interim arrangement subject to the outcome of the appeal or dispute resolution mechanism to be resorted to by the Petitioner. Secondly, GUVNL was aware of the consequence that if the issue is decided in favour of the Petitioner, GUVNL would have no right over the said power and consequence of not allowing the Petitioner to sell to third party through Power

Exchange would follow. Thirdly, if GUVNL wanted that transactions through power exchange should be excluded, it should have decided the same in consultation with the Petitioner.

50. Next we consider whether the condition placed by GUVNL on sale of power through power exchange is in consonance with the provisions of the MoM dated 31.12.2010 which provided that sale to third party shall be arranged in such a manner so that sale transaction of GUVNL's share can be identified. GUVNL has submitted that in case of multiple sale by a generator in the Power Exchange, identification of GUVNL's share is not possible since the sale transactions of the generator is considered composite and cannot be identified in the name of both parties. The Petitioner has submitted that the sale through power exchange can be identified in the same manner as sale through bilateral transactions. The Petitioner has submitted that Gujarat SLDC gives NOC for sale through Power Exchange stage/phase-wise and since sale is made stage/phase-wise, sale from a particular stage/phase can be easily identified. Once the sale is identified phase-wise, then the share of GUVNL and the Petitioner in such sale can be obtained by pro-rating the power scheduled through power exchange. The Petitioner has explained that Phase II of Mundra Power Project consist of two units namely, Unit 5 and Unit 6 and depending on the sale from one unit or both units, share of GUVNL can be identified as per the following formula:

A		B		C
Power Sold through Power Exchange from the disputed capacity (MW)	=	Total Power Sold from Units 5 & 6 through Power Exchange – at Ex Bus (MW)	X	Disputed Contracted Capacity/Total Ex Bus Capacity (500 MW/617 MW in case only unit 5 is operating or 1000 MW/1234 MW in case Unit 5 & 6 both are operating)

From the submissions of the Petitioner and GUVNL, it emerges that the Petitioner was selling power from its merchant capacity from phase I (Unit 1 to 4) and phase II (Unit 5 & 6). Since, scheduling for sale through Power Exchange is given stage-wise / phase wise, sale of power from phase I or phase II of Mundra Power Project of the Petitioner can be easily identified. As regards identification of the share of different entities from sale of power in the Power Exchange from the same stage or phase is not possible, the Petitioner could not have sold the power from unit 5 & 6 severalty for GUVNL share and the Petitioner share. However, as submitted by the Petitioner, the share of GUVNL and the Petitioner could be obtained by prorating the power schedule through Power Exchange between the GUVNL share and the Petitioner's untied capacity. Further, GUVNL failed to consider that apart from collective transactions, there are transactions in Contingency and Term Ahead Market in the Power Exchange which are bilateral in nature. We are of the view that GUVNL instead of unilaterally refusing consent for sale of power through Power Exchange should have worked out a formula in consultation with the Petitioner so that the Petitioner could have sold the balance power of GUVNL's share through the Power Exchange. GUVNL by not permitting the Petitioner to sale power in the Power Exchange and by compelling the Petitioner to inject the power (other than the power sold through bilateral transaction) has not acted in accordance with the MoM dated 31.12.2010. After it was decided by GERC and Appellate Tribunal that the Petitioner was not obligated to supply power to GUVNL prior to SCOD, GUVNL becomes liable to compensate the Petitioner for the power which the Petitioner was compelled to supply to GUVNL.

51. Another issue which has been raised by GUVNL is that the Petitioner instead

of supplying the full capacity from GUVNL's share to UPPCL against the contract of 600 MW, has chosen to sell only 283-325 MW from GUVNL's share and has sold the remaining capacity from alternative sources. The Petitioner has submitted that the Petitioner had a merchant capacity of 200 MW from Units 1 to 4 and merchant capacity of 234 MW from Units 5 & 6 and during the period under consideration, the Petitioner has supplied 510.9 MUs from Units 1 to 4 and 258.8 MUs from Units 5 & 6 to UPPCL. The Petitioner has submitted that as the capacities tied up through PPA/disputed capacity and merchant capacity are parts of the same Units, generation of power takes place simultaneously from both these capacities. Since power generated cannot be stored, it ought to be supplied or sold and therefore, the Petitioner had to supply the power generated from merchant capacities of Unit 1-4 and Unit 5 to UPPCL. We have considered the rival submissions of the parties. Admittedly, the Petitioner has not sold its merchant capacities in the Power Exchange. It has sold part of the merchant capacities through bilateral transactions to UPPCL and partly injected power into the State grid. The Petitioner is not claiming any compensation for the merchant capacities which it sold to UPPCL. The Petitioner sold 258.8 MUs to UPPCL from its merchant capacities in Units 5 & 6 and 510.9 MUs from Units 1 to 4. GUVNL has raised a pertinent point that there was no embargo on the Petitioner to sell power from merchant capacities in Unit 5 & 6 in the Power Exchange since the letter dated 1.2.2011 was confined to the share of GUVNL only. Therefore, for sale of power from the merchant capacities of 234 MW in Units 5 & 6 in the power exchange, no permission of GUVNL was required. However, from the data produced, it is noticed that no power has been sold by the Petitioner from its merchant capacity in the Power Exchange and during the period of consideration, the Petitioner has sold about 258.8 MUs to UPPCL from its merchant capacity in Units 5 & 6 which could

have been sold at the Power Exchange and corresponding power from GUVNL's share could have been sold to UPPCL. We are of the view that had the Petitioner sold its merchant capacity in the Power Exchange and sold corresponding power from GUVNL's share to UPPCL, injection of power to Gujarat would have been reduced to that extent. In other words, the Petitioner has claimed to have sold 1250.86 MUs to GUVNL under compulsion which would be reduced to 992.06 MUs (1250.86 – 258.80).

52. The Petitioner has further submitted that even if the Petitioner would have sold the said quantum from the disputed capacity to UPPCL instead of Units 1 to 4 and Units 5 & 6 merchant capacities, then the sale quantum to UPPCL would have increased from 759.38 MUs and correspondingly, GUVNL's liability to pay the compensation for the additional power scheduled to UPPCL would have increased. We are unable to agree with the Petitioner. The Petitioner has sold 258.8 MUs from its merchant capacity to UPPCL. Assuming that the Petitioner had sold this power from GUVNL's share to UPPCL, it would have been required to pay the excess realisation on this power over the PPA price to GUVNL, and after the judgement of GERC and Appellate Tribunal holding that the Petitioner had no liability to supply power to GUVNL prior to SCOD, GUVNL would have refunded this excess realisation with 10% interest as per the MoM of 31.12.2010. Weighted average sale rate to UPPCL at Mundra bus bar was ₹4.283/kWh and after deducting the access charges for ISTS and STU and excluding PPA tariff charges, the Petitioner has computed the rate per kWh as ₹1.78. For 258.8 MUs, the Petitioner would have paid the excess realisation of ₹46.06crore (258.8 MUs*₹1.78). After the judgement of Appellate Tribunal and GERC, GUVNL would have refunded this excess realisation alongwith 10% interest to the

Petitioner in terms of the MoM dated 31.12.2010. In other words, the liability of GUVNL would have been confined to 10% interest on ₹46.06 crore only. Therefore, we do not agree with the Petitioner that had the Petitioner sold GUVNL's share to UPPCL in place of its merchant capacity, the liability for compensation would have been much higher after the judgement of the Appellate Tribunal.

53. In the light of the above discussion, we are of the view that the letter dated 1.2.2011 in so far it put restrictions on the ability of the Petitioner to sell GUVNL's share at the Power Exchange was not in conformity with the MoM dated 31.12.2010 and was unilateral and arbitrary. The said letter did not put any restrictions on the Petitioner to sell power from its merchant capacity in the Power Exchanges. However, the Petitioner did not sell any power from the merchant capacity in the Power Exchanges and instead sold 258.8 MUs power from its merchant capacity to UPPCL. Had the Petitioner sold this power at the Power Exchange and sold corresponding power from GUVNL's share, then the quantum of power scheduled to GUVNL under compulsion would have been reduced. To that extent, we cannot hold that GUVNL compelled the Petitioner to schedule power to GUVNL. Accordingly, we hold that only 992.06 MUs were scheduled to the Petitioner under compulsion for which the Petitioner is entitled for compensation in terms of the MoM dated 31.12.2010.

C. Compensation payable to the Petitioner

54. The Appellate Tribunal in its judgment dated 4.10.2012 in Appeal No 185 of 2011 has held that the Petitioner was not obliged to supply power to GUVNL prior to SCOD of Unit 5 and 6 of Mundra Power Project. It therefore follows that the Respondent was not entitled for supply of power prior to SCOD of these units. Therefore, the Petitioner is entitled to receive compensation for the power which was

compelled to schedule as GUVNL's share prior to the SCOD. The compensation shall be worked out on the basis of weighted average merchant sale of power by GUVNL during the corresponding period. Accordingly, the Petitioner shall be entitled for compensation at the rate of the difference between the weighted average merchant sale rate of power by GUVNL for the corresponding months and the PPA tariff (with applicable rebate @2%) for 992.06 MUs supplied to GUVNL.

D. Interest payable on compensation

55. The Petitioner has prayed to direct GUVNL to pay interest of ₹200 crore upto 30.5.2015. GUVNL has submitted that it has fully and finally settled the claim and any amount due would only be crystallized after the decision of the Commission. We have held above that the Respondent is liable to compensate the Petitioner for 992.06 MUs supplied prior to SCOD. The mechanism agreed by both the parties in the meeting held on 31.12.2010 was that in case the dispute is decided in favour of the Petitioner, excess realisation paid to GLUVNL shall be paid back to APL by GUVNL alongwith interest. Though the rate of interest has not been indicated with regard to final settlement, the parties had agreed in the MoM dated 31.12.2010 that the Petitioner could pay the sale from third parties within a credit period of 90 days at 10% rate of interest in terms of the MoM dated 31.12.2010. In our view, it will be just and fair, if GUVNL is directed to pay at the rate of 10% interest after one month of sale of power for the corresponding month till the date of actual payment in line with MoM dated 31.12.2010.

56. The Petitioner and GUVNL shall work out the compensation and interest amount in terms of the above order within a period of 15 days and full and final settlement shall be made within one month from the date of this order (due date). If the payment

is delayed beyond due date, GUVNL shall be liable to pay interest at the rate of 10% on the entire outstanding amount after the due date.

57. This order is subject to the final outcome of the Civil Appeal No. 2567 of 2013 pending before the Hon'ble Supreme Court. Since, there is no stay on the judgment of the Appellate Tribunal at present, this order shall be complied with by both the parties. If, the Hon'ble Supreme Court decides the appeal in favour of GUVNL, the parties shall re-work their respective liabilities in terms of the judgment of the Hon'ble Supreme Court.

58. The present Petition is disposed of in terms of the above.

sd/-	**sd/-**	**sd/-**	**sd/-**
(Dr. M.K. Iyer)	**(A.S. Bakshi)**	**(A. K. Singhal)**	**(Gireesh B. Pradhan)**
Member	**Member**	**Member**	**Chairperson**