

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal No. 16 of 2016 & IA No. 34 of 2016

Dated: 3rd July, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

Gupta Energy Pvt. Ltd. (GEPL)
5th Floor Gupta Tower, Temple Road
Civil Lines
Nagpur- 440 001

... Appellant

Versus

- 1. Maharashtra Electricity Regulatory Commission (MERC)**
World Trade Centre, Centre No. 1,
13th Floor, Cuffee Parade
Mumbai- 400 005 **...Respondent No. 1**
- 2. Maharashtra State Electricity Transmission Company Ltd.**
(MSETCL)
Prakash Ganga, C-19, E- Block,
Bandra – Kurla Complex
Bandra (East)
Mumbai- 400 051 **...Respondent No. 2**
- 3. Maharashtra State Load Despatch Centre (MSLDC)**
Belapur Road,
Thane, P.O. Airoli
Navi Mumbai- 400 708 **...Respondent No. 3**

Counsel for the Appellant(s): Mr. Ramji Srinivasan, Sr. Adv.
Ms. Deepa Chawan
Mr. H S Jaggi
Mr. Ratan Shah
Mr. Vivek Paul Oriel

Counsel for the Respondent(s): Mr. Buddy A Ranganadhan
Mr. Raunak Jain
Mr. D V Raghu Vamshi
Ms. Aditi Sharma for R-1

Mr. M Y Deshmukh
Mr. Shakti Pandey
Mr. S B Petkar
Mr. E T Dhengle Selea for R-2&R-3

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s Gupta Energy Pvt. Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 9.11.2015 (“**Impugned Order**”) passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”), in Case No.109 of 2014 regarding disputes between the Appellant and MSETCL (Respondent No. 2) & MSLDC (Respondent No. 3) regarding Open Access, Bulk Power Transmission Agreement and Transmission Charges. The present Appeal is concerning about the lacuna in Bulk Power Transmission Agreement (“**BPTA**”), double charging i.e. Long Term Open Access

(LTOA) charges & Short Term Open Access (STOA) charges for wheeling of same power and denial of Open Access including denial of opportunity to redress.

2. The Appellant, M/s Gupta Energy Pvt. Ltd., a generating company established under provisions of Companies Act, 1956 has established 2x60 MW generating station (hereinafter referred to as the 'Station') at Usegaon in Chandrapur District of Maharashtra.
3. The Respondent No.1, Maharashtra Electricity Regulatory Commission is the Regulatory Commission for the State of Maharashtra, exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
4. The Respondent No.2, Maharashtra State Electricity Transmission Company Ltd. (MSETCL), is a Transmission Licensee in the State of Maharashtra and also discharging functions of State Transmission Utility (STU) in terms of the Electricity Act, 2003.
5. The Respondent No.3, Maharashtra State Load Despatch Centre (MSLDC), is the State Load Despatch Centre in the State of Maharashtra discharging its functions in terms of the Electricity Act, 2003.
6. **Facts of the present Appeal:**
 - a) The Appellant has established 2x60 MW generating station using coal washery reject as the main fuel at Usegaon in Chandrapur District of Maharashtra. First unit of the Station was synchronised

on 19.4.2012 and was declared under commercial operation w.e.f 10.5.2012. Second unit of the Station was synchronised on 29.8.2012 and was declared under commercial operation w.e.f 17.9.2012.

- b) The Appellant entered into Memorandum of Understanding (MOU) with Tata Power Trading Company Ltd. (TPTCL) on 18.10.2007 for sale of power from its Station. Thereafter the Appellant approached the Respondent No. 2 for the grant of LTOA.
- c) The Appellant and the Respondent No. 2 entered into the BPTA on 27.3.2012 for reserving Transmission Capacity Rights (“TCR”) of 110 MW from the Station of the Appellant.
- d) On 2.5.2012, the Respondent No. 2 raised first bill on the Appellant towards wheeling of power through its network as per BPTA for the entire capacity (i.e. 110 MW).
- e) The Respondent No. 3 on 16.5.2012 issued No Objection Certificate (NOC) to the Appellant for the period from 17.5.2012 to 31.5.2012 for injection of up to 50 MW from the Station. Further, on 30.5.2012, the Respondent No.3 issued NOC for injection upto 50 MW for the period from 1.6.2012 to 30.6.2012 from the Station.
- f) The Respondent No. 2 kept on raising monthly bills on Appellant towards wheeling of power through its network as per BPTA. The Appellant started making representations from July’ 2012 onwards to the Respondent No. 2 for the claim of exorbitant transmission charges by it. In August’2012, the Respondent No.2 replied to the Appellant that it has raised bills from the effective date of the BPTA

and the bills so raised were according to the provisions of the BPTA.

- g) On 27.8.2012, the Appellant through e-mail brought to the notice of the Respondent No. 2 that it is being charged doubly for the same power wheeled i.e. STOA charges by Respondent No. 3 and LTOA charges by Respondent No. 2 and sought redressal of the matter by placing it before the Grid Co-ordination Committee (GCC) as per BPTA. In the mean time the Respondent No. 2 kept on writing to the Appellant to make balance payments. The Appellant also sold its power to the traders and through power exchange on short term basis through MSLDC. The Appellant never approached MSLDC for sale of power under LTOA which was available with it. In May' 2013 the Appellant made detailed representation to the Respondent No. 3 and sought refund of STOA charges.
- h) The Appellant, vide letter dated 23.5.2013 sought cancellation of the BPTA with the Respondent No. 2. The Appellant vide letter dated 7.6.2013 requested Respondent No. 2 for surrender of LTOA Capacity. The Respondent No. 2 insisted for payment of transmission charges before termination of the BPTA along with applicable Delayed Payment Charges (DPC).
- i) The Appellant, on 1.2.2014 entered into an arrangement with M/s Global Energy Pvt. Ltd. for sale of its power to Power Company of Karnataka Ltd. (PCKL) for period from 12.2.2014 to 30.6.2014. M/s Global Energy Pvt. Ltd. applied to the Respondent No. 3 for Open Access for the same. The Respondent No. 3 replied that its application can be processed only on receipt of No Dues certificate

from the STU (i.e. Respondent No.2) in respect of the Appellant. M/s Global Energy Pvt. Ltd. filed petition bearing Case No. 71 of 2014 before the State Commission against refusal of grant of Open Access by Respondent No. 3. This petition was disposed of by the State Commission vide Order dated 2.6.2014 wherein one condition to grant Open Access to M/s Global Energy Pvt. Ltd. was clearance of outstanding dues of the Respondent No. 2 by the Appellant.

- j) The Appellant filed a petition being Case No. 109 of 2014 before the State Commission regarding disputes with MSETCL and MSLDC regarding Open Access, Bulk Power Transmission Agreement and Transmission Charges. The State Commission vide the Impugned Order dated 9.11.2015 did not provide relief as sought by the Appellant.
- k) Aggrieved by the Impugned Order passed by the State Commission, the Appellant has preferred the present appeal on the following issues:
- a. Lacuna in BPTA
 - b. Levy of double charges i.e. LTOA & STOA charges for same power which was evacuated.
 - c. Denial of open access by Respondent No. 3 on ground of non payment of dues to Respondent No. 2 i.e. STU.
 - d. Appellant being pressurised to establish evacuation facility and also provide land and undertake works as directed by Respondent No. 2 contrary to the Regulations.

7. QUESTIONS OF LAW

The Appellant has raised the following questions of law in the present appeal:

- a. Whether the impugned order contravenes any provisions of the Electricity Act, 2003 and the relevant Regulations framed there under?**
- b. Whether the impugned order recognizes the role of the State Regulator in upholding fairness, reasonableness and public interest in contractual relations of a Generator with a State instrumentality?**
- c. Whether the impugned order which is not a speaking order, on many issues raised for consideration of the Respondent No. 1 Commission, is tenable in law?**
- d. Whether the impugned order contravenes the basic principles of natural justice in as much as it does not consider and deal with the issue relating to double charging for the same transactions, the correct nature of the transaction, the lacuna in the BPTA and denial of an opportunity to the Appellant to redress its grievance by a State Entity?**
- e. Whether the impugned order amounts to the Respondent No. 1 Commission having exercised its functions of resolving disputes under Section 86 (1) (f) in accordance with the provisions of the Act and powers conferred upon it?**
- f. Whether the impugned order can ignore the double charging**

issue wherein the same transaction of wheeling electricity is paid for under the BPTA as a LTOA and the same transaction is subjected to STOA by the State, SLDC impleaded herein as Respondent No.3?

8. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
9. The learned senior counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
 - a) The Respondent No. 2 being a Public Utility should have ensured appropriate contractual agreement with the Appellant which in any case was not BPTA in this case. Even after entering into BPTA, on grievance of double charging for the same power transacted, raised by the Appellant, the Respondent No. 2 should have considered the same being a Public Utility. The Impugned Order failed to appreciate that the Respondent No. 2 being a Public Authority was duty bound to act in a fair, just and equitable manner.
 - b) The Apex Court in catena of judgements has held that in contractual relation the States and its entities are bound to act fairly, just and equitable, guided by reason & public interest and unfair & untenable contracts are amenable to judicial review. In this context the Appellant has quoted the Apex Court case of LIC of India and Anr. Vs. Consumer Education and Research Centre and Ors. {(1995) 5 SCC 482} and also placed reliance on the judgement passed by the

Apex Court in case of Central Inland Water Transport Corporation Ltd. & Anr. Vs. Brojo Nath Ganguly and Anr. {(1986) 3 SCC 156}.

- c) The LTOA/Transmission Charges raised by the Respondent No. 2 based on BPTA was with the consideration that the transmission capacity of 110 MW is made available by it between point of injection and drawal. The charges were levied on the Appellant under BPTA considering it as a Transmission System User (TSU) as per the Statutory Regulations. BPTA does not specify any drawal point and is contrary to the Statutory Regulations. The Respondent No. 3 had rightly classified the transaction as STOA transaction. Thus, the Appellant ended up in paying double charges i.e. STOA charges and also the transmission charges as per the BPTA. The transaction between parties was STOA and not LTOA. The Respondent No. 2 was provided with the copy of the agreement between the Appellant and TPTCL before entering into the BPTA and thus was aware of the nature of the transactions. The Respondent No. 2 was required to adhere to the provisions of the Electricity Act, 2003 to ensure economically efficient transmission facility for the Station.
- d) The State Commission failed to appreciate that the BPTA could never have been entered into without a drawal point. There is no drawal point mentioned in the BPTA despite its requirement as per MERC (Transmission Open Access), Regulations, 2005. This means that the Appellant and the Respondent No. 2 were under bonafide mistake of the fact that without defining the drawal point in the BPTA, it becomes void under Section 20 of the Contract Act, 1872. The Appellant also relied on the Section 65 of the Contract

Act, 1872 for refund of the monies deposited as transmission charges for wheeling electricity as the BPTA stands void. The Appellant also relied on the judgement of the Apex Court in case of Tarsem Singh Vs. Sukhminder Singh {(1998) 3 SCC 471}, wherein the Apex Court has held that when an agreement is void, all its terms are void and none of the clauses can be enforced, except where the same constitutes a separate and independent agreement severable from the main agreement.

- e) The State Commission failed to appreciate that the regulations framed cannot be interpreted to place an entity in a situation that defeats its existence and continuation. The Appellant was forced to shutdown since June'2013. Further, the transmission capacity was to be made available between injection and drawal points subject to clearance from SLDC. In this case, the approval from MSLDC was for lower capacity and the Appellant was subjected to pay for 110 MW.

- f) The State Commission ignored the fact that in spite of the request dated 27.8.2012 (even before the synchronisation of the second unit) from the Appellant, Respondent No. 2 failed to place the matter before the Grid Co-ordination Committee (“**GCC**”) in terms of clause 8 (Handling Default and Disputes) of the BPTA. Had the Respondent No. 2 considered this request of the Appellant, the closure of the Station could have been averted. The Respondent No. 2 used its dominant position and flouted the said provision of the BPTA. The Respondent No. 2 also justified execution of the BPTA. The Respondent No. 2 in its submissions before the State

Commission stated that the issue was a commercial matter and hence was not referred to the GCC.

- g) The State Commission also failed to appreciate the documents/facts placed on record by the Appellant to show that the Respondent No. 2 has used its dominant position to get various works executed by the Appellant related to transmission line of the Respondent No. 2 including demand for non-agricultural plots for its own network.
- h) The State Commission also failed to appreciate that the Respondent No. 3 acted contrary to the provisions of Electricity Act, 2003 and MERC (Transmission Open Access) Regulations, 2005 while processing open access application of M/s Global Energy Pvt. Ltd. by demanding No Dues certificate in respect of Respondent No. 2 from the Appellant. By doing so MSLDC was acting as a recovery agent of the Respondent No. 2. The reliance on order dated 2.6.2014 passed by the State Commission in Case No. 71 of 2014, in the Impugned Order regarding condition of payment of dues by the Appellant to the Respondent No. 2, where the Appellant was not a party is bad in law and contrary to the principles of natural justice. In Case No. 71 of 2014, the State Commission was not apprised about the nature of transactions (i.e. STOA/LTOA), correctness of the demand raised by the Respondent No. 2, BPTA and request of the Appellant to place the matter before the GCC. The Appellant relied on the judgement of the Apex Court in case of J S Yadav Vs. State of Uttar Pradesh & Anr. {(2011) 6 SCC 570} regarding passing of an order behind the back of a person adversely affecting him.

10. The learned counsel for the Respondents has made following arguments/submissions on the issues raised in the present Appeal for our consideration:

- a) The BPTA entered between the Appellant and the Respondent No. 2 clearly mentions that the Appellant is proposing to sell the power from the Station to TPTCL with long term transmission open access capacity rights of 110 MW at 220 kV Chandrapur MIDC substation of Respondent No. 2. In the BPTA, the Appellant agreed to pay transmission charges from the Effective Date of the agreement (date when BPTA is executed and delivered by the parties and the required letter of credit submitted by the Appellant) for the period of 25 years as per tariff order issued by the State Commission from time to time. The Appellant submitted the requisite letter of credit to Respondent No. 2 on 7.4.2012. The State Commission at para 13 of the Impugned Order has dealt the issue of erroneous consideration of the role of Public Utility raised by the Appellant.

- b) The Appellant vide letters dated 4.6.2013/7.6.2013 addressed to the Respondent No. 2 requested for cancellation of BPTA due to financial difficulties faced by it citing market scenario due to which they are not able to fully utilise the Transmission Capacity Rights of 110 MW. The Appellant has not cited the reason of non-availability of 'drawal point' in the BPTA for cancellation of the BPTA. In response, vide its letter dated 21.6.2013, the Respondent No. 2 informed the Appellant about its initiation for cancellation of the BPTA which was subject to payment of dues. The Appellant vide letter dated 25.6.2013 agreed to pay the dues and the Respondent No. 2 vide letter dated 26.7.2013 confirmed the cancellation of the

BPTA which was approved by the competent authority subject to payment of dues by the Appellant.

- c) The State Commission in the Impugned Order has noted the provisions of its MERC (Transmission Open Access) Regulations, 2005 and according to which Transmission System User (TSU) is required to enter into the BPTA. The Appellant had the option to enter or not to enter into BPTA after considering the type of transactions that may be carried out on sale of its energy from the Station. There is no error on part of the State Commission for reliance on BPTA while holding that the transmission charges are applicable to the Appellant which are separate and distinctive from STOA charges.
- d) On the issue of drawal point not defined in BPTA, Respondent No. 2 submitted that the MOU entered between the Appellant and TPTCL clearly mentions the delivery point. Thus the contention of the Appellant regarding issue of mistaken contract (i.e. BPTA) entered into by the parties does not hold. The State Commission in the Impugned Order has decided that the BPTA shall be considered as terminated from the date originally sought by the Appellant and the payments due till that date are to be made by the Appellant to the Respondent No. 2.
- e) The Appellant never made 'drawal point' an issue in its original petition before the State Commission. The said ground was a clear improvement made to its case during the course of proceedings before the State Commission. In original petition before the State Commission, the Appellant submitted that the fundamental mistake

in entering into BPTA was that the Appellant was transacting through the trader and no recipient of power was identified in the BPTA. This is very different from stating that there was no 'drawal point' in the BPTA. Since the issue of 'drawal point' was not a ground for seeking termination of BPTA and was never raised in original petition/pleadings before the State Commission, the issue of mistake as contemplated under Section 20 of the Contracts Act, 1872 does not arise. The State Commission has also explained the issue of BPTA between the Appellant and the Respondent No. 2 in its Impugned Order.

- f) The Appellant was granted open access and connectivity subject to construction of 220 kV D/C line from its Station to Chandrapur MIDC Sub Station along with bays, by the Appellant. According to the minutes of meeting between the Appellant and the Respondent No. 2 there was clear division of works to be carried out for facilitation of the works of Respondent No. 2 and the Appellant. The Respondent No. 2 in fact facilitated the construction of its 220 kV line from Station to Chandrapur MIDC Sub-Station. The undertaking given by the Appellant was only in relation to its commitment made in the said minutes of meeting and the Respondent No. 2 has not forced the Appellant or misused its position to do the works as alleged.

On the issue of dominant position used by the Respondent No. 2, the State Commission dealt with the termination of the BPTA even after considering the alleged charges of using the dominant position as submitted by the Appellant.

- g) The State Commission has rightly relied on its order in Case No. 71 of 2014 while passing the Impugned Order as the Appellant needs to clear the dues of the STU before grant of STOA to M/s Global Energy Pvt. Ltd.
- h) In the Impugned Order the State Commission had dealt with all the issues in detail and is a well reasoned and speaking order. There is no violation of natural justice as the Appellant entered into BPTA consciously and after considering the provisions of Electricity Act, 2003, Regulations and various orders of the State Commission.
- i) The State Commission in the Impugned Order has considered the issue of double charging and has rightly held that the payment of LTOA charges is admissible irrespective of quantum of actual usage. The Appellant mixed two separate transactions i.e. LTOA charges arising out of BPTA with Respondent No. 2 and STOA charges arising out of State Commission's order in Case No. 58 of 2005 with Respondent No. 3. According to this order all transactions through power exchanges to fall in STOA category. The STOA was granted to the Appellant based on its request only and STOA charges and payable accordingly. The same has been done by the State Commission based on its Regulations and Orders. Accordingly, there is no question of double charging and the Appellant is trying to mislead this Tribunal.
- j) On the issue of clearance of injection of 50 MW into the grid by Respondent No. 3, Respondent No. 2 submitted that the clearance by SLDC is meant for operational availability of the line in real time situation and in no way deprive the Appellant from the allocated

capacity rights. Further, the clearance for injection of power into the grid was given by the Respondent No. 3 based on the operational status of the units of the Appellant as requested by it from time to time.

11. After having a careful examination of all the aspects brought before us on the issues raised in the Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-

- a. The present case pertains to decision of the State Commission vide its Impugned Order regarding lacuna in BPTA, double charging (i.e. LTOA & STOA charges) for same power, denial of Open Access and payment of transmission charges including denial of opportunity to redress.
- b. **First we take Question No. 7. d. i.e. Whether the impugned order contravenes the basic principles of natural justice in as much as it does not consider and deal with the issue relating to double charging for the same transactions, the correct nature of the transaction, the lacuna in the BPTA and denial of an opportunity to the Appellant to redress its grievance by a State Entity? and Question no. 7. f. i.e. Whether the impugned order can ignore the double charging issue wherein the same transaction of wheeling electricity is paid for under the BPTA as a LTOA and the same transaction is subjected to STOA by the State, SLDC impleaded herein as Respondent No.3?, we observe as follows:**

- i. These questions need examination of the transactions on which LTOA and the STOA charges can be levied as per the Regulations and Orders of the State Commission in this regard.

- ii. Let us first deal with the LTOA charges. From the submissions made by the parties, it is clear that the Appellant on its own request was granted LTOA for its Station and it entered into BPTA with Respondent No. 2 for sale of power to TPTCL as per the agreed MOU between them. The BPTA has been agreed between the Appellant and the Respondent No. 2 based on the MERC (Transmission Open Access), Regulations, 2005. Relevant provisions of these Regulations are re-produced below:

“2 (e) “Bulk Power Transmission Agreement” means an executed agreement that contains the terms and conditions under which a Transmission System User is entitled to the access to an intra-State transmission system of a Transmission Licensee;

(h) “Transmission System User” means a person who has been allotted transmission capacity rights to access an intra-state transmission system pursuant to a Bulk Power Transmission Agreement, except as provided in Regulation 5.1 below;

(i) “Transmission capacity rights” means the right of a Transmission System User to power transfer in MW, under normal circumstances, between such points of injection and drawal as may be set out in the Bulk Power Transmission Agreement;

7.6 Every Transmission System User shall, at the time of allotment of transmission capacity rights to him, enter into a Bulk Power Transmission Agreement with the Transmission Licensee for access to and use of the intra-State transmission system of the Transmission Licensee.

9.2 Notwithstanding the provisions contained in Regulation 9.1, a Transmission System User may surrender the whole or any part of his transmission capacity rights to the Transmission Licensee:

Provided that such surrender of capacity shall be on such terms and conditions as may be mutually agreed upon between the Transmission System User and the Transmission Licensee:

Provided further that if any dispute arises with reference to the terms and conditions of such surrender or where the Transmission System User and the Transmission Licensee cannot agree on the terms and conditions of such surrender, it shall be referred to the Commission for decision.

9.4 If a Transmission System User neither uses nor assigns the whole or any part of his transmission capacity for a period of one (1) continuous year, he shall be deemed to have surrendered such unutilized and unassigned capacity to the Transmission Licensee on such terms as may be specified by the Transmission Licensee in the Bulk Power Transmission Agreement:

Provided that if any dispute arises with reference to the terms and conditions of such surrender, it shall be referred to the Commission for decision.

11.6 A Transmission System User shall not be entitled to a refund of the transmission charges paid for capacity rights not utilized by such user.”

Now let us look at the relevant provisions of the MOU dated 18.10.2007 between the Appellant {earlier known as Gupta Coal Fields and Washeries Ltd. (GCWL)} and TPTCL which are reproduced below:

“WHEREAS

GCWL is desirous to sell and TPTCL is desirous to purchase for trading upto 120 MW (after deduction of auxiliary consumption) located at Chardrapur for a period commencing from 1st January, 2010 and for a period of five years (extendable further by mutual consent) subject to availability of open access from State Load Despatch Centre.....”

1. *Quantum of Power*

Upto 120 MW from 1st January, 2010 on round the clock basis to continue for a period of five years and beyond based on mutual agreement.

2. *Delivery Point:*

For the purchase of energy by TPTCL, the delivery point shall be at, 220 kV interconnection between GCWL and MSETCL substation.

4. *Open Access Charges & Losses:*

All transmission charges and losses of the Regional (RLDC) / State Load Despatch Centres applicable beyond Delivery Point shall be borne by TPTCL.”

Now we examine the relevant provisions of the BPTA dated 27.3.2012 between the Appellant and the Respondent No. 2 which are re-produced below:

“AND WHEREAS:

- (a) “GEPL” is a generating company proposing to sell 110 MW of power to “Tata Power Trading Company Limited” (hereinafter called “TPTCL” which expression shall unless repugnant to the context or meaning thereof include its successors and assignees) from its (2 x 60 MW) generating units at Usegaon, Dist: Chandrapur.*
- (b) “MSETCL” is a transmission licensee having transmission network within Maharashtra State.*
- (c) Long Term Transmission Open Access capacity rights of 110 MW at 220 kV Chandrapur MIDC Sub station of MSETCL are granted to M/s GEPL for supplying power to Tata Power Trading Company Limited herein referred to as “TPTCL” through Intra State Transmission network of Maharashtra.*
- (d) “GEPL” agrees, on terms and subject to the conditions of this Agreement, to use the available transmission capacity allotted to it, and*

pay the transmission licensee the charges as determined in accordance with the terms of this Agreement; and

(e) “GEPL” agrees to pay transmission charges for 110 MW of power as per tariff order issued by MERC from time to time from the effective date of this agreement.

2.1 Effective Date

This Agreement shall be effective from the date when it is executed and delivered by the parties and the required Letter of Credit submitted by M/s GEPL to MSETCL.”

From the above it is clear that the Appellant has wilfully and knowingly entered into the BPTA dated 27.3.2012 with the Respondent No. 2 with the intention of selling power to TPTCL for a period of 5 year with provision of extension with mutual agreement. The Appellant was aware of the Delivery Point as per the MOU entered with TPTCL. As per BPTA the sale of power to TPTCL was at the 200 kV Chandrapur MIDC Sub- Station of the Respondent No. 2. The question raised by the Appellant that as required under Regulation 2 (i) of the MERC (Transmission Open Access) Regulations, 2005 the drawal point is not mentioned in the BPTA. As per BPTA, the LTOA capacity rights of 110 MW are granted to the Appellant at 220 kV Chandrapur MIDC Sub-station of MSETCL. It is seen that as per MOU with TPTCL, the delivery point is 220 kV interconnection between the Appellant and MSETCL substation. TPTCL, being trader can sell the power

generated at the Appellant's Station to the utilities/ consumers within the State of Maharashtra or outside the State of Maharashtra and therefore TPTCL can have many delivery points. The sale of power by a trader is dynamic and depends upon various other factors including price signals. The MOU entered between the Appellant and TPTCL also contemplates efforts by TPTCL to secure highest possible rate based on market dynamism and the additional revenue earned above the base rate will be to the account of the Appellant. Thus, the Appellant was aware that there cannot be definite drawal point(s) for power sale by TPTCL. The Appellant was aware of these facts and knowingly entered into the BPTA with the Respondent No. 2 for sale of power to TPTCL. Further, the request by the Appellant to the Respondent No. 2 for cancellation of BPTA was based on non/under utilisation of the LTOA citing market conditions and not the 'drawal point'. Therefore, the contention of the Appellant that 'drawal point' is not defined in the BPTA is misplaced.

As per the provisions of the MERC (Transmission Open Access) Regulations, 2005 and provisions of BPTA as brought out above, the Appellant is liable to pay transmission charges from the Effective Date for transmission capacity rights allotted to it despite of the same being utilised or not by the Appellant.

In view of our discussions as above the issue of BPTA being void on the ground of mistake under Section 20 of the Contract Act, 1872 does not arise.

iii. Now let us deal with the STOA charges. Respondents have submitted that the as per State Commission's Order in Case No. 58 of 2005, the transactions at power exchange are to be treated as STOA transactions. The Appellant has also submitted that the Respondent No. 3 has rightly treated the power exchange transactions as STOA transactions and STOA charges shall be applicable to those transactions. From the submissions made by the parties, it can be seen that the Appellant was granted Standing Clearance / NOC for STOA from the Respondent No. 3 for its Station for the following transactions:

- I. For the period from 17.5.2012 to 31.5. 2012 for injection of maximum 50 MW.
- II. For the period from 1.6.2012 to 30.6. 2012 for injection of maximum 50 MW.

In addition to above, the Appellant from time to time also sold power from its Station to various traders including TPTCL and through power exchange after obtaining STOA from the Respondent No. 3.

iv. The State Commission in its Impugned Order has held as below:

"18. In the light of the foregoing, the Commission holds that, having entered into a BPTA of its own volition, GEPL is bound by its terms, including the payments to be made irrespective of the quantum of actual usage as mandated by the relevant Regulations and Orders of the Commission. By its very nature, the BPTA formalises a long term arrangement, separate and distinct from any other Short

Term OA dispensation that GEPL may seek from the MSLDC. GEPL had the option not to enter into a BPTA considering the nature of its expected transactions, and limit itself to seeking Short Term OA instead from time to time and thus not bear the additional liability arising from the terms of such BPTA. The fact is that it did not choose such option, erroneously or otherwise, and is, therefore liable to pay the consequent dues to MSETCL.”

In view of our discussions as above, the State Commission has rightly held that the BPTA formalises long term arrangement for which LTOA charges are applicable which is different from short term transactions made through traders or exchange on which STOA charges are applicable. The Appellant, despite having LTOA/ Transmission Capacity Rights by way of BPTA willingly chose to sell its power to traders and at exchange by seeking STOA from MSLDC. The Appellant is solely responsible for its current situation. The Appellant also had the option to surrender the Transmission Capacity Rights granted to it as per the MERC (Transmission Open Access), Regulations, 2005 which it exercised at a later date and accordingly, allowed by the Respondent No. 2 and the State Commission. Accordingly, the Appellant is liable to pay LTOA charges to the Respondent No. 2 and applicable STOA charges for transactions carried out from time to time for sale of its power through traders and at exchange as per prevalent regulations of the State Commission.

- v. The Appellant has raised the issue that as requested by it the Respondent No. 2 had not referred the matter to the GCC as per

Clause 8 of the BPTA. The Respondent No. 2 in its submissions before the State Commission has submitted that the Appellant's claim of double charging is a commercial matter. It was related to the BPTA, which was already in force and governed by the relevant provisions and Regulations, and was hence not referred to the GCC. The Respondent No. 3 submitted before the State Commission that it has not received any email in this regard.

Let us examine the Clause 8 of the BPTA which is reproduced below:

8. Handling of defaults and Disputes

The default in payment of monthly Transmission Charges bill by any Transmission System User (TSU) and dispute if any in this regard shall be referred to Grid Co-ordination Committee (GCC) in the meeting held every month and shall be dealt with as per decision of Grid Co-ordination Committee (GCC).

From the above it is clear that the said clause is only related to default/ dispute related to payment of monthly transmission charges by a TSU. Here the Appellant vide its communication represented the case to the Respondent No. 2 as double charging (i.e. LTOA & STOA charges). These charges are governed by the BPTA/Regulations/Orders of the State Commission. The Respondent No. 2 has rightly termed the matter as commercial issue related to BPTA which is governed by regulations of the State Commission. In our view the decision of the Respondent No. 2 regarding not referring the matter to GCC was justified.

vi. In view of the above, we are of the considered opinion that the State Commission in the Impugned Order has dealt with the issue as per its Regulations/Orders, there is no lacuna in the BPTA and also there is no denial of opportunity to redress the grievance by the State Entity. Accordingly, the various judgements of the Apex Court (Hon'ble Supreme Court) quoted by the Appellant in its submissions have no relevance in the present appeal.

vii. Hence these issues are decided against the Appellant.

c. On Question No. 7. b. i.e. Whether the impugned order recognizes the role of the State Regulator in upholding fairness, reasonableness and public interest in contractual relations of a generator with a State instrumentality? and on Question No. 7. c. i.e. Whether the impugned order which is not a speaking order, on many issues raised for consideration of the Respondent No. 1 Commission, is tenable in law?, we decide as follows:

i. For deciding this, we shall examine the impugned finding of the State Commission on these issues. The analysis and decision part of the Impugned Order of the State Commission is produced below:

“Commission’s Analysis and Ruling

13. Regulation 7.6 of the MERC (Transmission Open Access) Regulations, 2005 provides that every TSU shall, for acquiring Long Term (12 to 25 years) or Medium Term (3 months to 3 years) TCR, enter into a BPTA with the concerned Transmission Licensee for access to and use of its Intra-State Transmission System. Such Agreement must

be entered into where long term use for OA is envisaged. Accordingly, GEPL entered into a BPTA with MSETCL on 27 March, 2012 for 25 years for transmission of 110 MW of power to TPTCL from its 2 X 60 MW generating Plant.

14. As clarified by the Commission in its Order dated 21 May, 2012 in Case No. 51 of 2012, Transmission Charges are payable by all long term TSUs irrespective of actual utilisation during the tenure of their BPTAs, subject to the provisions of Regulation 66.4 of the MERC (Multi Year Tariff (MYT)) Regulations, 2011 in case actual utilisation varies from the allocated transmission capacity (i.e., Base TCR). Regulation 66.4 reads as follows:

“66.4 The charges for intra State transmission usage shall be shared among various TSUs in the following manner:

a) Existing Long Term TSU with recorded demand upto Base TCR (i.e., average of CPD [Coincident Peak Demand] and NCPD [Non-Coincident Peak Demand]) shall not be subjected to payment of Short Term transmission charges.

b) Long Term TSU with recorded demand greater than Base TCR but lower than Contracted Capacity shall make payment of Short Term Transmission charges for the recorded demand in excess of Base TCR.

c) Where the recorded demand of Long Term TSU is greater than Contracted Capacity (termed as Transmission Capacity Right - TCR), the TSU shall bear additional transmission charges as specified in

MERC (Transmission Open Access) Regulations, 2005, as amended from time to time:

Provided that Short Term transmission charges and additional transmission charges, if payable or paid, as applicable in accordance with the clauses (a), (b) and (c) above, by Long Term TSUs, shall be adjusted during subsequent billing period upon availability of information regarding actual recorded demand by such Long Term TSUs.”

15. As per Article 7.1.1 of the BPTA executed on 27 March, 2012, GEPL agreed to pay Transmission Charges of 110 MW of power as per the InSTS Tariff Orders issued by the Commission from time to time, from the effective date of that BPTA.

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.....

The BPTA was executed on 27 March, 2012. MSETCL raised the first bill to GEPL towards reserved TCR of 110 MW from April, 2012.

*16. GEPL applied to MSLDC for grant of STOA for 28 MW on 19 May, 2012. Accordingly, MSLDC granted OA for the period from 20 May to 31 May, 2012 for 28 MW. GEPL applied to MSLDC for NOC for sale of 50 MW power on a Power Exchange on a monthly basis. *In accordance with the Commission’s Order in Case No. 58 of 2005, all transactions through Power Exchanges will fall in the STOA category.**

17. Global Energy, a Trading Licensee, applied for STOA for sourcing power of GEPL to KPTCL, in respect of which

MSLDC refused to grant STOA on 5 March, 2014. The Commission addressed this matter in its Order dated 2 June, 2014 in Case No. 71 of 2014 and ruled as follows: -

“16.1 In the present peculiar facts of the instant case, the Commission hereby directs MSLDC to grant Open Access permission to the Petitioner; subject to:

a. Petitioner should submit all the required documents as per the procedure laid by and as sought by MSLDC for such Short Term Open Access transaction, in case it wants to change the Generator;

b. Clearance of all the outstanding dues should be made by the Generator i.e. M/s Gupta Energy Pvt. Ltd., in the present transaction to STU (MSETCL), in accordance with the procedure laid by MSLDC for such Short Term Open Access transaction;

c. Suitable changes should be done by MSLDC for commercial settlements, in the existing FBSM of Maharashtra State, in order to accommodate this particular STOA transaction in the instant case.”

18. In the light of the foregoing, the Commission holds that, having entered into a BPTA of its own volition, GEPL is bound by its terms, including the payments to be made irrespective of the quantum of actual usage as mandated by the relevant Regulations and Orders of the Commission. By its very nature, the BPTA formalises a long term arrangement, separate and distinct from any other Short Term OA dispensation that GEPL may seek from the MSLDC. GEPL had the option not to enter into a BPTA considering the nature of its expected transactions, and limit

itself to seeking Short Term OA instead from time to time and thus not bear the additional liability arising from the terms of such BPTA. The fact is that it did not choose such option, erroneously or otherwise, and is, therefore liable to pay the consequent dues to MSETCL.

19. Having considered that the BPTA arrangement was unsuitable or onerous for its purposes, GEPL sought to terminate it. While accepting GEPL's request in principle, MSETCL made final termination dependent on clearance of its outstanding dues under the BPTA (vide its letter dated 21 June, 2013 and subsequent correspondence). The Commission is of the view that MSETCL could and ought to have invoked the payment security mechanisms envisaged under such arrangements at the appropriate time so as to recover the payments due to it, or even exercised its own right under the BPTA to terminate it for any default of GEPL. The fact that it did not do so cannot be a valid reason for not unconditionally terminating the BPTA when it was sought by GEPL. Hence, the Commission directs that the BPTA be considered as terminated from the date originally sought by GEPL and that, separately, the payments due to MSETCL till that date under the BPTA shall be made by GEPL within 45 days of this Order (if not already done), or such longer period as may be agreed to by MSETCL considering the circumstances set out by GEPL.

20. MSETCL has denied GEPL's allegation that it also predicated acceptance of its termination request on arrangements separately agreed to regarding the provision of NA plots, etc., and that these were agreed to under

duress. Whatever be the case, the Commission makes it clear that such extraneous considerations outside the BPTA shall have no nexus with the termination of the BPTA.”

From the above it is clear that the State Commission has dealt with all the issues raised by the Appellant i.e. liability of payment of LTOA/STOA charges, termination of BPTA by Appellant/ Respondent No. 2 as per the provisions of MERC (Transmission Open Access) Regulations, 2005, grant of Open Access to M/s Global Energy Pvt. Ltd. and misuse of dominant public authority by Respondent No. 2 which is in any way is a bilateral matter between the Appellant and the Respondent No. 2. The Appellant failed to put on record that there is no requirement of clearance of dues to STU as per the procedure laid down by MSLDC before the grant of STOA by it. However, we go by the observations of the State Commission in its Order dated 26.4.2014 in Case No. 71 of 2014 regarding the requirement of the same. Hence, we do not find anything wrong in referring to the order in Case No. 71 of 2014 by the State Commission.

In view of our discussions as above, we are of the considered opinion that the Impugned Order is a well reasoned & speaking order and recognizes the role of the State Regulator in upholding fairness, reasonableness and public interest in contractual relations of a generator with a State Instrumentality.

- ii. Hence these issues are decided against the Appellant.

d. On Question No. 7. a. i.e. Whether the impugned order contravenes any provisions of the Electricity Act, 2003 and the relevant Regulations framed there under? and on Question no. 7. e. Whether the impugned order amounts to the Respondent No. 1 Commission having exercised its functions of resolving disputes under Section 86 (1) (f) in accordance with the provisions of the Act and power conferred upon it?, we decide as follows:

i. As per the Impugned Order the petition was filed by the Appellant regarding dispute with Respondent No. 2 and Respondent No. 3 regarding Open Access, Bulk Power Transmission Agreement and Transmission Charges. The same has been filed under the following provisions of the Electricity Act, 2003 as stated at S.No. 1 of the Impugned Order:

“1. M/s Gupta Energy Pvt. Ltd. (GEPL), Gupta Tower, Civil Line, Nagpur has filed a Petition dated 19 May, 2014 under Section 86 (1) (c), (f) and (k) read with Sections 42(2) and 32 of the Electricity Act (EA), 2003 for adjudication of its dispute with the Respondent No. 1, Maharashtra Electricity Transmission Co. Ltd. (MSETCL).”

The Sections of the Electricity Act, 2003 quoted above are reproduced below:

“86. (1) The State Commission shall discharge the following functions, namely: -

(c) facilitate intra-state transmission and wheeling of electricity;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(k) discharge such other functions as may be assigned to it under this Act.

42 (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission :

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee :

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

32. (1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall -

(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;

(b) monitor grid operations;

(c) keep accounts of the quantity of electricity transmitted through the State grid;

(d) exercise supervision and control over the intra-state transmission system; and

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

(3) The State Load Despatch Centre may levy and collect such fee and charges from the generating companies and licensees engaged in intra-State transmission of electricity as may be specified by the State Commission.”

Provisions of Section 86 quoted above mainly deals with the functions of the State Electricity Regulatory Commissions for facilitation of intra state transmission & wheeling of electricity and adjudication of disputes between transmission licensees/ generating companies. As discussed above the Impugned Order has been decided by the State Commission based on its Regulations and Orders from time to time on the subject matter.

Section 42 deals with the Duties of distribution Licensee and open access which is not relevant in present case.

Section 32 deals with the functions of the State Load Despatch Centres. In view of our discussions in the preceding paragraphs and as also admitted by the Appellant that the MSLDC has rightly observed the transactions as STOA, we are of the view that MSLDC has discharged its functions in accordance with the provisions of the Electricity Act, 2003 and Regulations framed under it.

- ii. In view of our observations as above, we are of the considered opinion that the Impugned Order of the State Commission does not contravene any provisions of the Electricity Act, 2003 and the relevant Regulations framed there under. The State Commission has appropriately dealt in resolving the disputes in the Impugned Order while exercising its functions of resolving disputes under Section 86 (1) (f) of the Electricity Act, 2003.
- iii. Hence these issues are also decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present appeal have no merit as discussed above. The Appeal is hereby dismissed.

The Impugned Order dated 09.11.2015 passed by the State Commission is hereby upheld. In view of above, I.A. No. 34 of 2016 does not survive and is disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **3rd day of July, 2017.**

(I.J. Kapoor)
Technical Member

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(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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