

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.10/MP/2016**

**Coram:**

**Shri A. K. Singhal, Member**

**Shri A.S. Bakshi, Member**

**Dr. M. K. Iyer, Member**

**Date of Order: 1<sup>st</sup> March, 2018**

**In the matter of**

Petition under Sections 79 (1) (f) and 19 of the Electricity Act, 2003 read with Regulation 14 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading license and other related matters) Regulations, 2009 seeking refund of the Late Payment Surcharge illegally retained by the Respondent No. 1 under Power Purchase Agreement dated 30.5.2011 alongwith interest and initiation of proceedings for revocation of the Inter-State Trading License of the Respondent No. 1

**And**

**In the matter of**

Jaiprakash Power Ventures Limited  
Sector-128,  
Noida-201 304, Uttar Pradesh

**...Petitioner**

**Vs.**

Global Energy Private Limited  
6<sup>th</sup> Floor, Le Meridien Commercial Tower,  
Raisina Road, New Delhi-110 001

**...Respondent**

**IA No. 24/2016**

Global Energy Private Limited  
6<sup>th</sup> Floor, Le Meridien Commercial Tower,  
Raisina Road, New Delhi-110 001

**....Applicant**

**Parties Present:**

Shri M.G. Ramachandran, Advocate, JPVL

Shri Vishal Gupta, Advocate, JPVL

Shri Sanjeev Goel, JPVL

Shri Sanjay Sen, Senior Advocate, GEPL  
Shri Matrugupta, Advocate, GEPL  
Shri Hemant Singh, Advocate, GEPL

### **ORDER**

This Petition has been filed by the Petitioner, Jaiprakash Power Ventures Limited (JPVL), under Section 79 (1) (f) and Section 19 of the Electricity Act, 2003 (hereinafter referred to as the Act) read with Regulation 14 of the Central Electricity Regulatory Commission (Terms and Conditions for grant of trading licence and other related matters) Regulations, 2009 (hereinafter referred to as Trading Licence Regulations) for seeking refund of the late payment surcharge received by the Respondent, Global Energy Private Limited (GEPL) along with interest from Uttar Pradesh Power Corporation Ltd. (UPPCL) and initiation of proceedings for revocation of inter-State trading licence granted to GEPL.

#### **Brief Facts of the case:**

2. On the basis of an open tender, Uttar Pradesh Power Corporation Ltd. (UPPCL) awarded a contract to GEPL, a Category-I inter-State trading licensee, to supply round the clock firm power at the delivery point i.e. UP State Transmission System periphery for the period from 1.7.2011 to 30.6.2012. As per the Lol dated 31.3.2011, power was to be supplied from single source i.e. 100 MW from Captive Power Plant in NR and 200 MW from Merchant Power Plant in WR. The rate of power was fixed at ₹4.71/kWh at the Delivery Point. All open access charges, transmission charges and transmission losses etc. upto the delivery point (UP State Transmission System Periphery) was to be borne by GEPL.

3. Jaypee Karcham Hydro Corporation Limited (JKHCL), a subsidiary of Jaiprakash Power Venture Limited has set up a 1000 MW Karcham Wangtoo Hydro Electric Project in the District Kinnaur in the State of Himachal Pradesh. GEPL approached JKHCL with an offer to purchase electricity for the period from 1.7.2011 to 30.6.2012 for the purpose of re-sale of power to UPPCL. JKHCL agreed to sell power to GEPL for quantum ranging from 100 MW to 300 MW from July, 2011 to June, 2012 for onward sale to UPPCL (Buyer). A PPA dated 30.5.2011 was entered into between JKHCL and GEPL in this regard. As per the PPA, the following arrangements were made by the parties:

(a) JKHCL shall supply to GEPL the following quantum of contracted power from its plant:

<b>Month</b>	<b>Quantum (MW)</b>
July, 2011	300
August, 2011	300
September, 2011	300
October, 2011	225
November, 2011	150
December, 2011	150
January, 2012	100
February, 2012	100
March, 2012	100
April, 2012	150
May, 2012	250
June, 2012	300

(b) The applicable tariff rate for sale of contracted power by JKHCL to GEPL was ₹4.54/kWh at the delivery point.

(c) The Delivery Point for the purpose of sale and purchase of the contracted power was defined as the interconnection of Central Transmission Utility system with the

Uttar Pradesh State Transmission System periphery. The risk and title of the billable power shall pass from JKHCL to GEPL at the Delivery Point.

- (d) JKHCL was to procure open access for delivery of power at the delivery point. The Agreement shall come into force only after obtaining the necessary permissions/clearances as set out by law/regulations relating to grant of open access from the concerned SLDC/RLDC.
- (e) JKHCL shall raise weekly bills on provisional basis based on the provisional data as available on the RLDC website. After receipt of the REA for the previous month, adjustment towards the difference between actual bill on the basis of REA issued by RPC for the previous month and provisional bills issued by JKHCL for the previous month shall be made in the first week/second weekly bills of the following month.
- (f) GEPL shall make the payment of the provisional bills including adjustment bills through Real Time Gross Settlement/Banker's cheque/demand draft within 7 working days from the receipt of the bill through fax or email (Due Date). GEPL was entitled to 2% rebate on the billed amount or settlement amount paid within the due date.
- (g) In the event of failure to pay within the due date, GEPL shall pay late payment surcharge of 1.25% per month of the outstanding billed amount for the period of delay calculated on the basis of number of days of delay in the payment.

(h) In order to secure JKHCL's payments, as a security mechanism GEPL was required to arrange and furnish to JKHCL before the start of supply of power an irrevocable revolving standby letter of credit from the buyer (UPPCL) which shall be duly transferred/assigned by GEPL in favour of JKHCL. The letter of credit shall be valid from 1<sup>st</sup> July, 2011 till 20<sup>th</sup> July, 2012. The amount of letter of credit shall be equivalent to 7 days average billing of the total amount to be billed under the agreement. JKHCL shall be free to draw the letter of credit if the payment is not made by GEPL by the due date. GEPL shall replenish the letter of credit within 5 days from the date of drawl by JKHCL.

(i) GEPL's event of default includes its failure to pay (i) JKHCL any sum under the agreement for 14 days from the due date of payment; (ii) failure to furnish or replenish the irrevocable revolving standby letter of credit; (iii) discontinuation by buyer to take supply of contracted power or any part thereof on account of any default of GEPL. JKHCL's event of default includes its failure to supply the scheduled electrical energy for a continuous period of 3 days without notice to GEPL.

(j) In case of event of default, the agreement may be terminated by a written communication given by the party not in default to the other party. The termination of the agreement for any cause shall not release a party from any liability which at the time of termination has been incurred by such party.

4. In terms of the PPA, JKHCL supplied power to GEPL from 1.7.2011 to 17.9.2011.

The supply of power and the bill amount raised during the period is as under:

S. No.	Energy Bill No.	Bill Date	Period of Supply	Bill Amount (₹)
1.	KW/BL/ST/GLB/C1-11/FY12/034	1.8.2011	1.7.2011 to 31.7.2011	75,88,68,264/-
2.	KW/BL/ST/GLB/C1-11/FY12/044(Credit)	5.8.2011	1.7.2011 to 31.7.2011	(-) 13,075/-
3.	KW/BL/ST/GLB/C1-11/FY12/058	7.9.2011	1.8.2011 to 31.8.2011	77,88,11,485/-
4.	KW/BL/ST/GLB/C1-11/FY12/082	1.10.2011	1.9.2011 to 17.9.2011	43,41,59,837/-
<b>Total</b>				<b>197,18,26,511/-</b>

5. In view of default of payment on the part of GEPL, JPVL issued a termination notice dated 13.9.2011 to be effective from 18.9.2011. JPVL terminated the PPA with effect from 18.9.2011 and discontinued the power supply from that date. JPVL vide its letter dated 1.10.2011 requested GEPL to make payment of the bill for the period from 1.9.2011 to 17.9.2011 and the arrears against the earlier energy bills including the late payment surcharge.

6. Correspondence between the JPVL and GEPL during the period post 1.10.2011 till August, 2013 has not been placed on record. JPVL vide its letter dated 6.8.2013 sought a confirmation from UPPCL whether the principal amount of ₹197.18 crore on account of supply of power by JPVL to UPPCL through GEPL was outstanding. GEPL vide its letter dated 25.9.2013 confirmed that ₹197.18 crore was the total outstanding against the PPA dated 30.5.2011 from GEPL to JPVL subject to final reconciliation and sought acknowledgment of the said letter in order to seek balance confirmation from UPPCL. JPVL in its letter dated 1.10.2013 intimated GEPL that in terms of Clause 5.3.3 of the PPA dated 30.5.2011, applicable surcharge would also be payable and requested GEPL to obtain balance confirmation from UPPCL and forward the same to JPVL. GEPL vide its letter dated 5.10.2013 informed JPVL that in terms of the discussion and agreement

between GEPL and JPVL on 19.3.2013 and 21.6.2013, no surcharge was payable and requested JPVL to review its internal stand and intimate the same to enable GEPL to secure payment from UPPCL. JPVL in its letter dated 9.10.2013 addressed to Chairman, UPPCL requested for release of the outstanding payments from GEPL immediately on release of payment by UPPCL to GEPL. JPVL also gave a Pre-Receipt and No Dues Certificate dated 15.10.2013 confirming that an aggregate amount of ₹1,97,18,26,511/- by Global Energy Private Limited (GEPL) to Jaiprakash Power Ventures Limited (JPVL) under the Power Purchase Agreement dated 30.5.2011 shall be the full and final settlement of all claims of either party under the said agreement.

7. JPVL received payment of ₹197,18,26,511 from GEPL in October, 2013. Subsequently, JPVL vide its letter dated 4.7.2015 sought a confirmation from UPPCL regarding the late payment surcharge amount paid by UPPCL to GEPL. UPPCL vide its letter dated 28.8.2015 confirmed that the late payment surcharge of ₹25,34,79,302 had been paid by UPPCL to GEPL on 9<sup>th</sup> and 10<sup>th</sup> October, 2013. JPVL vide its letter dated 27.10.2015 wrote to GEPL that it had misappropriated an amount of ₹25,34,79,302 towards late payment surcharge received from UPPCL and requested GEPL to make payment of the said amount with a compound interest @24% p.a. GEPL in its letter dated 2.11.2015 refuted the charge of JPVL and stated that the Pre-Receipt and No Dues Certificate dated 15.10.2013 was issued by JPVL on the basis of the mutual agreement between JPVL and GEPL after discussion on all issues, and further that JPVL had waived its claim to late payment surcharge by issuing the pre-receipt and no dues certificate dated 15.10.2013. GEPL further stated that its contract with UPPCL is an independent contract and as such GEPL is fully entitled to the benefits that accrued under the said contract and

JPVL cannot have a claim over the benefits available to GEPL under the independent contract with UPPCL.

8. In the above background, JPVL has filed the present petition with the following prayers:

“(a) Initiate appropriate proceedings under Section 19 of the Electricity Act, 2003 read with Regulation 14 of the 2009 Regulations for revocation of the inter-State trading licence granted to the Respondent No. 1/GEPL;

(b) Revoke the inter-State trading licence of GEPL;

(c) Alternatively, direct GEPL to cure its continuous, prolonged and willful default committed under the terms and conditions of its licence read with 2009 Regulations, failing which its licence shall be revoked;

(d) Suspend the trading licence as an interim measure.”

#### **Case of the Petitioner**

9. The Petitioner has submitted that it has a case for payment of the late payment surcharge received by the Respondent from UPPCL for the following reasons:

(a) Clause 5.3.3 of the PPA dated 30.5.2011 entitles the Petitioner to receive late payment surcharge in view of the delay in payment for the power supplied. The Petitioner had issued the “Pre-receipt and No-Objection Certificate” only on account of the fraudulent statement of GEPL that Late Payment Surcharge should not be insisted upon as it would be very difficult to receive payments from UPPCL with late payment surcharge. As the pre-receipt and no objection was obtained fraudulently by GEPL, the same cannot be relied upon to justify the illegal retention of late payment surcharge and GEPL is therefore liable to refund the same to the Petitioner.

- (b) The Petitioner believed the illegal and false representations made by the Respondent that UPPCL had not given any late payment surcharge to it for almost 2 years and it was only when it received letter dated 28.8.2015 from UPPCL that it realized the fraud played upon it and claimed illegally retained late payment surcharge.
- (c) As per the PPA dated 30.5.2011 read with the Lol dated 31.3.2011 issued by UPPCL, the Respondent is only entitled to receive 17 paise/kWh (₹4.71/kWh – ₹4.54/kWh) as its trading margin as agreed by the parties. Further, both the Petitioner and the Respondent have expressly agreed in the PPA that in case of late payment, the Petitioner would be entitled to receive the late payment surcharge. Therefore, the Respondent is not entitled to retain the late payment surcharge released by UPPCL.
- (d) Regulation 7(c) of the Trading Licence Regulations provides that the Respondent cannot charge any amount exceeding the trading margin for the inter-State trading in electricity, as fixed by the Commission at the relevant point of time. Though the PPA dated 30.5.2011 was for a period of one year, the same was terminated with effect from 18.9.2011 which was accepted by the Respondent, thereby mutually reducing the period of the PPA approximately to 2 months and 17 days which is less than one year. Therefore, retention of the late payment surcharge by the Respondent over and above the trading margin for inter-State trading in electricity is clearly violative of Regulation 7(c) of the Trading Licence Regulations. Even otherwise, the Respondent is entitled to retain only the trading margin as agreed between the parties and not beyond.

- (e) The Respondent received payment of late payment surcharge of ₹25,34,79,302/- from UPPCL on 9<sup>th</sup> and 10<sup>th</sup> October, 2013. Despite receiving the same, the Respondent acting in a dishonest and fraudulent manner coaxed the Petitioner to issue Pre-receipt and No-Objection Certificate dated 15.10.2013 stating that late payment surcharge should not be insisted upon as it would be very difficult to receive payments from UPPCL with late payment surcharge.
- (f) As per the arrangement between the parties, the Respondent was responsible for negotiating the release of payment from UPPCL having privity of contract with it and the payment including the late payment surcharge was to be released to the Respondent only. The Respondent enjoyed a dominant position qua the Petitioner having an unequal bargaining power in so far as negotiating with UPPCL for payment was concerned. Thus, the action of the Respondent was clearly an abuse of the said dominant position and was in violation of Regulation 7(o) of the Trading Licence Regulations which prohibits a licensee to abuse its dominant position.
- (g) The Respondent has violated Regulation 7(a), (c), (d), (h) and (o) of the Trading Licence Regulations and has rendered itself liable for revocation of its trading licence under Regulation 14 of the Trading Licence Regulations.

10. GEPL in its reply has refuted the claims of the Petitioner and has submitted as under:

- (a) The Petitioner in its letter dated 2.4.2011 has agreed to the fact that the transaction is in the nature of intra-State transaction on account of the delivery point being UP State transmission periphery.
- (b) The entire case of the Petitioner is based on the letter dated 5.10.2013 written by the GEPL which has been misinterpreted by the Petitioner to show that GEPL misrepresented to the Petitioner not to insist upon the late payment surcharge as it would be difficult to get payment from UPPCL. GEPL has submitted that it conveyed to the Petitioner that mentioning of late payment surcharge in the Petitioner's letter dated 1.10.2013 was not as per the discussions and agreements arrived between the parties during the meetings held on 19.3.2013 and 21.6.2013 in which the Petitioner itself agreed to waive off the late payment surcharge, in order to provide an additional monetary benefit to the Respondent so that the Respondent can keep on providing business opportunities to the Petitioner for sale of its power in future. On the basis of the same, the Respondent in the letter dated 5.10.2013 conveyed to the Petitioner that unless the Petitioner cooperates with respect to its own decision to waive off the late payment surcharge, the Respondent would not approach UPPCL for clearing the dues thereby resulting in delay in realizing such payments.
- (c) The Petitioner wrote a letter dated 9.10.2013 directly to UPPCL wherein it mentioned about the outstanding dues of ₹1,97,18,26,511 only and did not mention about the late payment surcharge subsequent to agreeing to the arrangement of waiving the late payment surcharge. The Petitioner vide its undertaking dated

15.10.2013 had stated that there was no other outstanding amount except ₹1,97,18,26,511 and the said amount is full and final settlement between the parties. The Petitioner had therefore waived such amounts in excess of energy charges for getting more business from the Respondent and as such, the waiver cannot be revoked.

(d) Once the Petitioner had itself waived the demand of late payment surcharge, the Respondent is entitled to retain the said amount as the same is not subject to any trading margin and is not related to the tariff of the Petitioner. The clauses in the PPA relating to rebate and late payment surcharge are mutual arrangements between the contracting parties, the terms of which can change depending on the whims and fancies of the contracting parties and are in no manner related to trading margin.

(e) The Respondent received payment from UPPCL on 9<sup>th</sup>/10<sup>th</sup> October 2013. However, the Respondent was not obliged to make payments to the Petitioner unless the Petitioner reverted to its stand of waiver of late payment surcharge based on aforementioned agreement of the Petitioner. It is only after the Petitioner vide an undertaking dated 15.10.2013 reverted to its earlier position of waiving late payment surcharge to the benefit of the Respondent in return for future business opportunities, subject to electricity industry/market being in good shape, that the said Respondent released payments due to the Petitioner.

(f) The Petitioner is not entitled to institute the present proceedings as the entire 1091 MW Jaypee Karcham Wangtoo Hydro-electric plant, has been transferred as a

going concern on a slump exchange basis, by the Petitioner to a third party for a consideration. The said transfer took place pursuant to a scheme sanctioned by the Government of Himachal Pradesh on 25.6.2015 and the said scheme became effective with effect from 1.9.2015. The Petitioner is now merely a legal entity which does not enable it to maintain any claim against the Respondent.

**IA No. 24/2016 (filed by GEPL)**

11. GEPL has filed IA No.24/2016 seeking dismissal of the present petition on the grounds of :(a) lack of jurisdiction of the Commission as the transaction between the Petitioner and GEPL is intra-State in nature; (b) absence of cause of action to trigger jurisdiction of the Commission; (c) The Commission's jurisdiction under Section 79 of the Act does not extend to the dispute between a generating company and an electricity trader; (d) the petitioner is not entitled to institute the present proceedings **as** the entire 1091 MW Jaypee Karcham Wangtoo Hydro electric generating station has been transferred by the Petitioner to a third party for due consideration.

12. As regards the lack of jurisdiction of the Commission to deal with the dispute, GEPL has submitted that the delivery point as specified in the PPA with the Petitioner and LOI issued by UPPCL is the inter-connection of the CTU system with the UP STU periphery and therefore, the transaction for supply of power by the Petitioner to GEPL was an intra-State transaction. GEPL has submitted that the letter dated 2.4.2011 issued by the GEPL to the petitioner clearly mentioned that the purpose of sourcing the power from the petitioner is for intra-State sale in the State of Uttar Pradesh. GEPL has submitted that the transaction qua GEPL was intra-State as the petitioner took responsibility to source power

from the State of Himachal Pradesh. The dispute being related to an intra-State transaction, the present petition is not maintainable before this Commission under Section 79(1)(f) of the Act. GEPL has further submitted that as per proviso to Regulation 2 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010, the said regulation is not applicable to an intra-State trading licensee under Rule 9 of the Electricity Rule 2005 under a specific intra-State trading licensee and therefore no allegation can be raised before this Commission for an intra-State transaction.

13. As regards lack of cause of action to trigger the jurisdiction of the Commission, GEPL has relied on the following observations of the Commission in the the Statement of Reasons to the First Amendment of the Trading Licence Regulations:

“It is clear from the above provision that an inter-State trading licensee is not required to take a separate licence from the State Commissions for carrying out intra-State trade. However, it remains an un-denying fact that the basis for such intra-State trade is the licence issued by the Central Commission and therefore, the licensee is also subject to the terms and conditions of the licence issued by the Central Commission for such intra-State trade. In so far as operational aspects are concerned, such licensee shall be governed by the regulations of the concerned State Commission. For example, if any trading margin has been specified by the State Commission, the licensee shall have to comply with the said regulations for charging trading margin for intra-State trade within the State. However, if the licensee fails to comply with the trading margin of the concerned State Commission and if the concerned State Commission is of the view that the licensee shall be debarred from trading within the State, the State Commission will issue such order and refer the matter to the Central Commission to take appropriate action against the licensee since the Central Commission is the Appropriate Commission in respect of the said licensee and debarring the licensee from carrying out intra-State trade within a State would amount to change in the terms and conditions of the licence.”

GEPL has submitted that any petition alleging violation of trading margin in an intra-State transaction has to be filed before the concerned State Commission, and only if such State Commission concludes that there is violation of trading margin, then only this Commission can exercise any jurisdiction. GEPL has further submitted that as per Section 79 of the Act, the Commission has no powers to adjudicate any monetary dispute between

a generating company and a trading licensee and the issue with respect to payment of late payment surcharge is at best a disputed question of fact which can only be adjudicated by the appropriate State Commission under Section 86 (1)(f) of the Act. GEPL has also submitted that the Petitioner having already assigned all rights and liabilities in respect of the generating station, is left with no standing basis or underlying interest, in law or in fact, to lodge any claim against GEPL.

14. GEPL has submitted that the Commission has absolutely no powers to adjudicate any monetary dispute between a generating company and a trading licensee in terms of Section 79 (1)(f) of the Act, as the dispute cannot be related to clauses (a) to (d) of sub-Section (1) of Section 79 the Act. GEPL has submitted that prayer (a) of the petition is qua an alleged money claim with a trading licensee which has got nothing to do with tariff of the petitioner in a transaction involving either a distribution licensee or a transmission licensee. As regards prayer (b) relating to revocation of trading licence, GEPL has submitted that the said prayer depends on the success of the petitioner qua prayer (a) by an appropriate forum, in this case the concerned State Commission. GEPL has further submitted that the petitioner in the present case has waived off its claim of late payment surcharge from the respondent. Even otherwise, the issue of waiver of surcharge is a disputed question of fact which can be adjudicated by the appropriate State Commission under Section 86(1)(f) of the Act.

15. GEPL has further submitted that the petitioner has transferred the entire 1091 MW Jaypee Karcham Wangtoo Hydro-electric plant as a going concern on a slump exchange basis to a third party for a due consideration along with its assets, liabilities, rights and

interests and obligations pursuant to a scheme sanctioned by the Hon'ble High Court of Himachal Pradesh. Consequently, the petitioner is left with no standing, basis or underlying interest, in law or in fact, to lodge any complaint against GEPL.

16. The Petitioner in its reply to the IA has submitted that JPVL admittedly supplied power from its power plant situated in HP to GEPL with the delivery point of the contracted power as UP STU periphery. Therefore, the title in the contracted power changed at the UP STU periphery and the transaction was clearly an inter-State transaction, and not intra-State transaction as claimed by GEPL. Being an inter-State transaction, the dispute pertaining to the same would fall within the jurisdiction of this Commission and not of the State Commission. The Petitioner has submitted that the reliance placed by GEPL on the letter dated 2.4.2011 (the letter of intent issued by GEPL to the petitioner) is misplaced as the purpose of sourcing power for consumption in the State of UP will not render this transaction an intra-State transaction. The petitioner has submitted that if the contention raised by GEPL is accepted, no transaction can ever qualify as inter-State transaction as every single unit of power is sourced for consumption within one or the other state and therefore every transaction involving the trading licensee and a generating company will amount to an inter-State transaction. The petitioner has further submitted that reference by GEPL to trading margin regulations of the State Commission has no relevance to the facts of the present case as the transaction is in the nature of inter-State transaction. The Petitioner has further submitted that the present dispute is not regarding the margin fixed by the State Commission but is essentially a dispute arising out of the conduct of GEPL being contrary to the licensing conditions framed by this Commission. The Petitioner has denied the contention of GEPL that the Petition is not maintainable under Section 79(1)(f)

of the Act and has submitted that the present petition has been filed under Section 79(1)(f) of the Act for adjudication of a dispute involving a generating company and a trading licensee with respect to any inter-State transaction undertaken by it as well as under Section 19 of the Act seeking revocation of the licence of GEPL for violation of the conditions for grant of trading licence. As regards the contention of GEPL that the Petitioner is not entitled to institute the present petition as it had sold its power plant on a slump exchange basis, the Petitioner has submitted that the late payment surcharge misappropriated by GEPL was not due and payable to the power plant which is not a legal entity but to the Petitioner which is a juristic entity being a company and is still surviving.

17. GEPL in its rejoinder has submitted that it is an inter-State trading licensee as well as an intra-State trading licensee. GEPL has been issued an intra-State licence by Uttar Pradesh Electricity Regulatory Commission (UPERC). GEPL has submitted that the Petitioner had itself agreed to the fact that transaction between GEPL and the Petitioner was intra-State on account of the delivery point being the UP State transmission periphery vide its letter dated 2.4.2011 wherein it accepted the liability to bear all charges till the delivery point and the Petitioner cannot take a U-turn on its own interpretation of the nature of transaction. GEPL has further submitted that Section 79(1)(f) of the Act empowers the Commission to adjudicate upon the dispute connected with clauses (a) to (d) only relating to tariff of generating companies owned or controlled by the Central Government, generating companies having a composite scheme for sale of electricity in more than one State and issues and tariff related to inter-State transmission system. GEPL has submitted that the said provisions do not prescribe that this Commission can adjudicate the dispute involving a generating company and a trading licensee in

contradiction with Section 86(1)(f) of the Act which clearly specifies the jurisdiction of the State Commission for adjudicating upon the disputes between the licensees and generating companies. According to GEPL, since the present dispute does not fall under the categories covered under Section 79(1)(a) to (d) of the Act, this Commission does not have the jurisdiction to go into the merit of the present petition. GEPL has submitted that even if a transaction between a trading licensee and a generator is inter-State, even then the adjudication of the dispute between them has to be done by the State Commission that has been granted power to adjudicate the disputes between all kinds of licensees and generating companies in terms of Section 86(1)(f) of the Act. GEPL has submitted that the Petitioner vide its letter dated 1.10.2013 while confirming an amount of ₹197,18,26,511/- had raised the issue of late payment surcharge as per Clause 5.3.3 of the PPA in response to which GEPL vide its letter dated 5.10.2013 conveyed to the Petitioner that as per the understanding reached between the parties in meetings dated 19.3.2013 and 21.6.2013, the Petitioner had given up/waived its claim against any late payment surcharge and as such GEPL advised the Petitioner to withdraw the above letter dated 1.10.2013. GEPL has submitted that this was a private arrangement between the parties whereby the Petitioner had given up its civil rights under the PPA qua late payment surcharge. GEPL has submitted that the Petitioner itself wrote a letter dated 9.10.2013 to UPPCL in which it mentioned about its outstanding dues only and did not at all mention about the late payment surcharge. GEPL has submitted that once the Petitioner has itself waived the demand of late payment surcharge, GEPL is entitled to retain the said amount as the same is not subject to any trading margin and is not related to the tariff of the Petitioner. GEPL has further submitted that in terms of Section 394(2) of the Companies

Act, 1956, the Hon'ble High Court of Himachal Pradesh vide order dated 25.6.2015 has approved the transfer scheme under which all rights and interest of the Petitioner in the Karcham Wangtoo Hydro Electric Project have been transferred to the transferee company and therefore, the Petitioner cannot claim any rights including the rights to claim late payment surcharge for the power supplied by the said projects to any of its previous buyers.

### **Submissions during the hearing**

18. Learned counsel for the Petitioner submitted during the hearing on 6.7.2017 that the PPA dated 30.5.2011 between the Petitioner and GEPL was for the purpose of purchase of electricity from the Petitioner by GEPL for further sale to UPPCL for which GEPL had entered into a Power Sale Agreement with UPPCL. Learned counsel submitted that there is no dispute regarding the supply of electricity by the Petitioner to GEPL for onward sale to UPPCL during the period from 1.7.2011 to 17.9.2011, the quantum of electricity sold, tariff applicable, the trading margin on the two transactions, and the amount due and payable by UPPCL to GEPL and in turn by GEPL to the Petitioner. Learned counsel submitted that by reason of various supplies made by the Petitioner to GEPL and onward sale by GEPL to UPPCL, an amount of ₹197,18,26,511/- was outstanding from GEPL to the Petitioner exclusive of late payment surcharge which was confirmed by GEPL vide its letter dated 25.9.2013. Learned counsel submitted that by its letter dated 1.10.2013, the Petitioner called upon the GEPL to pay the said amount with applicable late payment surcharge as per clause 5.3.3 of the PPA dated 30.5.2011. Learned counsel submitted that by letter dated 5.10.2013, GEPL wrote to the Petitioner that in order to enable the payment being secured from UPPCL, the Petitioner should

confirm that no surcharge shall be payable on the principal amount and particularly, GEPL stated that “unless we have your cooperation on this issue, there is likelihood of further delay in securing your claim against UPPCL which is against our mutual interest.” Learned counsel submitted that believing on the representation of GEPL, the Petitioner gave a pre-receipt certificate on 15.10.2013 stating that payment of ₹197,18,26,511/- shall be accepted in full and final settlement of all claims under the PPA dated 30.5.2011. GEPL paid the entire principal amount on 10.10.2013 (₹160 crore), 11.10.2013 (₹14 crore) and 17.10.2013 (₹23.18 crore). Subsequently, while dealing with UPPCL, the Petitioner came to know that UPPCL had released an additional sum of ₹25,34,79,302/- towards late payment surcharge on 9/10.10.2013. Learned counsel submitted that GEPL cannot retain the late payment surcharge for the following reasons:

- (a) After receiving the said amount towards late payment surcharge on 9/10.10.2013, GEPL with an intent to cheat and play fraud upon the Petitioner took a pre-receipt and no-dues certificate on 15.10.2013 towards full and final settlement of all claims and dues of the Petitioner. The said pre-receipt and no dues certificate is no longer valid as it is vitiated by fraud.
- (b) In terms of the provisions of the Act and regulations made thereunder and the scheme of activities of an inter-State trading licensee, GEPL is not entitled to claim any adjustment over and above the trading margin.
- (c) GEPL has not been subject to any loss whatsoever on account of the delay in the payment by UPPCL to GEPL on 9/10.10.2013. It is not a case where GEPL had paid the money to the Petitioner on due date as per the PPA dated 30.5.2011 and

GEPL could not receive the money from UPPCL till 9/10.10.2013. The non-receipt of the amount from UPPCL for the period till 9/10.10.2013 had financial implication only on the Petitioner and not on GEPL. GEPL as an electricity trader cannot demand or claim or adjust anything over and above the trading margin towards consideration for acting as an electricity trader for purchase of electricity for resale thereof.

(d) GEPL's contention that the Petitioner agreed to waive off the late payment surcharge in order to provide an additional monetary benefit to GEPL is specious and misconceived as it cannot be assumed by any stretch of imagination that a generating company having such large capacity and huge investment would be dependent only on one trader to sell electricity and offer incentives which are not standard industry practice.

(e) GEPL filed the IA on 30.6.2016 for dismissal of the petition and its reply to the petition on 24.10.2016. GEPL has not disclosed in the said application or reply that it had filed Writ Petition No.11374 of 2016 before the Hon'ble High Court of Judicature, Allahabad, Lucknow Bench on 20.5.2016 in which GEPL has claimed late payment surcharge at the rate of 15% per annum on monthly compounding basis as per the terms and conditions of the tender. In para 36 of the writ petition, GEPL has submitted that after discussion with the generators, GEPL accorded that power supply invoices alongwith 6% per annum late payment surcharge was acceptable to GEPL, which is subject to acceptance by the generators at a reduced

rate. Therefore, GEPL cannot claim that the Petitioner has waived the late payment surcharge.

(f) GEPL wrote to the Petitioner on 5.10.2013 that it was attempting to secure payment from UPPCL and in order to enable payment being secured from UPPCL, the Petitioner should confirm that no surcharge shall be payable on the principal amount whereas on the contrary GEPL wrote to UPPCL on 7.10.2013 that after discussion with the generators, GEPL is agreeable for the reduced rate of late payment surcharge @ 6% per annum.

(g) The Petitioner is a generating company within the scope of Section 79(1)(b) of the Act i.e. a generating company situated in the State of Himachal Pradesh selling electricity for delivery in the State of Uttar Pradesh. Since the title in the contracted power changed at the UP STU periphery, the transaction was clearly an inter-State transaction and the dispute pertaining to the same shall fall within the jurisdiction of this Commission. Further, the expression used in Section 79(1)(f) of the Act is adjudication of disputes involving a generating company and any dispute involving a generating company would come within the jurisdiction of the Commission. Since the dispute between the Petitioner and GEPL involves the Petitioner as a generating company, this Commission has the jurisdiction in the matter.

(h) In terms of Section 19 of the Act, GEPL has made willful and prolonged default in acting in a manner required of it under the Act and the Trading Licence Regulations as it is making unlawful excessive gain in the transactions of purchase and resale of

electricity. Therefore, the Commission should direct initiation of proceedings against GEPL under Section 19 of the Act.

19. Learned Senior Counsel for GEPL submitted that the first prayer of the Petitioner is a claim of money allegedly due to the Petitioner by GEPL for which the Petitioner has invoked Section 79(1)(f) of the Act. The said provision confers the jurisdiction on the Commission to adjudicate the disputes involving generating companies or transmission licensees if the matter in dispute is connected with Section 79(1)(a) to (d). Though the Petitioner is a generating company, the respondent is neither a generating company nor a transmission licensee and therefore, the jurisdictional facts for invoking the jurisdiction of the Commission are not in existence. Further, the dispute regarding electricity trader cannot be entertained as Section 79(1)(e) of the Act has been left out from the scope of Section 79(1)(f) of the Act. Learned senior counsel submitted that in the light of the observation of the Hon'ble Supreme Court in Carona Limited Vs. Parvathy Swaminathan & Sons {(2007) 8 SCC 559} wherein it was held that jurisdictional fact is a condition precedent, the Commission cannot go into the present petition due to absence of jurisdictional fact and also for limitation/restriction imposed on the Commission qua the subject matter for adjudication. Learned Senior Counsel further relied upon para 4(ix) and (x) of the Statement of Reasons to the Electricity Act, 2003 and submitted that as per the said provisions, while trading has been recognized as a distinct activity, the regulatory superintendence qua trader is only in relation to fixing of trading margins, if considered necessary and the regulatory jurisdiction has been kept away when it comes to direct commercial relationship between a consumer and a generating company or a trader. Learned Senior Counsel submitted that the dispute that traders may have, may be either

resolved before a State Commission or in appropriate civil proceedings and the Act does not envisage any role relating to resolution/adjudication of disputes by the Central Commission. Learned Senior Counsel further submitted that the dispute relates to an intra-State sale of power as is evident from the letter dated 2.4.2011 and therefore, there is no question of invoking the jurisdiction of this Commission. Learned Senior Counsel submitted that the Petitioner after slump sale of the asset has now sought to recover the delayed payment surcharge of ₹25.34 crore which amount it had expressly waived by a letter dated 15.10.2013. As regards the prayer for revocation of licence, learned Senior Counsel submitted that the said prayer is presumptuous and goes on the assumption that as if the first prayer has been granted and a liability to make payment has arisen on GEPL. Learned senior counsel submitted that grounds (a) to (k) of the petition relate to recovery of money on allegations of misappropriation, breach of trust, fraud and cheating which are criminal in nature and can only be established in a criminal court after a trial. Since the Commission cannot come to a finding, prima facie or final, in relation to allegations of misappropriation, breach of trust, fraud and cheating, the Commission cannot exercise its jurisdiction to revoke the licence on the basis of such charges. Learned Senior Counsel relied upon the judgement of the Hon'ble Supreme Court in Global Energy Limited Vs. Central Electricity Regulatory Commission {(2009) 15 SCC 570} and submitted that in the said case, Hon'ble Supreme Court held that pendency of certain criminal proceedings cannot be a ground for denial of licence. In the present case, there are no such criminal proceedings and mere allegations have been made by the Petitioner and keeping in view the principles settled in the said judgement, there is no ground for revocation of licence. Learned Senior Counsel further submitted that the Commission is a creature of the Act

and its duties and functions are defined and circumscribed by the Act and therefore, the Commission cannot travel beyond the provisions of the Act by adjudicating upon the present petition. In this connection, learned Senior Counsel relied upon the judgement of the Hon'ble Supreme Court in N.C. Dhoundial V. Union of India {(2004) 2 SCC 579}.

**Analysis and Decision:**

20. We have carefully considered the submissions of both the Petitioner and GEPL. At this stage, we are considering the issue of maintainability of the petition. The Petitioner has invoked Section 79(1)(f) of the Act for adjudication of the dispute between the Petitioner and GEPL and Section 19 of the Act for revocation of inter-State trading licence of GEPL. While the Petitioner has maintained that the dispute is amenable to the jurisdiction of the Commission, GEPL has pleaded absence of jurisdiction on the grounds that the transaction in question is an intra-State transaction, dispute involving an electricity trader cannot be agitated before the Central Commission under Section 79(1)(f) of the Act, the Petitioner has waived its rights to claim late payment surcharge and allegations made by the Petitioner against GEPL are criminal in nature which can only be taken up a criminal court. The following issues arise for our consideration:

- (a) Issue No.1: Whether the transaction in question is an intra-State transaction or inter-State transaction?
  
- (b) Issue No.2: Whether the dispute between the Petitioner, a generating company and GEPL, an electricity trader is subject to adjudication under Section 79(1)(f) of the Act?

(c) Issue No. 3 Whether the Petition is maintainable under Section 19 of the Act?

**Issue No. 1: Whether the transaction in question is an intra-State transaction or inter-State transaction?**

21. JKHCL which is a subsidiary of JPVL has set up a 1000 MW Karcham Wangtoo Hydro Electric Project in the State of Himachal Pradesh. GEPL, an inter-State trading licensee, was issued LOI dated 31.3.2011 to supply the power to UPPCL for the period from 1.7.2011 to 30.6.2012. GEPL approached JKHCL with an offer to purchase electricity for the period from 1.7.2011 to 30.6.2012 for the purpose of resale of power to UPPCL. After acceptance of the offer, GEPL executed the PPA with JPVL on 30.5.2011 for purchase of 100 MW to 300 MW power for onward sale to UPPCL for the period from July 2011 to June 2012.

22. LOI dated 31.3.2011 was issued to GEPL by UPPCL for supply of power from 1.7.2011 to 30.6.2012. Relevant portion of LOI dated 31.3.2011 is extracted as under:

**“No. Tender Spec No. 05/SPATC-11/2011LOI/Global/262 dated 31.3.2011**

Subject: Supply of power to UPPCL against Tender Specification No. 05/SPATCH-155/2011.

Maj Gen N.S. Pathania (Retd)  
Managing Director  
M/s Global Energy Ltd.  
1<sup>st</sup> Floor, Shangir-Las-Eros Corporate plaza,  
10 Ashoka Road,  
Connaught Place, New Delhi-110 001  
Fax No. 011-43734466/77

Dear Sir,

Refer your above subject offer against Tender Specification No. 05/SPATC-155/2011 on the above mentioned subject. This is to intimate you that UPPCL is pleased to accept your offer for the supply of RTC (00:00 to 24:00 hrs.), Firm Power at delivery point UP State Transmission System Periphery” from ‘Single Source’ as per details given below:

Sl. No.	Period	Quantum (MW) at Delivery Point	Source	Rate at Delivery Point (₹/Kwh)
1.	01-07-2011 to 30-06-2012	100	CPP in NR	4.71
2.	01-07-2011 to 30-06-2012	200	MPP in WR	4.71

All Open Access Charges, Transmission Charges & Transmission Losses etc. up to delivery point shall be borne by Global and all such charges and losses beyond the delivery point shall be borne by UPPCL.

This agreement shall become effective to the extent and for the period the Open Access (Corridor) is available.

Other Terms & Conditions shall remain same as per UPPCL's Tender Spec. No. 05/SPATC-155/2011. Please acknowledge the receipt of above order and do needful for supply of above power."

23. GEPL vide its letter 2.4.2011 issued offer to the Petitioner for purchase of power for the period 1.7.2011 to 30.6.2012. Relevant portion of the letter is extracted as under:

"Mr. Suren Jain  
Director  
Jaypee Karcham Hydro Corporation Limited,  
Sector-128, Noid-201 304  
Uttar Pradesh (India)  
Fax No. 0120-4609025

**"Sub: Offer for the purchase of power from JKHCL**

Dear Sir,

This is with reference to your LOI dated 26.2.2011 for purchase of power from your power project located in Himachal Pradesh during the period from 1<sup>st</sup> July 2011 to 30<sup>th</sup> June, 2012. Based on the confirmation received from buyer, we are pleased to place below our revised offer for the purchase of power on an intra-State basis:

Quantum of power	Upto 300 MW on firm basis
Duration of Supply	RTC (00:00 hrs to 24.00hrs)
Period of contract	1.7.2011 to 30.6.2012
Rate at Point of Billing	₹4.54 per kWh at the delivery point
Delivery Point/Billing	UP State Transmission System Periphery

Charges/Losses: All charges/Losses such as transmission charges and losses, all open access charges till the Point of delivery, if any applicable, will be to the account of

JKHCL and beyond the point of delivery to the account of GEPL/GEPL1s buyer at actual, as and when applicable....”

24. Subsequently, on the same date i.e. on 2.4.2011, the Petitioner conveyed its in-principle acceptance to the above subject to finalization of sale and purchase agreement.

The relevant portion of said letter is extracted as under:

“Mj Gen N.S. Pathania (Retd.)  
Managing Director  
Global Energy Private Limited (GEPL)  
1<sup>st</sup> Floor, Shangri La`s-Eros Corporate Plaza  
19, Ashok Road, Cannought Place,  
New Delhi

Sub: In-Principle Acceptance of your revised offer for the purchase of power from Jaypee Karcham Hydro Corporation Limited (JKHCL)

Dear Sir,

We are in receipt of your revised offer dated 2.4.2011 for purchase of power from our Karcham Wangtoo Hydro Electric Project in the State of Himachal Pradesh during the period 1 July 2011 to 30<sup>th</sup> June 2012. Accordingly, in-supersession of our in-principle acceptance vide out letter dated 26.2.2011 we are pleased to convey our in-principle acceptance of your revised offer dated 2<sup>nd</sup> April, 2011.

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This in-principle acceptance of revised offer is subject to finalization of sale and purchase agreement between JKHCL and GEPL latest by 15<sup>th</sup> April 2011 failing which this acceptance will be treated as null and void without in liability on either party.”

Subsequently, GEPL and JPVL have entered into a Power Purchase Agreement dated 30.5.2011 for supply of power of varying quantum from July, 2011 till June, 2012.

25. As per clause 4 of the PPA, the delivery point for sale and purchase of contracted power was inter-connection of CTU system with the Uttar Pradesh State Transmission System periphery which is extracted as under:

“4. Delivery Point: The Delivery Point for sale and purchase of Contracted Power shall be the inter-connection of Central Transmission Utility (CTU) System with Uttar Pradesh State Transmission System periphery. The risk and title of the billable power shall pass from JKHCL to GEPL at the delivery point.”

As per the above provision, the delivery point for sale and purchase of contracted power is the inter-connection point of the Central Transmission Utility with Uttar Pradesh State transmission system periphery.

26. GEPL has submitted that as per the letter dated 2.4.2011 from JPVL conveying the in-principle acceptance offer of the same date made by GEPL, JPVL has accepted that the offer was for purchase of power on an intra-State basis. GEPL has further submitted that since JPVL is required to deliver power within the territory of Uttar Pradesh for supply to UPPCL in terms of the letter of offer and clause 4 of the PPA, the supply of power by JPVL to GEPL for onward sale to UPPCL is intra-State in nature and is therefore, amenable to the jurisdiction of UPERC, and not this Commission. GEPL has further submitted that it has been issued with a trading licence by UPERC and since the delivery is within the territory of Uttar Pradesh, the transaction is not amenable to the jurisdiction of this Commission. JPVL has submitted that since the supply of power is from a generating company located in Himachal Pradesh to the distribution companies located in Uttar Pradesh, the said supply is inter-State in nature, irrespective of the stipulation in the letter dated 2.4.2011 that the supply will be on intra-State basis.

27. We have considered the submission of the JPVL and GEPL. In order to determine whether the supply of power by JPVL to GEPL is inter-State or intra-State in nature, we have to consider the LOI issued by UPPCL, the provisions of the PPA dated 30.5.2011 and the transmission licence issued by UPERC. As per the LOI dated 31.3.2011 issued by UPPCL, GEPL is required to source power from Northern Region and Western Region and deliver the same at the delivery point which has been defined as the

UP State Transmission System Periphery. In other words, the purchase of power is from a source outside the State of Uttar Pradesh and therefore, the supply of power is inter-State in nature. GEPL has referred to JPVL's offer letter dated 2.4.2011 in which it has been stated that "we are pleased to place below our revised offer for the purchase of power on an intra-State basis" in support of its contention that the transaction is on intra-State basis. JPVL is not located within the State of Uttar Pradesh, but in another State i.e. Himachal Pradesh. Since the supply of power by JPVL from its generating station in Himachal Pradesh at the inter-connection point of UP Transmission Periphery passes through more than one State, it becomes inter-State supply of power. After taking delivery of the said power, GEPL supplies the power to UPPCL which is intra-State in nature. Both the transactions taken together leave no manner of doubt that the supply of power from the generating station of JPVL to UPPCL with the intermediary of GEPL is inter-State in nature.

28. Next we consider the PPA between JPVL and GEPL to find out whether the transaction is inter-State or intra-State in nature. Recitals of the PPA dated 30.5.2011 provides as under:

"A. GEPL has been established with the object, inter-alia of carrying on the business of generation of, and trading in, all forms of electrical energy, and has executed several electricity trading transactions in different regions of the country;

B. GEPL has been granted a license for undertaking inter-State trading in electricity by the Hon`ble Central Electricity Regulatory Commission;

C. JKHCL, a generating company as defined in the Electricity Act, 2003 which is implementing the 1000MW Karcham Wangtoo Hydro Electric Project comprising 4 (four) Units of 250 MW each in the District of Kinnaur in the State of Himachal Pradesh (hereinafter to as the Power Plant);

D. JKHCL is desirous of selling electricity to be generated by the Power Plant to interested entities on mutually acceptable terms and conditions;

E. GEPL, being an inter-State trading licensee, has approached JKHCL with an offer to purchase electricity from 1<sup>st</sup> July, 2011 to 30<sup>th</sup> June, 2012 (Contracted period) for the purpose of re-sale thereof to Uttar Pradesh Power Corporation Limited (the Buyer).

F. The parties have discussed and agreed to enter into this Agreement for sale and purchase of the Contracted Power described hereinafter.”

From the above recital, it is apparent that GEPL has been relying on the inter-State trading licence issued by this Commission for purchasing electricity from JPVL for the purpose of re-sale to UPPCL (buyer). It is not a case that GEPL is buying power from JPVL and supplies power to buyers of his choice. In this case, the power being sourced from JPVL is meant for an identified buyer (UPPCL). Therefore, the LOI dated 31.3.2011 issued by UPPCL and the PPA dated 30.5.2011 between GEPL and JPVL are back to back contractual arrangements and establish a nexus for supply of power from the generating station of the Petitioner located in Himachal Pradesh to UPPCL which is the authorized agency to purchase power on behalf of the distribution companies of Uttar Pradesh. Further, clause 6 of the PPA provides as under:-

“6. Payment security mechanism

In order to secure, JKHCL’s payments, as a payment security mechanism, GEPL shall arrange and furnish to JKHCL before start of supply of power an irrevocable revolving standby letter of credit from the Buyer which shall be duly transferred/ assigned by GEPL in favour of JKHCL. The said letter of credit shall be valid from 1<sup>st</sup> July 2011 till 20<sup>th</sup> July, 2012. The amount of letter of credit shall be equivalent to 7 days average billing of total amount to be billed under this Agreement. JKHCL shall be free to draw the letter of credit if the payment is not made by GEPL by the Due Date. GEPL shall replenish the letter of credit within 5 days from the date of drawl by JKHCL upto the amount of letter of credit mentioned above. All cost and expenses related to letter of credit shall be borne by GEPL.”

Thus, as per the above provision, GEPL shall arrange a letter of credit from UPPCL which shall be duly transferred/ assigned in favour of JKHCL and the latter is free to draw the letter of credit if the payment is not made by the due date. The arrangement under the payment security mechanism clearly establishes nexus between JPVL and UPPCL for

supply of power from the generating station of JPVL to UPPCL through the intermediary of GEPL. Therefore, as per the provisions of the PPA, the transaction for supply of power by JPVL to GEPL for onward supply to UPPCL is inter-State in nature.

29. GEPL has placed on record the intra-State trading licence issued by UPERC vide its affidavit dated 17.11.2016. GEPL was issued a trading licence for a period of 5 years vide licence dated 6.3.2007 and a renewed licence for a further period of 20 years vide licence dated 6.3.2012. Under the trading licence dated 6.3.2012, GEPL is permitted to undertake electricity trade of 100 MU per year within the State of Uttar Pradesh. Para 10 of the licence provides as under:-

“10. Any intra-State trading activity, which is incidental to or resultant of any inter-State trading activity, is not allowed unless such inter-State trading is backed by suitable inter-State trading licence issued by CERC or the same is permissible within the legal framework of Electricity Act, 2003.”

Therefore, as per the above provisions of the trading licence issued by UPERC, any intra-State trading activity which is incidental to or resultant of any inter-State trading activity is not permitted under the intra-State trading licence unless the same is backed by inter-State trading licence issued by CERC. In the present case, JPVL has delivered the power within the territory of Uttar Pradesh as per the PPA and thereafter, the supply from the delivery point till UPPCL has been taken by GEPL. As per the intra-State trading licence, any inter-State trading activity which is resultant of inter-State trading activity shall be permitted only if inter-State trading is backed by intra-State trading licence. When JPVL delivered power from its generating station in Himachal Pradesh within UP periphery to GEPL, this resulted in inter-State supply of power and the intra-State trading by GEPL to UPPCL which is resultant of such inter-State supply could only be permissible since GEPL

had an inter-State trading licence. In our view, the intra-State trading between GEPL and UPPCL being resultant of inter-State supply of power by JPVL to GEPL and being undertaken on the basis of the inter-State trading licence issued by this Commission is a clear case of inter-State trading in electricity.

**Issue No. 2: Whether the dispute between the Petitioner, a generating company and GEPL, an electricity trader is subject to adjudication under Section 79 (1) (f) of the Act?**

30. Next we consider whether this Commission shall have the jurisdiction to deal with the dispute arising in the course of inter-State trading of electricity. GEPL has submitted that this Commission does not have jurisdiction to deal with the dispute since the transaction is intra-State in nature. We have already held that the supply of power by JPVL to GEPL and back to back supply of power by GEPL to UPPCL is inter-State trading in electricity. Therefore, objection of GEPL on this ground is not valid. GEPL has further submitted that the Commission's power of adjudication under Section 79(1)(f) of the Act does not extend to trading licensee as Section 79(1)(e) relating to power of the Commission for grant of licence for inter-State trading of electricity is not covered within the purview of Section 79(1)(f) of the Act. GEPL has further submitted that the scope of Section 86(1)(f) of the Act is wider than the scope of Section 79(1)(f) as it permits adjudication of dispute between a generating company and a licensee without any limitation. On the other hand, JPVL has submitted that Section 79(1)(f) talks about the dispute involving generating company or transmission licensee with regard to clauses (a) to (d) of sub-Section (1) of Section 79 of the Act and since the dispute relates to late payment surcharge which is due on the tariff payable to JPVL which is a generating

company involved in inter-State supply of power, the present dispute is amenable to the jurisdiction of the Commission.

31. Section 79 of the Act provides for the following functions of the Commission:

**“Section 79. Functions of Central Commission:** (1) The Central Commission shall discharge the following functions, namely:-

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
- (c) to regulate the inter-State transmission of electricity ;
- (d) to determine tariff for inter-State transmission of electricity;
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;
- (g) to levy fees for the purposes of this Act;
- (h) to specify Grid Code having regard to Grid Standards;
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
- (k) to discharge such other functions as may be assigned under this Act,”

As per the above provision, the Commission has the power under clauses (a) to (d) of sub-Section 1 of Section 79 of the Act to regulate the tariff of the generating stations owned or controlled by the Central Government and the tariff of the generating stations which have composite scheme for generation and sale of electricity in more than one State, regulate the inter-State transmission of electricity and determine the tariff of inter-State transmission system. Under Regulation 79 (1) (f) of the Act, the Commission has the power to adjudicate the dispute involving the generating company or transmission licensee in respect of the matters connected with Clauses (a) to (d) of sub-Section 1 of Section 79 of the Act. In other words, the jurisdiction of the Commission for adjudication of

the dispute gets activated if the dispute involves either a generating company or a transmission licensee and the dispute pertains to tariff. The Appellate Tribunal for Electricity (Appellate Tribunal) in its judgment dated 4.9.2012 in Appeal Nos. 94 and 95 of 2012 has come to the conclusion that billing, payment, rebate, surcharge etc. are terms and conditions of supply of electricity. The relevant para of the judgment is extracted as under:

“33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc, are nothing but terms and conditions of supply.”

In the said judgment, the Appellate Tribunal has observed the following with regard to the jurisdiction of this Commission under Section 79(1)(f) of the Act. The relevant para of the judgment is extracted below:

“34. Section 79(1) (f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensees in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act.”

Though the said judgment has been rendered in the context of supply of power by NTPC to BRPL and BYPL from its generating stations whose tariff is determined by this Commission under Section 62 of the Act, the jurisdiction of the Commission also extends to regulating the tariff of generating companies making inter-State supply of power through mutually negotiated PPA or other contractual arrangement. In the present case, the tariff of the generating station is regulated by the Commission in terms of the order of the Hon'ble High Court of Delhi in judgement dated 15.5.2012 in FAO No. OMP 677/2011 as JPVL has a composite scheme for generation and supply of electricity in more than one

State. Prior to determination of tariff of the generating station of JPVL, power was supplied by the JPVL on short term basis as in the present case. Since supply of electricity by JPVL to GEPL for the period 1.7.2011 to 17.9.2011 is an inter-State supply and dispute regarding late payment surcharge is a term and condition of supply of electricity, the Commission will have the jurisdiction to adjudicate the dispute between JPVL and GEPL. It has been argued by GEPL that Section 79(1)(e) has been kept out of the purview of Section 79(1)(f) and therefore, a dispute between the generating company and an electricity trader will be outside the jurisdiction of the Commission. In our view, such an interpretation is not correct as Section 79(1)(e) deals with issue of “licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations” and not with either regulation or determination of tariff for supply of power to these licensees. In fact, all aspects with regard to the trading and transmission licensees for inter-State operation are dealt with under Sections 12 to 23 of the Act which include the provisions for revocation of licence. Further, the Commission has the power under Section 129 of the Act to issue necessary directions to the licensees covered under its jurisdiction to ensure compliance with the provisions of the Act or conditions of licence. Therefore, Section 79(1)(e) has been kept out of purview of Section 79(1)(f) of the Act. However, whenever a dispute involves a generating company making inter-State supply of power to a trading licensee and such dispute relates to tariff or tariff related matters, this Commission will have the jurisdiction to adjudicate the dispute under Section 79(1)(f) of the Act.

32. GEPL has submitted that the power of the State Commission is wider under Section 86(1)(f) of the Act than the power of the Central Commission under Section 79(1)(f) of the

Act and therefore, all dispute between a generating company and trading licensee shall be adjudicated by the State Commission, in this case UPERC under Section 86(1)(f) of the Act. The said clause is extracted as under:

“(f) adjudicate the disputes between the licensees and generating companies and to refer any dispute for arbitration.”

Where the supply is made by a generating company located outside the State to a licensee located within the State, then such tariff can be regulated by the State Commission under whose jurisdiction the licensee is located in only in certain circumstances in terms of Section 64(5) of the Act which is extracted as under:

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this Section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.”

This is the only exception made to the jurisdiction of the Central Commission to regulate inter-State supply of electricity. Where there is inter-State supply involving territories of two States, the parties to such supply are required to make joint application before the State Commission having jurisdiction in respect of the licensee intending to supply such electricity and accepting liability for making payment for such electricity. Hon’ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos.5399-5400 of 2016 in Energy Watchdog Vs Central Electricity Regulatory Commission and Ors. and related appeals have interpreted the scope of Section 64(5) of the Act as under:

“27..... Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the

Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

As per the above judgment, jurisdiction of the State Commission can be invoked by application of the parties before the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. In the present case, only if JPVL and UPPCL make application before the UPERC in respect of supply made by GEPL, then only jurisdiction of UPERC can be invoked. JPVL is before this Commission and disputes the claim of GEPL with regard to jurisdiction of UPERC in this dispute.

33. There is another reason as to why jurisdiction of the State Commission cannot be invoked in the case of present dispute. In Lanco Amarkantak Power Pvt. Ltd. V/s M. P. Electricity Regulatory Commission [2010 ELR (APTEL) 161], the Appellate Tribunal considered the following question:

“13...Whether the Madhya Pradesh State Commission has got jurisdiction to adjudicate upon the disputes between the Appellant, a generating company situated outside Madhya Pradesh and the R-2 (PTC) which has not been granted licence by the Madhya Pradesh State Commission?”

Interpreting Section 86 (1)(f) of the Act, the Appellate Tribunal held as follows:

“14. (ii) The above provision with the opening words the State Commission, must be construed in the context of the territorial jurisdiction of the Regulatory Commission of each State. The word "the licensee" as referred to in Section 86(1)(f) has to be construed to mean such licensees which have been granted a trading licence or such licensee who has been granted a trading licence by the particular State Commission seeking to assume jurisdiction over the dispute. This means, the State Commission can assume jurisdiction in respect of the disputes arising between a generating company and an electricity trader operating under a trading licence granted by it.....”

The Appellate Tribunal held that the State Commission can assume jurisdiction in respect of the dispute arising between a generating company and an electricity trader operating under a trading licensee granted by the concerned State Commission. In this case, though the trading licence has been granted by UPERC, GEPL has not represented itself as an intra-State trading licensee of UPERC while entering into the PPA dated 30.5.2011 with JPVL. In fact, Recital E of the PPA dated 30.5.2011 provides as under:

“E. GEPL, being an inter-State trading licensee, has approached JKHCL with an offer to purchase electricity from 1<sup>st</sup> July, 2011 to 30<sup>th</sup> June, 2012 (Contracted period) for the purpose of re-sale thereof to Uttar Pradesh Power Corporation Limited (the Buyer).”

From the above, it is clear that GEPL represented itself as an inter-State trading licensee and approached JPVL with an offer for purchase of electricity for the purpose of resale to UPPCL. Since, GEPL has entered into the PPA dated 30.5.2011 with JPVL on the strength of the license issued by this Commission, GEPL cannot be said to operate as a trading licensee under a license issued by UPERC in so far as the transaction involving the present dispute is concerned. In the light of the order of the Appellate Tribunal in Lanco Amarkantak Case, we hold that it is this Commission which is competent to adjudicate the dispute between JPVL and GEPL.

34. GEPL has further raised a preliminary objection that there is absence of the cause of action to trigger the jurisdiction of the Commission. GEPL has submitted that JPVL has alleged violation of the trading margin as per the Trading Margin Regulation of the Commission. GEPL has submitted that allegation regarding violation of trading margin in intra-State transaction has to be filed before the concerned State Commission and only if such State Commission concludes that there is violation of trading margin, then only this Commission can exercise jurisdiction with regard to the license of GEPL. In this

connection, GEPL has relied on the observation of the Commission in the Statement of Reasons to the first amendment of the Trading License Regulations (quoted in para 13 of this order) wherein the Commission has held that if the basis of the intra-State trade is the licence issued by the Central Commission, the operational aspects such as trading margin shall be governed by the concerned State Commission. We have considered the submission of GEPL. In the Statement of Reason to the first amendment of the Trading License Regulations of this Commission, it has been observed as under:-

“It is clear from the above provision that an inter-State trading licensee is not required to take a separate license from the State Commission for carrying out intra-State trade. However, it remains an un-denying fact the basis for such intra-State trade is the license issued by the Central Commission and therefore the licensee is also subject to the terms and conditions of the license issued by the Central Commission for such intra-State trade. In so far as operational aspects are concerned, such licensee shall be governed by the regulations of the concerned State Commission. For example, if any trading margin has been specified by the State Commission, the licensee shall have to comply with the said regulations for charging trading margin for intra-State trade within the State.....”

It is therefore clear from the above observation of the Commission that an inter-State trading licensee is subject to the terms and conditions of the license issued by this Commission even though it undertakes intra-State trading on the basis of the said license. The only concession which has been given in case of intra-State trade is the applicability of the trading margin of the concerned State Commission. Since we have held that the transaction in question is inter-State in nature, the applicability of the trading margin fixed by UPERC does not arise in case of this transaction. Therefore, it has to be considered by this Commission whether in the facts of the case, trading margin fixed by this Commission has been violated by GEPL or not.

35. In the IA, GEPL has submitted that in terms of Section 394 (2) of the Companies Act, 1956, the Hon'ble High Court of Himachal Pradesh vide order dated 25.6.2015 has

approved the transfer scheme under which all rights and interest of the Petitioner in the Karcham Wangtoo Hydro Electric Project have been transferred to the transferee company and therefore, the Petitioner cannot claim any rights including the rights to claim late payment surcharge for the power supplied by the said projects to any of its previous buyers. The Petitioner has submitted that it has sold its power plant on slump base basis and the late payment surcharge due from GEPL was not payable to the power plant which is not a legal entity but to the Petitioner which is a legal entity. We have considered the submission of GEPL and JPVL. It is noticed that the Hon'ble High Court of Himachal Pradesh in the Company Petition No. 6 of 2015 has approved the scheme of arrangement between Jaiprakash Power Venture Limited and Himachal Baspa Power Company Limited under the provisions of Section 391-394 of the Companies Act, 1956. Pursuant to the sanction of the scheme, JPVL has transferred the project to Himachal Baspa Power Company Limited and the latter company has been sold to JSW Energy Limited on slump sale basis. Since JPVL continues as a legal entity and the dispute relates to the transactions for the period prior to the slump sale, we are of the view that the objections of the Respondent is not maintainable.

### **Issue No. 3 Whether the Petition is maintainable under Section 19 of the Act?**

36. The Petitioner has also filed the petition under Section 19 of the Act seeking a direction for revocation of the inter-State trading license granted to GEPL or alternatively direct GEPL to cure its continuous, prolonged and willful default committed under the terms and conditions of its license read with 2009 Regulations, failing which its license

shall be revoked. GEPL has submitted that grounds (a) to (k) of the petition relate to recovery of money on allegation of misappropriation, breach of trust, fraud and cheating. These are in the nature of criminal proceedings and unless a criminal court proves the allegation against GEPL, the Commission cannot proceed against GEPL for revocation of license.

37. Let us examine the Section 19 of the Electricity Act, 2003 which is extracted as under:

“19. (1) If the Appropriate Commission, after making an enquiry, is satisfied that public interest so requires, it may revoke a licence in any of the following cases, namely: -

(a) where the licensee, in the opinion of the Appropriate Commission, makes wilful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder;

(b) where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation;

(c) where the licensee fails, within the period fixed in this behalf by his licence, or any longer period which the Appropriate Commission may have granted therefor –  
(i) to show, to the satisfaction of the Appropriate Commission, that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his licence; or

(ii) to make the deposit or furnish the security, or pay the fees or other charges required by his licence;

(d) where in the opinion of the Appropriate Commission the financial position of the licensee is such that he Revocation of licence is unable fully and efficiently to discharge the duties and obligations imposed on him by his licence.

(2) Where in its opinion the public interest so requires, the Appropriate Commission may, on application, or with the consent of the licensee, revoke his licence as to the whole or any part of his area of distribution or transmission or trading upon such terms and conditions as it thinks fit.

(3) No licence shall be revoked under sub-Section (1) unless the Appropriate Commission has given to the licensee not less than three months” notice, in writing, stating the grounds on which it is proposed to revoke the licence, and has considered any cause shown by the licensee within the period of that notice, against the proposed revocation.

(4) The Appropriate Commission may, instead of revoking a licence under sub- Section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose, and any further terms or conditions so imposed shall be binding upon and be observed by the licensee and shall be of like force and effect as if they were contained in the licence.

(5) Where the Commission revokes a licence under this Section, it shall serve a notice of revocation upon the licensee and fix a date on which the revocation shall take effect.

(6) Where an Appropriate Commission has given notice for revocation of licence under sub-Section (5), without prejudice to any penalty which may be imposed or prosecution proceeding which may be initiated under this Act, the licensee may, after prior approval of that Commission, sell his utility to any person who is found eligible by that Commission for grant of licence.”

38. Section 19 of the Act enumerates the following cases under which licence can be revoked:

- (a) Wilful and prolonged default on the part of licensee in doing anything required of him or under this Act or the rules or regulations made thereunder.
- (b) Breach of any of the terms or conditions of licence which is expressly declared to render the licence liable for revocation.
- (c) Failure to establish to the satisfaction of the Commission that the licensee is in a position to fully or efficiently discharge the duties and obligations imposed under the licence.
- (d) Financial conditions of the licensee which prevents the licensee to fully or efficiently discharge its duties and obligations imposed on him by his licence.
- (e) In public interest in the operation of the Commission.

(f) For revocation of licence, a notice of three months and opportunity of hearing is required to be given.

Under Section 19 (1) of the Act, if the Commission is satisfied upon making an enquiry that public interest so requires, it may revoke the licence in any of the cases enumerated in clauses (a) to (d) of the said sub-Section after giving a notice of not less than three months stating the grounds for revocation and considering the cause shown by the licensee. One of the considerations for revocation of licence is “wilful and prolonged default on the part of licensee in doing anything required of him or under this Act or the rules or regulations made thereunder”. Trading Licence Regulations has been issued by the Commission laying down the terms and conditions for grant of trading licence for inter-State trading of electricity. Regulation 7 of the Trading Licence Regulations lay down the obligations of the licensee. Regulation 7(h) of the Trading Licence Regulations is extracted as under:

“(h) The licensee shall carry out trading in accordance with the agreed terms and conditions, and may take such safeguards as he may consider necessary with regard to payment security mechanism from the buyers, but shall always ensure timely payment of dues to the seller for purchase of the agreed quantum of electricity either through a letter of credit or any other appropriate instrument or as may be mutually agreed between the Seller and the licensee.”

As per the above regulations, the licensee is required to carry out trading as per the agreed terms and conditions and may take such safeguards with regard to the payment security mechanism from the buyer. Irrespective of the payment security mechanism from the buyer, it is the responsibility of the licensee to ensure timely payment of dues to the Seller for the purchase of agreed quantum of electricity either through a letter of credit or

any other appropriate instrument or as may be mutually agreed between the Seller and the licensee.

39. JKHCL, the subsidiary of JPVL and GEPL entered into a PPA for sale of power by JPVL to GEPL for onward supply of power to UPPCL. The relevant provisions of the PPA with regard to billing, payment and late payment charges are extracted as under:

### **“3. Tariff**

The applicable rate for sale of Contracted Power by JKHCL to GEPL throughout the term of this Agreement (i.e. 1<sup>st</sup> July, 2011 to 30<sup>th</sup> June, 2012) shall be `4.54/ kWh (Rupees Four and paisa Fifty Four per kWh) at the Delivery Point referred to in Clause 4 of this Agreement.

### **5.2 Billing**

5.2.1 For supply of energy during a month, JKHCL shall raise Weekly Bills on provisional basis. For the purpose of provisional weekly billing, each month shall be divided into four periods, the first period starting from 0:00 hrs of the 1<sup>st</sup> day of the month to 24:00 hrs of the 8<sup>th</sup> day of the month, the second period starting from 0:00 hrs of the 9<sup>th</sup> day of the month to 24:00 hrs of the month, the third period starting from 0:00 hrs of the 16<sup>th</sup> day of the month to 24:00 hrs of the 23<sup>rd</sup> day of the month, the fourth period starting from 0:00 hrs of the 24<sup>th</sup> day of the month to 24:00 hrs of the last day of the month.

5.2.2 The Weekly Bills raised by JKHCL shall be based on the provisional data as available on the concerned RLDC website. After receipt of REA for the previous month, adjustment towards the difference between actual bill on the basis of REA issued by concerned RPC for the previous month and the provisional bills issued by JKHCL for the previous month shall be made in the first/ second Weekly Bills of the following month (except for last month i.e. June, 2012 for which settlement shall be made through a separate bill).

### **5.3 Payment**

5.3.1 Payment for electricity supplied by JKHCL to GEPL under this Agreement will be made by GEPL on the basis of provisional bills (including adjustment bills) through Real Time Gross Settlement (RTGS)/ banker's cheque/ demand draft within seven (7) working days from the receipt of bills through fax or e-mail (Due Date).

5.3.2 GEPL shall be entitled to a 2% rebate on the billed amount or settlement amount paid within the Due Date.

5.3.3 In the event of GEPL failing to make payment within the Due Date, GEPL shall pay a late payment surcharge of 1.25% per month of the outstanding billed amount for the period of delay calculated on the basis of number of days of delay in the payment.”

Therefore, as per the provisions of the PPA, GEPL is required to make payment of for the electricity supplied by JKHCL to GEPL within 7 working days from the receipt of the bills. In the event of the non-payment of the bill by the due date, GEPL is obligated to pay late payment surcharge @ 1.25% per month to JPVL on the outstanding billed amount for the period of delay.

40. JKHCL supplied power to GEPL from 1.7.2011 to 17.9.2011. Monthly bills for a total amount of ₹1,97,18,26,511 was raised by JPVL vide invoices dated 1.8.2011, 5.8.2011, 7.9.2011 and 1.10.2011. On account of default in payment of bills, JPVL issued a termination notice dated 13.9.2011 to be effective from 18.9.2011. JPVL terminated the PPA and discontinued power supply from 18.9.2011. JPVL vide its letter dated 1.10.2011 requested GEPL to make payment of the bill for September 2011 and the arrears for earlier months including late payment surcharge. However, no payment was made by GEPL to JPVL. GEPL vide its letter dated 25.9.2013 confirmed to JPVL that ₹197.18 crore was the outstanding amount against the power supplied under the PPA dated 30.5.2011 subject to final reconciliation and sought acknowledgement of the said letter to seek balance confirmation from UPPCL. JPVL in its letter dated 1.10.2013 intimated to GEPL the following:

“We are thankful for your letter dated September 25, 2013 inter-alia confirming that an amount of ₹197,18,26,511/- (Rupees One Hundred Ninety Seven Crore Eighteen Lakh Twenty Six Thousand Five Hundred Eleven Only) is payable to us for supply of power from our Jaypee Karcham Wangtoo Hydro Electric Plant (JKWHEP), Distt. Kinnaur (H.P.) to Uttar Pradesh Power Corporation Limited through GEPL during the period from 1<sup>st</sup> July, 2011 to 17<sup>th</sup> September, 2011.

In this connection, we wish to submit that as per Clause No. 5.3.3 of our Agreement dated 30.5.2011 with you, the applicable surcharge would also be payable please.

You are kindly requested to obtain balance confirmation from Uttar Pradesh Power Corporation Limited (UPPCL) and forward us a copy of the same.”

GEPL vide its letter dated 5.10.2013 replied to JPVL as under:

“This has reference to your letter dated 1<sup>st</sup> October 2013, which is not as per our discussions and agreements reached with Mr. Suren Jain, Managing Director, Jaiprakash Power Ventures Limited during the meeting on 19<sup>th</sup> March, 2013 and then again on 21<sup>st</sup> June, 2013. Please note, no surcharge is payable in any event and the principal amount confirmed by us is subject to final reconciliation and confirmation of payment by Uttar Pradesh Power Corporation Limited (UPPCL).”

We request you to review the stand internally and let us know how you want us to proceed on your behalf. Since we are trying to secure payments from UPPCL, we need to have absolute clarity as to how to close the matter. In the meantime, you should consider withdrawing your letter under reference, and align your communication with our discussions/agreement on the subject. Unless we have your cooperation on this issue, there is likelihood of further delay in securing your claim against UPPCL, which is against our mutual interest.”

41. JPVL has given the following Pre-receipt and No Objection Certificate on 15.10.2013 to GEPL:

**Pre-receipt and No dues certificate**

“This is to certify that payment of ₹174,00,00,000/- (already received) and ₹23,18,26,511/- (to be received on issue of this certificate) aggregating ₹1,97,18,26,511/- by Global Energy Private Limited (GEPL) to Jaiprakash Power Ventures Limited (JPVL) under the Power Purchase Agreement dated 30.5.2011 shall be in full and final settlement of all claims of either party under the said agreement.”

42. GEPL has made payment of ₹197.18 crore to JVPL in October 2013. But in view of the above quoted Pre-receipt and No dues Certificate, GEPL has stated that JPVL has waived its right to receive the late payment surcharge. JPVL has submitted that it gave the certificate on the basis of the representation of GEPL that it would facilitate to get payment from UPPCL. GEPL in its reply to the petition has submitted that during the discussion, JPVL had agreed to waive the late payment surcharge in the interest of future business relationship between the parties. Relevant para is extracted as under:

“15. The contents of para 16 to 24 are denied and disputed to the extent the same are contrary to the stand of the Respondent No. 1. It is stated that the Respondent No. 1 had two separate Contracts for Intra-State trade of electricity, one with the Petitioner and another with Respondent No. 2. Further, as stated herein above in para 7 of the present reply, the Petitioner has created an imaginary chain of events which is not at all supported by the documents annexed by the said Petitioner in its petition. The Petitioner in the meetings held on 19.3.2013 and 21.6.2013 had categorically agreed to waive the late payment surcharge as a private agreement for the monetary benefit of the Respondent in return for the said Respondent providing the said Petitioner with future business opportunities for sale of power, subject to the electricity industry/ market being in good shape. As such it was a conscious decision, as otherwise the Petitioner was always free to inquire from UPPCL as to the alleged claim of the Respondent that without waiving the late payment surcharge, UPPCL would not release payments. The Petitioner has itself placed on record its letter dated 9.10.2013 to UPPCL wherein it had reiterated of having a decade old relations with the said entity, and it is a well-known fact that the Petitioner is a dominant player in power and industry in the state having enormous leverage and clout, and as such there is no rhyme or reason as to why the Petitioner would not reconfirm from UPPCL as to whether the payments would not be released until the late payment surcharge is waived. This demonstrates that the Petitioner waived late payment surcharge solely as per a private arrangement with the Respondent in return for future business, and when on account of the slump in the electricity industry, which was beyond control of the Respondent, it was not possible for the said Respondent to provide adequate business opportunities to the Petitioner that the said Petitioner chose to file the present petition thereby creating an entirely false chain of events.”

43. We have considered the submission of the parties. From the letters dated 1.10.2013 and 5.10.2013 as quoted above, it is clear that discussion between GEPL and JPVL took place on 19.3.2013 and 21.6.2013 with regard to waiver of the late payment surcharge, though no formal record of proceedings are placed on record. While JPVL in its letter dated 1.10.2013 reminded GEPL for payment of outstanding dues alongwith late payment surcharge, GEPL referred to their earlier discussion and reiterated that no surcharge was payable in any event and only principal amount is payable after reconciliation. It has been further stated by GEPL that clarity is required to secure payment from UPPCL and if cooperation is not extended by JPVL, there is likelihood of further delay in “securing your claim against UPPCL”. It is therefore clear that the subject of discussion between the parties was with regard to waiver of late payment surcharge in order to secure payment from UPPCL and GEPL in its letter dated 5.10.2013 sought confirmation from JPVL with

regard to waiver of late payment surcharge in order to secure payment from UPPCL against the outstanding amount for the power supplied. However, as per GEPL, JPVL agreed during the meetings held on 19.3.2013 and 21.6.2013 to waive the late payment surcharge for the monetary benefit of the GEPL in return for GEPL to provide to JPVL with future business opportunities for sale of power. In our view, the submissions of GEPL is inconsistent with the contents of its letter dated 5.10.2013 in which it has stated that “unless we have your cooperation on this issue, there is likelihood of further delay in securing your claim against UPPCL, which is against our mutual interest”. It appears that the consideration for the JPVL to agree to the settlement of outstanding dues in the Pre-receipt and No Dues Certificate is the representation by GEPL that this would help in securing payment from UPPCL.

44. JPVL has placed on record a copy of the writ petition filed by GEPL before the High Court of Allahabad, Lucknow Bench claiming 15% late payment surcharge from UPPCL for the power supplied including the power supplied from the project of JPVL. One of the annexures to the writ petition is a letter by GEPL to UPPCL dated 7.10.2013 which is extracted as under:

“7<sup>th</sup> October 2013

The Chairman,  
UP Power Corporate Limited (UPPCL)  
Shakti Bhawan,  
14, Ashok Marg,  
Lucknow-226 001

Kind Attention: Mr. Sanjay Agarwal, IAS

Subject: Payment outstanding for Supply of Power to UPPCL

This is further to our letter dated 26<sup>th</sup> August 2013 on the captioned subject regarding the clearance of the outstanding dues for the power supplied by us to UPPCL During July-

September 2011. In this regards we are given to understand that the old outstanding dues are being settled by UPPCL along with Late Payment Surcharge (LPS) @ 6% PA.

In good faith we are agreeable to UPPCL releasing the entire old outstanding along with a LPS @ 6%, but we also submit that we Global Energy Private Limited are just an intermediary and the ultimate Generators also have to agree to accepting the LPS at a reduced rate of 6% and not claiming it from us at the rate as agreed in the Power Purchase LOI.

Further we also would like to state that as discussed and suggested by you, UPPCL has not paid LPS/ will not be paying LPS to any other entity at a rate higher than 6%, if however at a later date it is discovered that LPS has been paid to any entity at a rate higher than 6% we reserve our right for recompense at the original contractual rate.

You are requested to release the entire outstanding dues along with a LPS of 6% at your earliest.

Looking forward for an early release of payment.”

Thus GEPL has written this letter to UPPCL seeking settlement of the outstanding amount with a reduced percentage of late payment surcharge @ 6% per annum, subject to the agreement of the generators. GEPL has represented before UPPCL that it is just an intermediary and the ultimate generators will have to agree to the late payment surcharge at a reduced rate of 6% and not claiming it from GEPL as per the Power Purchase Agreements/LOI. This letter written by GEPL shows that late payment surcharge to be paid by UPPCL is meant for payment to the generators who have supplied power to UPPCL through GEPL.

45. UPPCL has vide its letter dated 28.8.2015 informed JPVL that late payment surcharge of ₹25,34,79,302 was paid to GEPL on 9<sup>th</sup> and 10<sup>th</sup> October 2013. The said letter has been placed on record. Despite receiving the late payment surcharge from UPPCL, GEPL has retained the said amount and not paid to JPVL, even though the payment was secured from UPPCL for payment to the generators supplying power to UPPCL through GEPL. In our view, the actions of GEPL are in violation of the provisions

of the terms and conditions of the PPA dated 30.5.2011 read with provisions of Regulation 7(h) of the Trading Licence Regulations which enjoins upon the trading licensee to ensure timely payment of dues to the Seller.

46. Section 19 (1) of the Act provides “that if the Appropriate Commission after making an enquiry is satisfied that public interest so requires, it may revoke the licence under any of the cases, namely,.-

“(a) Where the licensee, in the opinion of the Commission, makes willful and prolonged default in doing anything required of him by or under this Act or the Rules or regulations made thereunder.”

As per the above provisions, the Commission has to form an opinion about the willful and prolonged default on the part of the licensee to do certain things which is expected of the licensee under the regulations made under the Act. Based on the materials on record, we are of the view that since GEPL has retained the late payment surcharge of ₹25,34,79,302 and not paid the same to JPVL, despite having received the said amount from UPPCL on 9.10.2013 and 10.10.2013, it amounts to willful and prolonged default in making timely payment of dues of the seller of electricity, i.e. JPVL in this case in contravention of Regulation 7(h) of the Trading Licence Regulations. Therefore, a case against GEPL under Section 19 (1)(a) of the Electricity Act, 2003 (the Act) for revocation of licence has been made out.

47. According to sub-Section (3) of Section 19 of the Act, the Commission is required to give three months’ notice to the licensee stating the grounds for revocation of licence and take a decision after considering the cause shown by the licensee. Accordingly, notice is hereby given to GEPL to show cause as why its licence of GEPL should not be revoked

for its failure to pay JPVL the late payment surcharge received from UPPCL for the power supplied in terms of the PPA dated 30.5.2011 which is in contravention of the Regulation 7(h) of the Trading Licence Regulations. The reply to the show cause notice shall be filed by GEPL by 23.3.2018. It is clarified that if GEPL makes the full and final payment of late payment surcharge to JPVL on or before 23.3.2018 and submit a confirmation in that regard, the Commission will take a view with regard to the continuation of the show cause notice.

48. The matter shall be listed for hearing GEPL on show cause notice on 12.4.2018.

**sd/-**  
**(Dr. M. K. Iyer)**  
**Member**

**sd/-**  
**(A. S. Bakshi)**  
**Member**

**sd/-**  
**(A.K. Singhal)**  
**Member**