

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 10/MP/2016  
alongwith I.A. No.24/2016**

Subject : Petition seeking refund of the late payment of surcharges illegally retained by the respondent under Power Purchase Agreement dated 30.5.2011 along with interest and initiation of proceedings for revocation of the Inter-State Trading License granted to GEL.

Petitioner : Jaiprakash Power Ventures Limited.

Respondent : Global Energy Private Limited

Date of hearing : 22.8.2017

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

Parties present : Shri Sanjay Sen, Senior Advocate, GEPL  
Shri Hemant Singh, Advocate, GEPL  
Shri Matrugupta Mishra, Advocate, GEPL  
Shri Nishant Kumar, Advocate, GEPL  
Shri M.G. Ramachandran, Advocate, JPVL  
Ms. Poorva Saigal, Advocate, JPVL

**Record of Proceedings**

At the outset, learned counsel for the petitioner submitted that the present petition has been filed seeking refund of late payment surcharge illegally retained by Global Energy Private Limited (GEPL) and for initiation of proceedings for revocation of inter-State trading licence granted to GEPL by the Central Commission. Learned counsel for the petitioner further submitted as under:

(a) Jaypee Karcham Hydro Corporation Limited (JKHCL), a subsidiary of Jaiprakash Power Venture Limited (JPVL) has implemented 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 resale of power to UPPCL.

(b) JKHCL agreed to sell power to GEPL for quantum ranging from 100 MW to 300 MW from July, 2011 to June, 2012. A PPA dated 3.5.2011 was entered into between JKHCL and GEPL. As per the PPA, GEPL is required to make the

payment within 7 days from the receipt of the bill. If the payment is made within due date, GEPL is entitled to 2% of the rebate on the bill amount or settle amount and if it is not made within due date GEPL shall pay late payment surcharge of Rs.1.25 per month of the outstanding bill amount.

(c) Since, there was a default of payment on the part of GEPL, the petitioner issued a termination notice dated 13.9.2011 to be effective from 18.9.2011 and power supply discontinued with effect from that date.

(d) The petitioner vide its letter dated 6.8.2013 sought a confirmation from UPPCL whether the principal amount of Rs. 197.18 crore was outstanding to be paid to GEPL. UPPCL vide its letter dated 25.9.2013 confirmed that Rs. 197.18 crore was outstanding against the PPA from GEPL to the petitioner. The petitioner in its letter dated 1.10.2013 informed GEPL that in terms of the PPA, applicable surcharge would also be payable. GEPL vide its letter dated 5.10.2013 informed the petitioner that in terms of the discussion and agreement between GEPL and the petitioner on 19.3.2013 and 21.6.2013, no surcharge was payable.

(e) In order to get payment, the petitioner agreed to take payment of the principal amount without late payment surcharge. At the insistence of GEPL, the petitioner gave a 'Pre-Receipt and No Dues Certificate' dated 15.10.2013 to GEPL.

(f) The petitioner received the payment of Rs. 197.18 crore from GEPL in October, 2013. Subsequently, the petitioner sought a confirmation from UPPCL vide letter dated 4.7.2015 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 Rs. 25,34,79,302 was paid by UPPCL to GEPL on 9/10.10.2013.

(g) The petitioner vide its letter dated 27.10.2015 wrote to GEPL that GEPL had misappropriated an amount of Rs. 25,34,79,302 towards late payment surcharge received from UPPCL and requested GEPL to refund the same with a compound interest @24% p.a. GEPL vide its letter dated 2.11.2015 refuted the charge of the petitioner and stated that the Pre-Receipt and No Dues Certificate dated 15.10.2013 was issued by the petitioner on the basis of the mutual agreement between the petitioner and GEPL after discussion on all issues.

(h) GEPL as an inter-State trading licensee having illegally retained the late payment surcharge for two years without disclosing the receipt of the same to the petitioner has committed criminal breach of trust, cheating and fraud for which the licence of GEPL should be revoked.

(i) GEPL as an inter-State trading licensee cannot retain more than 17 p/kWh trading margin allowed to GEPL under the PPA. However, by retention of late

payment surcharge by GEPL over and above the trading margin is violative of Regulation 7 (c) of the Trading Licence Regulation for which the licence of GEPL should be raised. In support of his contentions, learned counsel relied upon the Hon'ble Supreme Court's judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 [Adani Power Limited Vs. Energy Watchdog].

(j) GEPL has filed a Writ Petition before the Hon'ble High Court of Allahabad seeking late payment surcharge @ 15% from UPPCL on the same amount and this fact was deliberately not brought to the notice of the Commission. The Writ Petition is pending.

2. In his rebuttal, learned senior counsel for GEPL submitted as under:

(a) In terms of Section 79 of the Electricity Act, 2003, the Commission has no powers to adjudicate any monetary dispute between a generating company and a trading licensee. The Commission has power to adjudicate upon any dispute involving a generating company of transmission licensee in regard to matters connected with clauses (1) to (d) of sub-section (1) of Section 79. GEPL is neither a generating company nor a transmission licensee. The subject matter of dispute does not come within the ambit of 79 (1) (a) to (d). The reading of the aforesaid clauses will demonstrate that disputes relating to electricity traders cannot be entertained before this Commission because Section 79 (1) (e) has been left out from the scope of Section 79 (1) (f). Section 79 (1) (f) only deals with matters relating to Section 79 (1) (a) to (d). Therefore, the prayer (a) of the petitioner cannot be adjudicated by the Commission. The prayer (b) of the petition seeks revocation of trading licence of GEPL based on the alleged fact that GEPL has illegally retained an amount of money, over and above trading margin, which otherwise, it could not have retained. The said prayer can only be allowed in the event the Commission has the ability to adjudicate and decide prayer (a) in favour of the petitioner. The disputes that traders may have, may either be resolved before a State Commission or in appropriate civil proceedings.

(b) Under Section 86 of the Electricity Act, 2003, the State Commission has been vested power to adjudicate disputes between all kinds of licensees and the generating companies. The jurisdiction vested in a State Commission under Section 86 (1)(f) is much wider than the Central Commission under Section 79 (1) (f). Therefore, the Central Commission cannot adjudicate upon purely commercial disputes involving inter-State trading licensees and the generating companies. In support of his contention, learned senior counsel relied upon the judgment of the Hon'ble Supreme Court in Civil Appeal No. 1940 of 2008 [Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.].

(c) Since, GEPL's transaction with the petitioner was an intra-State transaction and not inter-State, the Commission has no jurisdiction to examine the issues related to trading margin for an intra-State transaction. GEPL had separate independent agreement with the UP Discoms and with the petitioner. The offer letter issued by GEPL to the petitioner dated 2.4.2011 clearly specifies that the purpose of sourcing power was for intra-State sale in the UP. The petitioner vide its letter dated 2.4.2011 confirmed that the transaction with GEPL was separate and intra-State.

(d) The delivery point as per the LOI/agreement between the petitioner and GEPL was UP STU periphery. GEPL, by a separate and independent agreement, was taking power from UP STU system and then delivering it to the UP Discoms, which makes the transaction intra-State. Therefore, the Hon'ble Supreme Court's judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 [Adani Power Limited Vs. Energy Watchdog] is not applicable in the present case.

(e) The petitioner has wrongly relied upon GEPL's letter dated 5.10.2013 and has mis-interpreted the contents of the said letter so as to state that GEPL represented to the petitioner that the late payment surcharge should not be insisted upon as it will be difficult to receive payments from UPPCL along with surcharge whereas GEPL vide its letter dated 5.10.2013 informed the petitioner that the mentioning of late payment surcharge in the petitioner's letter dated 1.10.2013 was not as per the discussions and agreements arrived at between the parties during the meetings held on 19.3.2013 and 21.6.2013. The same was as per mutual discussions carried out between two contracting entities in which the petitioner itself agreed to waive off late payment surcharge, in order to provide an additional monetary benefit to GEPL, keeping in mind the long term business association of the petitioner with GEPL, so that GEPL keeps on providing business opportunities to the petitioner for sale of its power in future subject to the electricity industry being in good shape. GEPL nowhere in the said letter mentioned that such waiver of surcharge was required as the same would result in realizing the payments from UPPCL expeditiously.

(f) GEPL vide its letter dated 5.10.2013 informed the petitioner that as per the understanding reached between the parties in meetings held on 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 its above letter dated 1.10.2013. This was a private arrangement between the parties whereby the petitioner had given up its civil right under the PPA qua late payment surcharge. The petitioner vide letter dated 9.10.2013 to UPPCL mentioned about its outstanding dues of Rs. 197,18,26,511/- only and did not at all mention any late payment surcharge issues subsequent to agreeing to the arrangement of waiving the late payment surcharge.

(g) As such, nothing stopped the petitioner from raising the issue of late payment surcharge with UPPCL in the event any alleged representation was being made by GEPL. The petitioner vide its undertaking dated 15.10.2013 stated that there is no other outstanding amount except Rs. 197,18,26,511/- and that the said amount is full and final settlement between the parties. Such waiver by the petitioner has been under the provisions of separate independent contract dated 30.5.2011 between petitioner and GEPL.

3. After hearing the learned counsel for the petitioner and learned senior counsel for GEPL at length, the Commission directed GEPL to file on affidavit, by 15.9.2017, the Agreements entered into between GEPL and UPPCL for supply of the power from JKHCL of JPVL and all the relevant documents pertaining to said Agreements. The Commission directed the parties to file their written submissions by 22.9.2017 with an advance copy to each other. The Commission directed that due date of filing information and submissions shall be strictly complied with, failing which the order shall be passed based on the documents available on record.

4. Subject to the above, the Commission reserved the order in the petition.

**By order of the Commission**

**Sd/-  
(T. Rout)  
Chief (Legal)**