

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 273 OF 2014 &  
APPEAL NO. 85 OF 2014**

**DATED: 8<sup>th</sup> July, 2016**

**PRESENT: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER  
HON'BLE MR. T. MUNIKRISHNAIAH, TECHNICAL MEMBER**

**Appeal No. 273 of 2014**

**IN THE MATTER OF:**

Essar Power Gujarat Limited (EPGL)  
Through its Authorized Representative,  
5<sup>th</sup> Floor, Tower-2, Equinox Business Park,  
(Peninsula Technopark), Off. Bandra Kurla Complex,  
LBS Marg, Mumbai - 400 070. ... **Appellant(s)/Petitioner(s)**

**Versus**

1. Gujarat Electricity Regulatory Commission,  
Through its Authorized Representative,  
1st Floor, Neptune Tower,  
Opp. Nehru Brodge, Ashram Road,  
Ahmedabad – 380009
2. Gujarat Urja Vikas Nigam Limited,  
Through its Authorized Representative,  
Sardar Patel Vidyut Bhavan,  
Race Course, Vadodara – 390007
3. Gujarat Energy Transmission Corporation Limited,  
Through its Authorized Representative,  
Sardar Patel Vidyut Bhavan  
Race Course, Vadodara – 390007 ... **Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur  
Mr. Abhishek Munot  
Mr. Melcolm Desai  
Mr. D.L. Chidanada  
Ms. Apoorva Misra, Adv.

Counsel for the Respondent(s) : Ms. Suparna Shrivastava  
Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Mr. Anand K. Ganesan  
Ms. Anushree Bardhan  
Mr. S.K. pandey for GERC/R-1  
Ms. Anushka Arora for R-1  
Mr. Ishan Mukherjee  
Ms. Venu for GETCO  
Ms. Swapna Srivastava  
Ms. Nishtha Sikroria  
Ms. Poorva Saigal

**Appeal No. 85 of 2014**

**IN THE MATTER OF:**

1. Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhawan  
Race Course, Vadodara – 390007
2. Gujarat Energy Transmission Corporation Limited  
Sardar Patel Vidyut Bhawan  
Race Course, Vadodara-390007

**.... Appellant(s)/Petitioner(s)**

**Versus**

1. Gujarat Electricity Regulatory Commission  
1<sup>st</sup> Floor, Neptune Tower  
Opp. Nehru Brodge, Ashram Road  
Ahmedabad-380009

**....Respondent(s)**

2. Essar Power Limited  
Essar House  
11, Keshavrao Marg  
Mahalaxmi, Mumbai-400034

**....Respondent(s)/Petitioner(s)**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Ms. Ranjitha Ramachandran  
Mr. Anand K. Ganesan  
Ms. Anushree Bardhan for GUVNL

Ms. Poorva Saigal  
Mr. Shubham Arya for R-2  
Mr. Ishan Mukherjee

Counsel for the Respondent(s) : Mr. Amit Kapur  
Ms. Suparna Srivastava for R-1  
Mr. S.K. Pandey for GERC/R-1  
Mr. Abhishek Munot  
Mr. Malcolm Desai for R-2  
Ms. Anuska Arora  
Mr. S.K. Pandey (Rep)  
Ms. Apoorva Misra, Adv.

## **JUDGMENT**

**Per Hon'ble Mr. T. Munikrishnaiah, Technical Member**

### **Appeal No. 273 of 2014**

1. The Appellant Essar Power Gujarat Ltd. (EPGL) has filed this Appeal under Section 111 of the Electricity Act, 2003, against the order dated 08.08.2013 passed in Petition No. 1257 of 2012 filed by the Appellant.

After hearing the parties at length, the State Commission passed an Impugned Order dated 08.08.2013 directing as under:

*“18. In view of the above analysis, we come to the conclusion that the Petitioner is liable to pay Liquidated Damages for delay in commissioning both Unit 1 and Unit 2 of its power plant at Salaya. For this purpose the SCODs of Unit 1 and Unit 2 would be respectively 210 days and 270 days from 2 August 2011. The appropriate amount of Liquidated Damages may be calculated accordingly. The amount which Respondent No. 1 had withheld earlier and retained/recovered in pursuance of our Interim Order dated 31 January, 2013 be adjusted in accordance with this order”.*

## Appeal No. 85 of 2014

2. The instant Appeal has been filed by the Appellants/Petitioners, Gujarat Urja Vikas Nigam Ltd. (GUVNL) and Gujarat Energy Transmission Corporation Ltd., (GETCO), under Section 111 of the Electricity Act, 2003 against the Order dated 08.08.2013 passed by Gujarat State Electricity Regulatory Commission (GERC) in Petition No: 1257 of 2012 whereby the State Commission allowed the petition filed by the Respondent No. 2, Essar Power Gujarat Limited by holding that liquidated damages are not payable by Essar Power Ltd. For the delay in commissioning of Unit-1 & 2 of its power plant at Salaya for the period till 01.04.2012 for the first unit and till 15.06.2012 for the second unit.
3. The Appellant in Appeal No. 273 of 2014, Essar Power Gujarat Limited, is a company incorporated under the provisions of the Companies Act, 1956 having its office in Mumbai. The Appellant is a generating company, as defined in Section 2(28) of the Electricity Act, which owns, operates and maintains a generating station at Salaya, Gujarat. The Appellant is engaged in the business, *inter alia*, of generating and selling and/or supplying electricity. The Appellant has constructed, commissioned and is currently operating the 1200 MW (2x600 MW) Salaya I Project.
4. Respondent No.1, Ld. Gujarat Commission is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with

specific powers vested in terms of Sections 86 and 181 of the Electricity Act.

5. Gujarat Urja Vikas Nigam Ltd. (GUVNL), is a company incorporated under the provisions of the Companies Act, 1956 is a successor of the erstwhile Gujarat Electricity Board which was constituted previously under the Electricity (Supply) Act, 1948.
6. Gujarat Transco was set up in May, 1999 and is incorporated under the provisions of the Companies Act, 1956. Gujarat Transco was promoted by the Board as it's wholly owned subsidiary in the context of liberalization and as a part of efforts towards restructuring of the power sector. The objective of Gujarat Transco is to undertake planning and co-ordination of activities of transmission and Load Dispatch functions in the State of Gujarat.
7. Both the Appeals have been filed against the same Impugned Order dated 08.08.2013 passed by Gujarat State Electricity Regulatory Commission in Petition No. 1257 of 2012 filed by Essar Power Gujarat Ltd.

Since both the Appeals are cross appeals, we are taking up both the Appeals 85 of 2014 and 273 of 2014 together for consideration.

## 8. **Brief Facts of the Case**

- 8.1 On 01/02.02.2006, GUVNL published the Request for Qualification ("RFQ") Notification for the supply of power on long term basis under

Bid Nos. 01/LTPP/2006, 02/LTPP/2006 and 03/LTPP/2006. Bid No. 03/LTPP/ 2006 pertains to the present matter, for supply of maximum/minimum capacity of 2000/1000 MW based on imported coal for a period of 25 years. Request for proposal was issued on 24.11.2006 for Bid No. 03/LTPP/2006 for procuring 2000 MW of power.

- 8.2 Consequent upon the process of competitive bidding for supply of power on a long-term basis, on 10.01.2007, GUVNL declared Essar Power Limited as a successful bidder to supply 1000 MW of power to GUVNL, pursuant to which GUVNL on 11.01.2007 issued the Letter of Intent (“**LoI**”) to EPGL for supply of 1000 MW of power.
- 8.3 On 26.02.2007, the PPA was entered into between EPGL and GUVNL for supply of 1000 MW power from Unit-1 and Unit-2 of the Salaya Project.
- 8.4 According to PPA, the Scheduled Commercial Operation Date (i) for the first Unit was 48 months of the Effective Date; and (ii) for the second Unit was 54 months from the Effective Date of the PPA i.e. 26.02.2007. Accordingly, the Commercial Operation Date (COD), the date from which the supply of power was to commence on a commercial basis was 26.02.2011 for Unit-1 and 26.08.2011 for Unit-2.
- 8.5 The seller’s obligation is to build, own and operate the project, as per Article 4.2 of the PPA. The procurer (GUVNL) shall be responsible for providing the interconnection and transmission facilities to enable the

evacuation of contracted capacity from the delivery point to the procurer's network, not later than the scheduled connection date.

8.6 As provided in the PPA, the GUVNL informed EPGL on 26 March, 2007 that it had requested GETCO to initiate necessary action for evacuating 1,000 MW of power from the delivery point which was the 220 KV Vadinar sub-station. Subsequently, EPGL had a meeting with GETCO wherein the latter clarified that the nearest GETCO 220 KV sub-station was at Jamnagar. GETCO further pointed out in a meeting on 11.04.2007 that in view of techno-economic considerations, it would prefer to evacuate power at 400 KV level from EPGL's bus bar instead of 220 KV sub-station at Jamnagar. EPGL requested GUVNL to decide on the issue because the PPA would be required to be amended for this purpose. There were correspondence and interactions regarding the cost implications and other aspects. Finally, on 21 July 2007, GUVNL informed EPGL that it had agreed to off-take the contracted capacity from EPGL's Vadinar bus bar at 400 KV voltage level and that EPGL would have to set up the required infrastructure for the evacuation of power from the bus bar without any cost implications to GUVNL/GETCO.

8.7 On 15.06.2007, EPGL informed GUVNL that a Special Purpose Vehicle (SPV) namely, EPGL had been formed for the purpose of development and implementation of the Project. In view of the same, EPGL requested GUVNL to accord its consent to the said assignment of the

PPA on 25.11.2008, an assignment agreement was executed between GUVNL and EPGL assigning the project to EPGL.

- 8.8 On 17 November 2009 vide its order in Petition No. 962 of 2009 the Gujarat Electricity Regulatory Commission approved the change of delivery point and consequent execution of supplemental PPA. The supplemental PPA was signed on 16 October, 2009 whereby the existing definitions of delivery point and the details of inter-connection facilities was amended and replaced as follows:

*“The Delivery Point shall be the point of delivery for fulfilling the obligation of the Seller to deliver the contracted electrical output/energy to Procurer, i.e. Salaya Thermal Power Project bus bar at 400 KV voltage level situated at Khajurda, Taluka Khambaliya, District Jamnagar, Gujarat. All necessary arrangements to receive the Contracted Capacity from the Delivery Point and transmission there onwards shall be taken care by the Procurer.”*

- 8.9 The Generator, EPGL thought that the start-up power can be taken through the 400 KV evacuation line for testing of auxiliary equipment. Due to delay in execution of the line, EPGL requested Paschim Gujarat Vij Company Ltd. (PGVCL) on 07.01.2011 for releasing the start-up power.

- 8.10 On 30.06.2011, the Appellant, EPGL wrote to GUVNL that it would be practically impossible to achieve COD of unit on or before 25.10.2011 because of the reasons mentioned in their letter dated 05.03.2011. The EPGL requested GUVNL for extension of 180 days from the date when the 400 KV Vadinar-Hadala Transmission Line is stabilized within the

acceptable voltage limits and the connection of the network of 400 KV Salaya switchyard is achieved and further EPGL requested that the period for achieving of SCOD of Unit-2 should be extended for three months from the SCOD of Unit-1.

8.11 In response to the above letter of EPGL, GUVNL on 15.07.2011 replied that it was not agreeable for the suggestion of EPGL and that the EPGL should ensure achievement of SCOD of both the units within 180 days from 25.04.2011, the date of commissioning of 400 KV Vadinar-Hadala Transmission Line because there was no inter-dependency of commissioning of one unit with the other and no pre-requisite that Unit-2 would achieve SCOD only after Unit-I.

8.12 On 25.07.2011, the EPGL informed Gujarat Transco that the installation of the bus reactors at that stage was not possible as designing, ordering, manufacturing and installation of bus reactor and associate equipment of this capacity would take at least 10-12 months. This would delay the COD further causing significant losses to the EPGL. It was further submitted that as per the Supplemental PPA (Article 2.5) it was the responsibility of Gujarat Transco/GUVNL to arrange the connectivity and ensure the permissible voltage levels. The EPGL would only be able to synchronize its units of Phase I to Gujarat Transco grid only when the voltage is maintained within 420 KV. In view of the same, The EPGL requested Gujarat Transco to take necessary steps to control the

voltage within the permissible limits to have the connectivity of the 400 KV switchyard.

8.13 On 02.08.2011, GETCO issued a letter to EPGL declaring the Commercial Operation of the 400 KV Vadinar-Hadala Transmission Line w.e.f. 25.04.2011.

8.14 The EPGL informed GETCO on 16.08.2011 that the 400 KV line at EPGL end could not be charged due to high voltage and EPGL also suggested a meeting of all concerned, including State Load Dispatch Centre and Areva. Accordingly, a meeting was held on 29.08.2011 between GETCO, EPGL and Areva in the context of stabilization of Vadinar-Hadala 400 KV Transmission Line.

It was decided that Areva shall check the safety margin for over voltage of 400 KV equipments supply by them. Subsequently, Areva made some recommendations regarding various equipments. The EPGL informed GETCO that it would charge 400 KV Salaya Switchyard with maximum 425 KV voltage of GETCO Vadinar-Hadala Transmission Line at Salaya end. In case the voltage exceeded 425 KV, the line would be required to be disconnected with mutual consent of SLDC and EPGL.

8.15 On 30.09.2011, the EPGL informed GUVNL that the commissioning of Unit-1 of the project was at an advanced stage, but the COD of Unit-1

and Unit-2 of the project was delayed in certain critical activities due to factors beyond EPGL's control.

Hence, the Appellant, EPGL requested GUVNL to extend the SCOD of Unit-1 and Unit-2 of the project, respectively to 24-01.2012 and 24-04.2012. In response, GUVNL replied on 21.10.2011, that it will examine the request for extension of SCOD after both the Units achieved commercial operation.

8.16 On 01.11.2011, the EPGL issued the Advance Preliminary Notice under Article 6.1.1 of the PPA to GUVNL informing that it was planning to synchronize Unit-1 (600 MW) tentatively by 25.11.2011.

8.17 On 30.11.2011, the EPGL informed GUVNL that Unit-1 of the Project had been synchronized with GETCO grid through a 400 KV Vadinar-Hadala transmission Line on 24-11.2011.

8.18 On 03.02.2012, GUVNL issued letter to the EPGL intimating that:-

- a) Despite the EPGL letter dated 30.11.2011 providing the synchronization of Unit-1 of Salaya-1 with Gujarat Transco Grid through the Interconnection and Transmission Facility on 24.11.2011, the EPGL was yet to declare COD for Unit-1 and Unit-2.
- b) Expiry of extension granted by GUVNL vide their letter dated 15.06.2011 for a period of 180 days from the date of commissioning of the Interconnection and Transmission Facility i.e. 25.04.2011.

In view of the above, the EPGL was requested to expedite the progress for declaring the COD of Unit-1 and Unit-2.

8.19 On 06.02.2012, EPGL requested GUVNL to extend SCOD due to certain factors beyond control of EPGL including:-

- a) Technical glitches with Unit-1 such as scorching marks observed on Generator shaft in the sealed area;
- (b) Delay in grant of visa to the technical team of the Original Equipment Manufacturer (OEM) for the repair of Unit-1; and
- (c) Complete black out of the power project due to tripping of the Transmission line leading to further delay in commissioning activities.

In view of the above, EPGL requested GUVNL to defer the SCOD of Unit-1 to 15.03.2012 and Unit-2 to 15.05.2012.

8.20 On 23.03.2012, GUVNL wrote to EPGL that it had not achieved COD as per Article 4.6.1 of the PPA and hence, EPGL was liable to pay liquidated damages. Thereafter, GUVNL adjusted the amount payable towards invoices of infirm power against liquidated damages.

8.21 EPGL informed on 07.04.2012 to GUVNL, having achieved the synchronization of Unit-1 & Unit-2 on 03.04.2012 that the Unit was expected to be ready for commercial operation before 24.04.2012. Further, on 10.04.2012, EPGL requested GUVNL to defer the SCOD of Unit-1 to 24.05.2012 (180 days from scheduled synchronization date which was achieved on 24.04.2011 and for Unit-2 on 24.07.2012.

8.22 GUVNL vide its letter of 23.04. 2012 mentioned that EPGL had achieved commercial operation of the project after the expiry of the period of extension granted by GUVNL and hence, was liable to pay Liquidated Damages in terms of Article 4.6.1 of the PPA. Consequently,

GUVNL had adjusted a sum of Rs. 12,37,77,973/- (admitted amount of invoices for the months of November 2011, December 2011 and February/March 2012) payable for infirm power. In response, the EPGL replied on 26.04.2012 that the delay in achieving SCOD was due to non-availability of transmission line on account of high voltage.

8.23 On 15.06.2012, EPGL informed GUVNL that Unit-2 of the project had achieved commercial operation on that day. EPGL further stated that it had been supplying power to GUVNL since November 2011, for which it had raised invoices amounting to Rs. 80,73,42,951/- till date. However, GUVNL had not made any payment on the ground that the amount was being adjusted against the alleged Liquidated Damages payable by EPGL for not achieving the commercial operation of Unit1 and Unit-2 by the SCOD. EPGL requested GUVNL to release the amount immediately.

8.24 GUVNL vide its letter of 18.06.2012 reiterated the liability of EPGL to pay Liquidated Damages. It further mentioned that it had adjusted an amount of about Rs. 79 crores against a liability of about Rs. 266crores towards Liquidated Damages for not achieving SCOD. GUVNL further informed that the request of EPGL for extension of SOCD of Unit1 and Unit-2 was being examined separately and the outcome would be communicated in due course. On 20.06.2012, EPGL suggested to GUVNL that while its request for extension of SCOD was under consideration, GUVNL should release 50% of the invoice amount

immediately to enable EPGL to continue its operations. EPGL was willing to resolve the issue related to Liquidated Damages as per the procedure laid down in the PPA. EPGL was agreeable to pay even the applicable interest on the payments to be made by GUVNL if the decision for extension of SCOD was in its favour.

8.25 On 31.07.2012 GUVNL informed EPGL that it had agreed to extend the period of SCOD by 30 days over and above the extension of 180 days. Accordingly, the revised date for achieving SCOD became 23.11.2011, beyond which Liquidated Damages would be payable. Further, GUVNL agreed to pay 50% of the admissible amount for April 2012 and onwards till the entire Liquidated Damages amount was recovered. Further correspondence and interactions continued. A meeting was held in GUVNL's Office on 27.08.2012. Subsequently, EPGL requested GUVNL to release 100% amount against the invoices submitted by releasing 50% as advance and the balance 50% after submission of equivalent amount of bank guarantee. A letter dated 28.08.2012 from EPGL to GUVNL indicates that the amount withheld by GUVNL towards payment of Liquidated Damages was Rs. 221.25 crores.

8.26 In view of the divergent views and disputes between EPGL and GUVNL, on 16.10.2012 EPGL issued a default notice to GUVNL which had wrongly levied liquidated damages and adjusted the same against legitimate dues of EPGL.

8.27 On 14.11.2012, the Appellant, EPGL filed a Petition before the Gujarat Electricity Regulatory Commission under Section 86(1)(f) of the Electricity Act 2003 read with Article 17 of the PPA seeking adjudication of dispute between the Appellant and GUVNL regarding wrongful levy of Liquidated Damages of Rs. 221.25 crores by GUVNL for alleged delay in achieving the commercial operation of Unit-1 and Unit-2 of the Appellant's 1200 MW Phase-1, Salaya Thermal Power Plant.

8.28 On 31.01.2013, an interim Order was passed by Ld. Gujarat Commission in Petition No. 1257 of 2012, wherein the State Commission held that:

- a) The GUVNL should refund 90% of the deducted amount towards liquidated damages immediately to the Appellant and retain 10% of the same; and
- b) The GUVNL may deduct 10% of the amount so refunded by it from the monthly bills raised by the Appellant till the refunded amount is recovered completely.

8.29 After going through the submissions made by the rival parties and after hearing the arguments, the State Commission passed an Impugned Order on 08.08.2013.

8.30 On 07.11.2013, GUVNL/GETCO filed a Review Petition being RP No. 1361 of 2013 seeking review of the Impugned Order dated 08.08.2013 passed by the Ld. Gujarat Commission in regard to:

- a) The availability of the 400 kV Vadinar-Hadala line for evacuation of power from the two units of the Salaya I Project upon their commercial operation; and

- b) The calculation of 210 days prior to the Schedule Commercial Operation of the two Units of the Salaya I Project for the period of delay on part of the Appellant.

8.31 On 06.01.2014, the Appellant, EPGL filed a Miscellaneous Application in Petition No. 1257 of 2012 before the State Commission for initiating action against the GUVNL under Section 142 of the Electricity Act 2003 for failure to implement the Impugned Order dated 08.08.2013 by making payment to the Appellant.

8.32 On 29.01.2014, GUVNL and GETCO filed the instant Appeal No. 85 of 2014 before this Tribunal and prayed for the following reliefs:

- a) Allow the Appeal and set-aside the Order dated 08.08.2013 passed by the State Commission to the extent challenged in the present appeal.
- b) Pass such other Order(s) and this Tribunal may deem just and proper.

8.33 Similarly, Essar Power Gujarat Ltd. (EPGL) also filed cross Appeal being Appeal No. 273 of 2014 on 16.09.2014 and prayed for the following reliefs:

- (a) Allow the Appeal and set aside/ modify the Impugned Order dated 08.08.2013 to the extent sought in the present Appeal;
- (b) Declare that the delay in achieving the commissioning of Unit-1 and Unit -2 of the Project is not attributable to the Appellant but on account of the delay on part of GUVNL in providing an “useable” Transmission and Interconnection Facility by the Scheduled Connection Date;
- (c) Direct GUVNL to extend the COD of Unit-1 of the Project till 01.04.2012 and Unit-2 of the Project till 15.06.2012;
- (d) Declare that the Appellant is not liable to make the payment of Liquidated Damages to GUVNL under Article 4.6 of the Power Purchase Agreement dated 26.02.2007;

- (e) Direct GUVNL to refund the entire amount of Liquidated Damages recovered from the Appellant along with Late Payment Surcharge payable and Rebate arbitrarily adjusted by GUVNL contrary to the terms of the PPA and in terms of Paragraph 9.57 of the present Appeal;
  - (f) Direct GUVNL to additionally pay interest to the Appellant in terms of the PPA from the date of filing the Appeal till the entire amount, due and payable is recovered from GUVNL; and
  - (g) Pass any other order as it may deem fit and proper in the facts and circumstances of the present case.
9. Heard the arguments of Mr. Amit Kapur, Learned Counsel for the Appellant, Essar Power Gujarat Ltd. and Mr. M.G. Ramachandran, Learned Counsel for the Respondent, Gujarat Electricity Regulatory Commission and after going through the submission made by the rival parties and Impugned Order and materials on record, the following issues arise for our consideration:

**Issue No. 1: Whether the Essar Power Gujarat Limited is liable to pay the liquidated damages because of delay in achieving the Commercial Operation of the project as per the PPA as claimed by the Respondent, GUVNL?**

**Issue No. 2: Whether the Gujarat Urja Vikas Nigam Ltd. (GUVNL) is right in levying the liquidated damages due to delay in providing the useable transmission and inter-connection facilities for evacuation of power?**

10. **Both the issues are inter-related, hence both the issues would be taken up together.**
11. The following are the submissions made by Ld. Counsel for the Essar Power Gujarat Limited:
- 11.1 that the delay in achieving the commissioning of the Project was due to the GUVNL's failure to comply with its material obligation in terms of Article 4.2(a), 4.2(c) read with Schedule 3 of the PPA in not providing a "useable" Transmission and Interconnection Facility by the Scheduled

Connection Date i.e. 30.07.2010. Articles 4.2(a), 4.2(c) read with Schedule 3 of the PPA mandates GUVNL to procure the Transmission & Interconnection Facility at 400 kV voltage level with the permissible variation of (+/-) 5% by the Scheduled Connection Date. The said obligation of GUVNL is absolute and independent of the obligation of the EPGL to execute the Project in a timely manner. On the other hand, the EPGL cannot perform its obligation to execute the Project in a timely manner unless GUVNL performs its obligation of providing the “useable” Transmission and Interconnection Facility not later than the Scheduled Connection Date. Having not performed the said obligation, GUVNL cannot claim Liquidated Damages under Article 4.6 of the PPA from the EPGL for not complying with Article 4.1.1(b) of the PPA. GUVNL cannot claim Liquidated Damages from the EPGL in view of Article 4.5.1, which provides for extension of time to the EPGL to execute the Project beyond the SCOD of its respective Units in case the Appellant does not setup the useable Transmission and Interconnection Facility by the Scheduled Connection Date. The extension to be granted is beyond such time GUVNL provides a “useable” Transmission and Interconnection Facility, thereafter extending the SCOD for the respective Units accordingly. The non-execution of the Project by the EPGL in a timely manner cannot be an impediment upon GUVNL in granting extension to the EPGL in terms of the PPA. The Transmission and Interconnection Facility was only charged by Gujarat Transco on

25.04.2011. However, it was only available in a “useable” form thereafter. The extension period granted for achieving the commissioning of the Project by 23.11.2011 was rendered meaningless due to delays and defaults of GUVNL.

11.2 The extensions being granted by the GUVNL was without dealing with:

- (i) it’s obligation to provide a “useable” Transmission and Interconnection Facility;
- (ii) the fact that it takes around 210 days to commission a Unit after the actual connection date as acknowledged by GUVNL by granting the two extensions dated 15.06.2011 and 31.07.2012; and
- (i) it takes around 180 days to commission a subsequent Unit after the first Unit is commissioned. This is a settled industry practice and has also recognised in the Bid Documents including the PPA.

11.3 that it is settled principle of law of contract that the period in which reciprocal promises are to be performed is expressly fixed in the contract, they shall be performed in that period, and where the period is not expressly fixed by the contract, they shall be performed in that time period which the nature of the transaction requires. For the EPGL to commission its Units by the SCOD, it was quintessential for GUVNL to set up the transmission and interconnection facility by the Scheduled Connection Date. This fact has also been acknowledged by GUVNL in granting the extension to the EPGL for a period of seven months (210 days), which recognises the fact that after putting up the transmission and interconnection facility (25.04.2011) it took about 210 days to commission a unit. However, on the other hand it is submitted that setting up the transmission and interconnection facility by the

Scheduled Connection Date by the GUVNL was independent of the fact that the construction of the project being complete or incomplete. However, GUVNL failed to acknowledge the fact that setting up of the transmission and interconnection facility was not the only obligation but the obligation was to set it up in a “useable” condition as required in Schedule-3 of the PPA read with the various provisions therein. Given this fact, it is important to acknowledge that when a contract consists of reciprocal promises such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

11.4 that the drawings and the functional specifications for the Transmission and Interconnection Facility and the EPGL switchyard were duly approved by GUVNL/ Gujarat Transco and were as per their recommendations. GUVNL/ Gujarat Transco were very well aware of the fact that the EPGL was setting up equipments which would be able to withstand 400 KV voltage level of electricity with  $\pm 5\%$  variation i.e., as per the limits prescribed in the Grid Code. While approving the Appellant’s drawings including the system study done by Gujarat Transco for evaluating the dedicated line to Essar Oil Refinery, neither

GUVNL nor Gujarat Transco at any time suggested to the EPGL to install switchable bus reactors as a protective measure for ensuring the voltage of the Transmission and Interconnection Facility is within the limits of the Grid Code.

11.5 that the GUVNL granting extension to the Appellant from the physical availability of the line i.e. 25.04.2011 till 23.11.2011 was rendered meaningless since:

- (i) The Transmission and Interconnection Facility was not maintained within the statutorily and contractually prescribed voltage levels [400 kV (+/-) 5%], as also admitted by GUVNL/Gujarat Transco, failing which the EPGL could not connect with the same until 26.10.2011; and
  - (ii) In fact the Transmission and Interconnection Facility was not only, not “useable” but in fact was not available at the 400 kV voltage levels to the EPGL till 26.10.2011.
- (i) Pursuant to the joint meeting dated 29.08.2011 Gujarat Transco took the efforts to maintain the Transmission and Interconnection Facility voltage at the agreeable 425 kV level at the Interconnection Point end. Thereafter, the EPGL in consultation with Gujarat Transco and PGVCL connected to the Transmission and Interconnection Facility and back energized the switchyard at 400 kV levels on 26.10.2011 (actual Connection Date).

11.6 that in light of the above, it is most respectfully submitted that no Liquidated Damages are payable by the EPGL. GUVNL had by 03.10.2012 recovered an amount of Rs. 221.25 Crores towards its alleged claim of Liquidated Damages by arbitrarily adjusting the said amounts from the Invoices raised by the EPGL for supply of power to GUVNL. However, pursuant to the Interim Order dated 31.01.2013, GUVNL had refunded an amount of Rs. 199,12,50,000/- to the EPGL on 11.03.2013. Further as per the Interim Order, GUVNL recovered/

deducted 10% of the sum of Rs. 19,91,25,000/- per month from the provisional Invoices raised by the EPGL from the month of March, 2013. In total GUVNL made seven such deductions amounting to Rs. 139,38,75,000/-. As a result the total Liquidated Damages recovered by GUVNL from the EPGL is Rs. 161,51,25,000/-. As per the Impugned Order the EPGL is liable to pay Liquidated Damages of Rs. 40,50,00,000/-. Therefore in terms of the Impugned Order, and without prejudice to the EPGL's submissions that it is not liable to pay Liquidated Damages, GUVNL is liable to refund the Liquidated Damages of Rs. 121,01,25,000/-. As demonstrated above, GUVNL, in addition is also liable to pay an amount of Rs. 73,25,93,444/- on account of Late Payment Surcharge and Rebate unlawfully adjusted by GUVNL which Ld. Gujarat Commission has failed to appreciate/ address in the Impugned Order. As per the Undertaking dated 31.03.2014 submitted by the EPGL, GUVNL on 04.04.2014 refunded an amount of Rs. 60,00,00,000/- to the EPGL pending the decision of this Tribunal in the said Appeal and subject to its final decision therein. Further, the EPGL once again provided an Undertaking dated 06.09.2014 to GUVNL refunding an amount of Rs. 60,00,00,000/- pending the decision of this Tribunal in the said Appeal and subject to its final decision therein. Therefore, GUVNL is liable to refund an amount of Rs. 1,01,25,000/- on account of Liquidated Damages and a further pay a sum of Rs. 73,25,93,444/- as Late Payment Surcharge and unlawful adjustments

on account of Rebate. Therefore, GUVNL in total is liable to refund a sum of Rs. 74,27,18,444/- to the Appellant. The above claim of the EPGL is without prejudice to its submissions that no Liquidated Damages are payable by the EPGL. The claim of the EPGL is subject to the outcome of the present proceedings.

12. **Per Contra**, the following are the submissions made by the Counsel of the GUVNL/GETCO:

12.1 that the State Commission erred in holding that the functional specification as defined in the Power Purchase Agreement and contained in Schedule 3 of the Power Purchase Agreement, *inter alia*, providing for condition at the Interconnection Point as furnished by Essar Power vide letter dated 7.10.2008 were to be maintained not only by Essar Power but also by GETCO. The above conclusion reached by the State Commission is patently erroneous and contrary to the records in as much as –

- i) Article 4.1 of the PPA deals with the obligation of the Generating Company i.e. Essar Power to maintain the power station synchronised functional specification. It was for GUVNL/GETCO to provide the functional specification.
- ii) GUVNL had provided such functional specifications vide its letter dated 7.10.2008, in accordance with the terms of the bidding. Such functional specification to be given by Essar Power is to indicate the parameters at which the Power Plant would operate.
- iii) All the functional specifications are related to the power station and not to the grid system. The functional specifications are therefore with reference to operation, maintenance and dispatch of any unit and power station.

- iv) The functional specification has nothing to do with the specification at which the grid system operates. The Essar Power is required to adjust the voltage level of the various equipments more particularly the generation voltage at the generating station to the grid voltage level and not otherwise.
- v) If the functional specification is to bind GETCO also (which is not even a party to the PPA) the same would not have been left to be decided by Essar Power. The transmission system operated and maintained by GETCO in an integrated manner the specifications would have been provided generally by regulations.
- vi) The State Commission has clearly recorded the findings of the fact in Para 15.5.3 that it was the obligation of Essar Power to plan and install the bus reactor at the time of the approval of Switchyard drawings;
- vii) In Para 15.5.4 the State Commission had accepted the position that Essar Power could have achieved the synchronisation to the transmission system even before 26.10.2011 on which date also there was high voltage and, therefore, did not accept the contention of Essar Power that because of high voltage synchronisation did not take place.

12.2 that the State Commission erred in holding that the high voltage in the transmission system/grid reached the level of 438 KV accepting the bald allegation made by EPGL and without considering other material on record. In this regard GETCO had filed the status of the voltage on the 400 KV Line vide affidavit dated 19.1.2013 for the entire period from 1.4.2011 till 17.1.2013 clearly showing that the voltage never reached 438 KV as alleged by EPGL. The voltage level was in the region less than 432 KV.

12.3 that the State Commission has failed to appreciate that the high voltage level at Hadala substation was there at all relevant times including on 23.11.2011 when Essar Power sought to achieve and achieved the

synchronization. The synchronization was, in fact, achieved at a voltage level of 423 KV maximum and 413 KV minimum on 23.11.2011. The voltage level prevalent at the Switchyard of Essar Power generating station before synchronisation was admittedly 420 KV and after synchronisation 423 KV, Essar Power had duly synchronized the generating station at the above voltage level and, therefore, there is no basis for Essar Power to allege that the commissioning of the power plant could not be achieved from the period from 25.11.2011 onwards on account of high voltage.

12.4 that the State Commission has failed to appreciate that the commissioning of the power plant could be done only when the construction was complete and all equipments of the power plant were ready for operation. Admittedly, the power plant was not ready for commissioning even on 23.11.2011 as accepted by the State Commission in the impugned Order.

12.5 that the State Commission has failed to appreciate that non-achievement of the commercial operation of the power plant by Essar Power by 23.11.2011 and the delay in achievement of the commercial operation till 1.4.2012 for Unit No. 1 and 15.6.2012 for Unit No. 2 was solely on account of the factors and reasons attributable to Essar Power and not for any reason attributable to the GUVNL/GETCO. The above non-achievement on the part of Essar Power was not in any manner on account of any high voltage level prevalent in the transmission system

or grid but for the failure on the part of Essar Power to complete the construction activity and establishment of various crucial equipment as admitted by Essar Power and as found during site inspection, evidence of which was available on record.

12.6 that the State Commission erred in not appreciating the submissions of the GUVNL on the aspect of Scheduled Connection Date. The State Commission has failed to appreciate that in terms of the provisions of the Power Purchase Agreement (PPA), when Essar Power is commissioning the power plant for Commercial operation, the Scheduled Commissioning is with reference to the date on which Essar Power proposes to actually commission the generating unit and not with reference to the Scheduled Commercial Operation Date. The Scheduled Connection Date and the Scheduled Synchronisation Date are not with reference to the effective date but with reference to the Commissioning Date. Accordingly, the provisions of the Power Purchase Agreement are clear namely that the obligation of the Procurer i.e. the GUVNL is to provide the connectivity to the power project through the evacuation / transmission line with reference to the date which the Essar Power decides the Commissioning Date. The State Commission has failed to consider the above salient aspect of the Power Purchase Agreement.

12.7 that the State Commission erred in considering the facts and circumstances of the case in the light of the provisions of the Power

Purchase Agreement as creating a right for the EPGL to postpone the completion of the project on account on non-availability of such Interconnection and Transmission facilities holding that to be the incidence of reciprocal promise. The State Commission has failed to appreciate that in the facts and circumstances of the case where the construction activity and completion of the power plant is not dependent on the availability of Interconnection and Transmission facilities, the same cannot be construed as non-fulfilment of any reciprocal promise on the part of the Appellant or otherwise pre-condition for completion of the project.

12.8 that the State Commission has failed to appreciate that Essar Power as a generator should be ready to commission its unit at a particular date and with reference to that date, the evacuation facilities should be ready. If Essar Power is not in a position to commission the power plant by the SCOD, the evacuation facilities need not be ready 210 days before the Scheduled COD.

12.9 that the State Commission has failed to appreciate that making the power plant ready for commissioning is not dependent on the evacuation line being ready and the construction power is not to be provided through the evacuation line. Accordingly, it is not open to Essar Power to contend that until the evacuation facilities are established, Essar Power is not required to complete the construction or that it can claim extension for the Scheduled Commercial Operation

Date on the ground that the evacuation facilities have not been established. It is in this context that the advance preliminary synchronization notice as required to be given as provided in Article 6.1.1 is of relevance.

12.10 that the State Commission failed to appreciate that GUVNL had agreed not to claim liquidated damages for the delay in the commercial operation of Units 1 and 2 of the power plant from 26.02.2011 and 26.08.2011 respectively till 22.11.2011 by way of accommodation because the Scheduled Connection Date was achieved only on 25.04.2011 and accordingly the 210 days expired on 22.11.2011. The above cannot be interpreted against GUVNL to hold that GUVNL has to arrange the inter connection facility without the incidence of high voltage. The Liquidated damages had been claimed by GUVNL only for the delay in COD after 22.11.2011.

12.11 that the State Commission failed to appreciate that the scheduled connection date is only with reference to the first unit and not separately with reference to the other units or respective units. The determination of scheduled commercial operation date with regard to the second generating unit of the power project working backwards from the scheduled connection date needs to be 210 days only and not 270 days as held by the State Commission.

12.12 that the State Commission has proceeded on the erroneous basis that by letter dated 2.8.2011 GETCO communicated to all concerned regarding Commercial Operation of the 400 KV Vadinar–Hadala line only on 2.8.2011 even though GETCO claims in that very same letter that the line was charged on 25.04.2011. The State Commission failed to appreciate that the letter dated 2.8.2011 written by GETCO was a normal communication of the line having been duly charged on 25.4.2011 itself and it was not a date of declaration of commercial operation of the line by GETCO. The wordings of the letter itself clearly show that GETCO is referring to the charging of the line on 25.04.2011. There is nothing in the letter to even remotely infer that despite charging the line on 25.04.2011 GETCO had not wanted the commercial operation because of any problem.

12.13 that the State Commission erred in holding that GETCO declared Commercial Operation of the line after a lapse of more than three months from 25.04.2011 because of interruptions, tripping and other problems in the line. The interruptions, tripping etc. alleged had nothing to do with the line being not commercially available but because of the line being not used on account of the generating units of Essar Power being not ready for injection of power into the system.

12.14 that the State Commission failed to appreciate the settled principle that tariff can be allowed only from commercial operation and not prior thereto. The fact that GETCO received the tariff for the Vadinar-Hadala

line from 25.04.2011 and the same was granted by the State Commission itself shows that the line was ready on 25.04.2011.

### 13. **Our Discussion and Conclusion on these issues**

We have cited above the facts of the case, the issue involved and contention of the rival parties in the upper part of the Judgment, hence, we directly proceed to our own discussion and conclusion on these issues.

- 13.1 The contention of the M/s. Essar Power Gujarat Limited (EPGL), (Appeal No. 273 of 2014) is that the Respondents (GUVNL/GETCO) completed Transmission Line/Evacuation Line on 25.04.2011 but it is not in usable condition due to high voltage on the generation end of the Transmission Line. Hence, EPGL could not able to synchronize their generating unit with the grid and hence EPGL is not liable for the payment of liquidated damages. Hence, the LD amounts recovered by way of adjusting the invoice of infirm power injected into the Respondent's grid, has to be returned and the balance payment withheld towards power injected to the grid has to be returned by GUVNL/GETCO. .

Whereas the Respondents, GUVNL and GETCO of Appeal No. 273 of 2014 (Appellants of Appeal No. 85 of 2014) contested that the Transmission Line is constructed and idle charged on 25.04.2011 but the Appellant is not ready to synchronize the unit due to delay in

execution of the project and not due to the fault of GUVNL. Hence, Essar Power Gujarat Limited (EPGL) is liable to pay the LD charges.

Further, there are divergent views regarding the date of completion of evacuation line under usable condition between the Appellant, EPGL, Respondent No. 1, GERC and Respondent No. 2 and 3, GUVNL/GETCO. The GUVNL/GETCO, submitted that the evacuation line was completed on 25.04.2011.

The Appellant/Petitioner, EPGL stated that the evacuation line was completed on 25.04.2011, but was not in usable condition, and the line is in usable condition on 26.10.2011 onwards.

The State Commission considered the completion date of the transmission line as 02.08.2011, as per the letter of GUVNL/GETCO.

The State Commission in the Impugned Order dated 08.08.2013 considered that SCOD of Unit-1 and Unit-2 would be respectively from 210 days and 270 days from 2<sup>nd</sup> August, 2011.

13.2 To resolve the dispute between Appellant/Petitioner, EPGL and Respondents, GUVNL/GETCO, let us examine the relevant articles of the PPA entered between the parties GUVNL and Essar Power Gujarat Limited (EPGL) on 26.02.2007.

***Article 4.1: The Seller's obligation to build, own and operate the Project***

***Article 4.1.1: Subject to the terms and conditions of the Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:***

- a) *obtaining and maintaining in full force and effect all Consents required by it pursuant to this Agreement and Indian Law;*
- b) *executing the Project in a timely manner so as to enable achievement of COD of each of the Units and the Contracted Capacity as a whole, no later than its Scheduled Commercial Operations Date and such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and dispatch requirements throughout the term of this Agreement but under no event earlier than 48 months from Effective Date;*
- c) *owning the Project throughout the term of this Agreement free and clear of encumbrances, except those expressly permitted by Article 16;*
- d) *procure the requirements of electricity at the Project (including construction, commissioning and start-up power) and to meet in a timely manner all formalities for getting such as supply of electricity;*
- e) *shall be responsible for informing about the project to the CTU/STU and procuring the Interconnection and Transmission Facilities up to the Delivery Point to enable the Power Station to be connected to the Grid System of the CTU/STU not later than the Scheduled Connection Date and to facilitate transmission of power from the Power Station to Delivery Point;*
- f) *fulfilling all other obligations undertaken by him under this Agreement.*

#### **Article 4.2: Procurer's obligation**

*Subject to the terms and conditions of this Agreement, the Procurer:*

- a) *Shall be responsible for procuring the Interconnection and Transmission Facilities to enable the evacuation of Contracted Capacity from the Delivery Point to the Procurer's customers network not later than the Scheduled Connection Date;*
- b) *shall be responsible for payment of the Transmission Charges and SLDC charges beyond the Delivery Point;*

- c) shall make all reasonable arrangements for the evacuation of the Infirm Power from the Power Station; subject to such power being made available by the Seller at the Delivery Point and*
- d) shall be responsible for fulfilling obligations undertaken under this Agreement.*

13.3 According to Article 4.1 of the PPA, the seller, EPGL has to execute the project in a timely manner so far as to enable achievement of COD of each of the units. Similarly, the procurer has to provide the facility of interconnection and transmission facility to enable the evacuation of Contracted Capacity from the generation switchyard to the procurer's Grid sub-station not later than the Scheduled Connection Date.

13.4 According to PPA, the scheduled connection date means date falling maximum 30 days before the scheduled synchronization date of Unit-1. Further, scheduled synchronization date means in relation to unit-1, the date which shall be maximum of 180 days prior to scheduled commissioning of the expected unit.

13.5 According to PPA, the EPGL has to complete erection of Unit-1, within 48 months from the effective date and for the Unit-2, 54 months from the effective date. Here, the effective date means, the date of signing of PPA by both the parties i.e. 26.02.2007. Accordingly, the Unit-1 had to be commissioned by 25.02.2011 and the Unit-2 by 26.08.2011. Further, as per the PPA, the GUVNL/GETCO had to complete their evacuation line 210 days before scheduled commissioning of the first unit.

- 13.6 We have gone through the submissions and noticed that the evacuation line was completed on 25.04.2011. The same was examined with respect to Log Book Records of 400 KV Hadala Sub-Station and there is no dispute on this date i.e. 25.04.2011. We have examined the Chief Electrical Inspector's Report dated 25.04.2011 and found that the Chief Electrical Inspector directed the GUVNL/GETCO to charge the line on 25.04.2011.
- 13.7 Accordingly, the line was charged on 25.04.2011, Circuit-1 of 400 KV Vadinar-Hadala line at 21:20 hrs. and Circuit-II at 21:43 hours and the bus voltage as per the Log Book Record at 400 KV Hadala Sub-Station is 416 KV before charging line 1 and 419 KV after charging of line 1. Similarly, 420 KV before charging of line 2 and 424 KV after charging of line 2 of 400 KV Vadinar-Hadala lines.
- 13.8 The EPGL has contested though the line was charged on 25.04.2011 but the voltage on EPGL end of the transmission line is around 438 KV. In view of the high voltage, the matter was reported to SLDC by the EPGL and the SLDC directed to trip the line and accordingly the line was tripped at 400 KV Hadala Sub-station.
- 13.9 We have gone through the logbook data submitted by the Counsel for the GUVNL, Mr. M.G. Ramachandran and the observations are as under:

### Logbook details of 400 KV Hadala Sub-station

Sl. No.	Date	Logbook remarks as per Page 7 & 8
1.	25.04.2011 at 2120 hrs.	400 kv Hadala-Vadinar Line-1 charged from Hadala end and bus voltages are 416 kv to 420 kv.
	25.04.2011 at 2143 hrs.	400 kv Hadala-Vadinar Line-2, charged from Hadala end and bus voltages are 420 kv to 424 kv.
2.	26.04.2011 Page-7	400 kv Hadala-Vadinar Line 1&2 tripped at 0020 hrs and type interruption is H/T. Bus voltages Max. 426 KV, Minimum 415 kv.
	26.04.2011 Page-8	<ol style="list-style-type: none"> <li>1. 400 kv Hadala-vadinar line No-1, tripped from 0020 hrs to 1208 hrs from Hadala end (LD/04/985)</li> <li>2. 400 kv Hadala-Vadinar line No-II tripped from 0020 hrs to 1220 hrs from Hadala end. (LD/04/1986)</li> </ol>
3.	27.04.2011	<p>Bus voltages at Hadala sub-station – 422 kv (Max.) and 415 kv. (Min.)</p> <ol style="list-style-type: none"> <li>1. 400 kv. Hadala-Vadinar line 1 &amp; 2 tripped from 1309 hrs. to 2235 hrs. on 26.04.2011 with an indication H/T</li> <li>2. At 2235 hrs 400 kv Hadala-Vadinar Line No. 1 charged from Hadala end, informed to SLDC</li> <li>3. At 2400 hrs, 400 kv Bus reactors on position.</li> </ol>
4.	28.04.2011	<p>Bus voltages at Hadala sub-station, 430 kv (Max.) and 422 kv (Min.).</p> <ol style="list-style-type: none"> <li>1. 400 kv, Hadala-Vadinar line 1, tripped at 0825 hrs on H/T indication and continued informed to SLDC</li> <li>2. 400 kv, Hadala-Vadinar line 2, tripped at 1309 hrs from 26.04.2011 and continued.</li> </ol>

13.10 We have also gone through the data submitted by the Counsel of the GUVNL regarding the bus voltages at 400 KV Hadala Sub-station from 01.04.2011 to 17.01.2013. The maximum bus voltage at Hadala sub-

station is varying from 420 KV to 430 KV and minimum bus-voltage is varying from 392 KV to 415 KV.

The high-voltage on the other end of the 400 KV Hadala-Vadinar line is due to 'Ferranti effect', i.e. when the transmission line is idle charged without load and if it is a radial line, it generates reactive power (MVAR) and a part of the generated reactive power will reflect on to the sending end bus and the remaining generated MVAR causes high voltage on the receiving end. Thus, the following two effects happened when a 400 KV line is idle charged.

- i) Rise in voltage at sending end (400 KV Hadala Sub-Station) due to injection of (capacitive) reactive power to the Hadala Sub Station 400 KV bus; and
- ii) Rise in voltage at receiving end of the line (EPGL side) due to 'Ferranti effect'.

As seen from the observations, the bus voltage at the 400 KV Hadala Sub-Station, raised after charging the line compared to before charging of the line. Further, after charging the line, the bus voltage prevailing at Hadala Sub-Station will be magnified/increased at the receiving end due to 'Ferranti effect'. Normally, if the voltage at sending end is 420 KV (after charging the idle line), then at the receiving end will be about 425 KV and it cannot be 438 KV as alleged by EPGL. The bus voltages vary with respect to fault levels of 400 KV Hadala Sub-Station.

As per the instructions of SLDC, the line was tripped at 400 KV Hadala Sub-station and kept idle without charging of the line from 26.04.2011 onwards as per the logbook records.

During technical validation/clarification on 04.05.2016 & 23.05.2016, the officials of the GETCO submitted when the line was kept switched off by the GUVNL, the conductor of the line was stolen on 02.06.2011, which ultimately led to the collapse of the transmission line tower. The tower was re-erected and after stringing of the line, the line was charged with 220 KV potential to avoid further theft of conductor on 02.07.2011.

13.11 We have gone through the submissions, the following facts are established with respect to readiness of the EPGL plant as on 25.04.2011.

- a) *The Appellant conducted a study report on power evacuation & system study for proposed 1200 MW coal power project through Power Research and Developments Consultants (P) Ltd. And they submitted a report during September, 2008. The incriminating part of the Report is quoted below:*

*Based on the studies, in order to regulate the voltage at Essar end before synchronization of the generator, it is recommended to install 50 MVAR (rated for 420 KV) shunt reactor in the bus. If Hadala bus voltage is controlled to be around 1.03 pu, no bus reactor is required at 400 KV Essar end. Studies have been carried out for different fault levels at 400 KV Hadala end.*

- b) *The Chief Electrical Inspector to Government of Gujarat made initial inspection on 26.04.2011, electrical installation of EPGL, the following equipment and permitted to energize the transformers and the associated equipment shown in the approval letter.*

*Initial inspection of electrical installations of 3 x 250 MVA 1-Ø 420/3/20KV Generator Transformers, 2x45 MVA 20/11.5 KV Unit Transformers, 1x70/45/25 MVA 20/11.5/34.5 KV station transformer, 2x16 MVA 20/3.4 KV Unit Auxiliary Transformers along with associated equipments at M/s Essar Power Gujarat Limited, 44 KM Stone, Jamnagar – Okha Highway, P.O. Khambhaliya, Dist: Jamnagar has been carried out by undersigned on dated 21.04.2011.*

As per this, a part of the equipment of the Appellant, were ready for charging. This clearly indicates the important equipment like turbine generator etc. are not ready as on 26.04.2011.

- c) According to Project & Planning Department, Vidyut Bhawan, Vadodara, the Executive Director (Com.) vide Letter No. PP/SE/EE(P1)/GUVNL-ESSAR/998/27.05.2011 intimated to Executive Director (Finance), that the following officers of GETCO were deputed, namely Shri P.B. Shah, S.E. (P&P), Shri R.N. Gangwani, SE to submit the status of construction, progress and project commissioning in respect of Essar Power Project at Salaya on 23.05.2011. Accordingly, the inspection team submitted a project Status Report of 2x600 MW Essar Salaya Project. The relevant part of the report is cited below:

**Status of critical activity to achieve COD of Unit#1 of ESSAR Salaya project (as proposed by Essar Power)**

<b>Sr. No.</b>	<b>Description</b>	<b>Original Date</b>	<b>Revised Date</b>	<b>Delay</b>
1.	Boiler hydro test	2 <sup>nd</sup> week Dec. 2010	April, 2011	4 months
2.	Boiler Lit-up	30.01.2011	15.06.2011	4.5 months
3.	Steam Blowing	12.02.2011	17.06.2011	4 months
4.	Turbine rolling	24.02.2011	15.07.2011	4.5 months
5.	Commissioning	28.02.2011	20.07.2011	4.5 months
6.	COD		25.07.2011	4.5 months

**Remarks**

Looking to the above status, we are of the opinion that M/s. ESSAR can achieve the COD by Dec'2011 subject to the availability of 400 KV power within permissible variation for the back charging of the switchyard & availability of commissioning power to the various systems & equipments and sufficient quantity of imported coal at their stock yard to run 600 MW unit.

**Second unit of 600 MW – COD can be achieved by March, 2012.**

According to this report, the project was not ready as on 15.04.2011. The inspection team opined that the COD of first unit of ESSAR could be achieved by December, 2011.

- d) The 400 KV Hadala-Vadinar line was back charged on 26.10.2011 for testing of the equipment of EPGL.

- e) *The Chief Electrical Inspector to Government of Gujarat issued a certificate on 08.11.2011, and permission was accorded to charge the power plant, transformer and H.T. motors along with the associated equipment shown in the report.*

*According to this report, it is proved that the power plant was ready on 08.11.2011 for charging.*

- f) *Again on 07.02.2011, Shri P.B. Shah, A.C.E. was deputed to ascertain the status of Essar Power Project at Salaya and the details of project status of 2x600 MW as on 07.02.2011 is as under:*

1. *Unit was synchronized on oil on 24.11.2011 and generated 126 MW with 3 Nos. Of coal mills into service.*

*Thereafter, a fault was observed in the generator rotor equipment on 10.12.2011. Hence, the machine was stopped to attend the same.*

*It took approximately 1½ to 2 months to rectify the defect, i.e. now it is ready for operation on 7.2.12:*

*In the meantime, a fault occurred in the CT of incoming line from Hadala to Essar, Vadinar in the switchyard and CT found completely damaged and require replacement by new one. It may take 1 week for replacing the damaged CT and put that line into service. After that further commissioning activity for the balance equipments and generating the full load at the rated capacity can be achieved.*

- **Balance Pending Work:**

- a) *Testing and commissioning of coal mills [3 No.s]*
- b) *Chimney – Elevator and other finishing work pending*
- c) *Ash handling system – work is in progress*

**Remarks**

*Looking to the above status, it seems that COD of Unit 1 could be achieved by March end/ 15<sup>th</sup> April, 2012.*

**Unit-2 X 600 MW:**

**Main Plant Equipment:**

- a) **Boiler**

- Boiler insulation work is in progress.
- ID fan and duct, ESP to chimney, PA fan and FD fan, etc. Insulation work is in progress
- Seal air fan work is in progress.
- Testing and commissioning of coal mills [ 6 Nos.] work is in progress.

**b) Turbine**

- Piping work is in progress
- Box up work is in progress
- BFP work is in progress

**c) CW System:**

- CW pump motor [2 Nos] erection, testing and commissioning pending.

**d) Main Control Room**

- DDC panel and its associated operating system – laying of cables and its termination work is in progress.

**\* Chimney:**

Commissioning pending –elevator to be commissioned.

**\* Coal Handling Plant:**

*This plant is based on imported coal and the coal to be imported from Indonesia and unloaded at Salaya jetty, from Salaya jetty which is approximately 13 km from the plant, the coal is required to be transported from Salaya jetty to plant by means conveyor belts. However, as informed by M/s. Essar, the approval of MoEF is pending for laying of conveyor belts from Salaya jetty to land point. Hence, the work of coal handling plant in that area has not started yet and from land point to plant, land acquisition also pending.*

*In context of above, M/s. Essar transported the imported coal from Okha and Bedi Port to plant by means of dumpers and trucks. And total quantity of Two Lacs MT [Appr.] stacked in the stock yard.*

*Approximately 7000 MT coal is required per unit to generate 600 MW per unit per day.*

\* **Sea Water Pump House:**

*The construction work of sea water pump house for cooling water requirement at Salaya yet not started because of pending MoEF clearance.*

*However, M/s. Essar have made alternate arrangement from Narmada canal for cooling water as well as plant water requirement*

**Remarks**

*Looking to the above status, I am of the opinion that M/s. Essar can achieve the synchronization of Unit 2x600 MW by April 2012 and COD by June 2012.*

*As per the report, Unit-1 is ready for operation after attending the defect of rotor of the generator on 07.02.2012. the inspecting officer felt synchronization of unit can be achieved by April, 2012.*

- g) The contention of the Petitioner is that the Respondent, GETCO while approving the drawings of the switchyard, GETCO has not suggested for installation of bus reactor to deal with high voltage. Further, the Respondent has not maintained the voltages as per Grid Code i.e.  $\pm 5\%$  of 400 KV i.e. 380 KV to 420 KV*
- h) To resolve the high voltage problem, a meeting was held on 29.08.2011 between the officials of the GETCO/GUVNL, EPGL, SLDC and equipment suppliers, AREVA. In the meeting, the original equipment manufacturer, AREVA clarified that the Petitioner (EPGL), could connect to transmission and interconnection facilities upto 425 KV.*
- i) During the technical clarification, the technical expert, EPGL has informed on 25.04.2011, when the 400 KV Hadala-Vadinar line was charged, measured the voltage at Essar end of the transmission line near CVT and noticed high voltage.*
- j) The Petitioner, EPGL submitted that the transmission line was back charged on 26.10.2011 and accordingly, the Petitioner is claiming 26.10.2011 as the actual connection date.*

*As seen from the above, the unit is not ready for synchronization as on 08.11.2011.*

13.12 After going through the above analysis, it is clear that the evacuation line was completed and charged on 25.04.2011. The line was rectified after erecting the fallen transmission tower and the line was charged at 220 KV potential to avoid theft of conductor on 02.07.2011, but the EPGL was not ready with generating plant to synchronize with the grid system of GETCO.

As seen from the above, the Chief Electrical Inspector gave clearance to charge Generator turbine and other H.V. Motors etc. on 08.11.2011. Thus, the plant was not ready upto 08.11.2011. Further, during the meeting on 29.08.2011, the equipment manufacturers had clarified that the EPGL could connect the generating system up to 425 KV. Even after this decision, the transmission line was back charged from Hadala end on 26.10.2011 after a period of two months.

13.13 It is also pertinent to mention here that the study conducted by the consultants of the EPGL stressed for erection of 50 MVAR shunt capacitor at the generator switchyard, if the Hadala sub-station end voltage is not controlled to be around 1.03 pu. The study report clearly specifies that the EPGL has to install 50 MVAR bus/shunt reactors before synchronization in the EPGL's switchyard, if the bus voltage is more than 1.03 pu i.e.  $400 \times 1.03 \text{ pu} = 412 \text{ KV}$ . The bus voltage at the time of charging of the line is around 415 KV to 424 KV. Hence, as per

the recommendation of the Study Report, EPGL is bound to install 50 MVAR shunt capacitors, but EPGL failed to take any steps for installation of shunt reactors.

Further, the EPGL informed to GETCO in their letter dated 30.09.2011 that the plant works were in an advance stage of commissioning of first unit.

13.14 The Status Report of the project based on the inspection by officials of Gujarat State Electricity Corporation Ltd. On 07.02.2012 (even after the date of synchronization) listed various activities pending in regard to both the units. The above aspects were neither challenged nor objected by the EPGL. The Chief Electrical Inspector permitted to charge the generator turbine, H.V. Motor, and other associated equipments on 08.11.2011.

Finally, Unit-1 was synchronized on oil on 24.11.2011 with 3 nos. Coal mills into service, but due to rotor fault on 10.12.2011, the machine was stopped for rectification.

Thus, it is clear that the completion of the project got delayed and the contention of EPGL that the plant was not synchronized due to non-availability of transmission/evacuation line is not tenable.

13.15 From the submissions, we have noticed that for the first time on 01.11.2011, the EPGL communicated with regard to the power project being ready for synchronization. Consequently, the office of the Chief

Electrical Inspector undertook the inspection of the electrical installations of Unit-1 on 08.11.2011 and gave permission to energize the power plant, transformer and the HT motors, etc. And the EPGL had taken subsequent steps after 08.11.2011 for synchronization of Unit-1.

13.16 The EPGL alleged that GETCO had approved the drawings of the power plant and switchyard but not suggested for installation of switchable bus reactors to deal with high voltage.

We cannot accept this contention, the EPGL appointed a Consultant for system study and power evacuation for proposed 1200 MW power plant during 2008. The EPGL had to take all suitable measures to protect their equipment, installation of bus reactors as one of the important suggestions. But it failed to take necessary steps. The consultant knew that the sending end voltage would be lower than receiving end voltage, when the line was idly charged, moreover the length of the line was also around 113 kms. The Appellant has not taken preventive steps to meet the high voltage problem etc. regarding installation of 50 MVAR capacitor bank even though a detailed system study was conducted in advance.

Further, finally the unit was synchronized without installation of bus reactors on 24.11.2011 and there was no allegation of any adverse impact on the EPGL on account of system voltage.

13.17 The contention of the EPGL regarding claim that the transmission facility in usable condition was only from 26.10.2011 has no basis. On 26.10.2011, the supply was back charged from 400 KV Hadala sub-station for testing of equipments and on 08.11.2011, Chief Electrical Inspector inspected the plant and gave clearance for charging of generator rotor turbine and other associated equipments. Since the Appellant required 20 MVA power demand for testing of all the equipment, supply was back charged from 400 KV Hadala Sub-station. Further, EPGL had connection at 33 KV level to meet their initial demand of 7.5 MVA through alternate source.

During technical clarification, the GETCO officials submitted that the transmission line of GETCO/GUVNL was ready from 02.07.2011 onwards after rectification of the fallen tower.

13.18 It is established fact that after initial charging of the line on 25.04.2011, the line tripped on high voltage indications. At that time, no load was connected on the generator end of the transmission line and the line was kept open as per the instructions of SLDC. Further, the EPGL side was not ready at that time and there was no point in keeping the line in charged position, even if it was charged, it would trip.

Hence, the line was kept idle without charging, unfortunately, conductor was stolen twice in the month of June, 2011 and a transmission tower had fallen down. Subsequently, the line was rectified and charged at

lower voltage i.e. at 220 KV because if the line was charged at 400 KV, it would again trip due to 'Ferranti Effect'. Hence, to avoid theft of conductor, the transmission line was charged at 220 KV, it does not mean that the transmission/evacuation line was not in usable condition.

In view of the above, we do not find any reason to consider, the date of drawl of power for testing of equipment i.e. 26.10.2011 can be treated as the evacuation line was available for use.

13.19 The next issue is whether the line was in usable condition from 02.08.2011 onwards as considered by the State Commission as per the Communications given by GETCO.

The Letter dated 02.08.2011 by GETCO only declaration of commercial operation of the transmission assets. The content of the letter is that the 400 KV Vadinar-Hadala D/C line along with bays at both ends was charged on 25.04.2011. It was only intimation to all that the Transmission line was charged on 25.04.2011 and it was operational for all intra-state beneficiaries/discoms/utilities, etc. This does not mean that the line was not in service from 25.04.2011 onwards.

In our opinion, the State Commission failed to appreciate that the letter dated 02.08.2011 written by GETCO was a normal communication.

13.20 After going through all the above submissions and analysis we consider the date of rectification of line after replacement of stolen conductor and

erection of fallen tower i.e. 02.07.2011 as the date of transmission line availability, even though the transmission line was originally charged on 25.04.2011, since the line was kept idle as per instructions of SLDC from 26.04.2011 onwards and the line was charged after rectification on 02.07.2011 as per the officials of GETCO during technical clarification time.

13.21 Further, the contention of the EPGL that the transmission and evacuation facility was not only in usable but in fact was not available at 400 KV voltage levels to the EPGL till 26.10.2011.

We have observed from the facts that the line after the incident of theft of conductor in June, 2011, the GETCO rectified the line and charged at lesser voltage i.e. at 220 KV upto 26.10.2011 to avoid further theft of conductor and not due to high-voltage prevailing in the system. On 26.10.2011 also to meet the EPGL's demand for 20 MVA temporary supply, GUVNL released the supply through 400 KV Hadala-Vadinar. The EPGL did not contest high voltage problem on the day of back charging of the line.

The voltage level of generator along with various equipments can always be varied to bring it in consonance with the grid system voltage level for the purpose of synchronization. Once the synchronization occurs the grid system and the generator along with other equipments operate synchronously. Even otherwise, EPGL could have installed Bus

reactors in the switchyard of the generating station in order to control the voltage level and prevent damages to the equipment. It is the responsibility of the generating station to decide whether or not to install Bus reactor based on the advice of equipment manufacturer or EPC contractor. The Study Report submitted by the consultant of the EPGL has suggested in the Report for installation of 50 MVAR shunt reactors in the switchyard of the EPGL but the same was not followed by it. Thus, the contention of the EPGL regarding high-voltage is not tenable.

13.22 Let us examine relevant clauses of the liquidated damages for the delay for providing contracted capacity as per the PPA entered between parties on 26<sup>th</sup> day of February, 2007.

**Clause 4.6** *Liquidated damages for delay in providing contracted capacity*

**Clause 4.6.1** *If any unit does not achieve COD by its Scheduled Commercial Operation Date other than for the reasons specified in Article 4.5.1, the Seller shall pay to the Procurer liquidated damages for such delay in achieving COD. The sum total of the liquidated damages payable by the seller to the procurer for such delayed COD shall be calculated as follows:*

$$SLDb = [CCun \times dn \times DR1], \text{ if } dn \leq 60$$

$$SLDb = [CCun \times 60 \times DR1] + [CCun \times (dn - 60) \times DR2], \text{ if } dn > 60$$

Where:

- a) "SLDb" are the liquidated damages payable by the seller during the period beginning with the day from the Scheduled Commercial Operation Date of a Unit up to and including the day on which Unit actually achieves COD;
- b) "CCun" is the Contracted Capacity of Unit "n";
- c) "DR1" is Rs. Ten Thousand (10,000) of damages per MW per day of delay in case "d" is less than 60 days and "DR2" is Rs. Fifteen

Thousand (15,000) of damages per MW per day of delay in case “d” is equal to or more than 60 days.

**Clause 4.6.2** *The Seller’s maximum liability under this Article 4.6 shall be limited to the amount of liquidated damages calculated in accordance with Article 4.6.1 for and up to twelve (12) months of delay for contracted capacity of the unit. Provided that in case of failure of the seller to achieve COD of the Unit even after expiry of twelve (12) months from its Scheduled Commercial Operation Date, the provisions of Article 14 shall apply.*

**Clause 4.6.3** *The Seller shall pay the liquidated damages calculated pursuant to Article 4.6.1 to the Procurer within ten (10) days of the earlier of:*

- a) *the date on which the Unit actually achieves COD; or*
- b) *the date of termination of this Agreement.*

*If the Seller falls to pay the amount of damages within the said period of ten (10) days, the Procurer shall be entitled to recover the said amount of the liquidated damages by invoking the Performance Guarantee. If the then existing Performance Guarantee is for an amount which is less than the amount of the liquidated damages payable by the Seller to the Procurer under this Article 4.6, then the Seller shall be liable to forthwith pay the balance amount.*

**Clause 4.6.4** *The Parties agree that the formula specified in Article 4.6.1 for calculation of liquidated damages payable by the Seller under this Article 4.6, read with Article 14 is a genuine and accurate pre-estimation of the actual loss that will be suffered by the Procurer in the event of Seller’s delay in achieving COD of a Unit by its Scheduled COD.*

**Clause 4.6.5** *If any Unit does not achieve COD by its Revised Scheduled COD other than for the reasons specified in Article 4.5.1, the Seller shall pay to the Procurer liquidated damages for the delay in achieving such COD. The sum total of the liquidated damages payable by the Seller to the Procurer for such delayed Commissioning shall be equivalent to the damages payable by the Procurer to the Gujarat STU for the period of delay, as per the terms of agreement proposed to be entered into by the procurer with Gujarat STU for establishment of transmission system. Provided however, the liquidated damages payable by the Seller to the Procurer in case of delay under this Article 4.6.5 shall not be more than twenty percent of liquidated damages computed in the manner mentioned in Article 4.6.1. Provided further, in case of delay beyond scheduled commercial operation date, the provisions of Article 4.6.1 to 4.6.4 will apply for such delay.*

13.23 According to the Clause 4.6 of PPA and after going through the submissions we find and hold that EPGL is liable to pay the liquidated damages.

The GETCO had completed the transmission line by 25.04.2011 due to theft of conductor; the transmission line was rectified and recharged on 02.07.2011. 400 KV Hadala-Vadinar transmission line was kept idle from 26.04.2011 onwards due to tripping of the line at high-voltage indications. The evacuation line was ready on 02.07.2011 but the generating station was not ready for synchronization upto 08.11.2011, and hence the EPGL is liable to pay the liquidated charges as per Article 4.6 of the PPA considering the date of transmission line in usable condition from 02.07.2011 onwards.

As per the PPA, the transmission line had to be made ready 210 days before synchronization of the generator with the grid system of the GETCO. Hence, 210 days had to be calculated from the date of charging of the line from 02.07.2011 onwards.

13.24 The next issue is whether any time delay has to be considered for commercial operation of Unit-2 after commercial operation date of Unit-1. In terms of the PPA, the Scheduled Commercial Operation of two units of the power project was 48 months and 52 months from the effective date. Thus, there is a difference of 6 months with reference to the effective date.

The State Commission in the Impugned Order dated 08.08.2013 analysed regarding liability of the EPGL to pay liquidated damages for Unit-2.

The EPGL vide its letter dated 30.06.2011 requested to consider the applicability of extension period by three months from the date of SCOD of Unit-1. With respect to its request for additional three months extension for achieving SCOD of Unit-2, GUVNL responded by its letter dated 15.06.2011 and is quoted here under:

*“....EPGL is required to undertake the construction / commissioning activities of both units so as to achieve the respective Scheduled Commercial Operation Dates and there being no interdependency of commissioning of one unit with other or pre-requisite that unit no.-1 having achieved commercial operation for unit no.-2 to achieve commercial operation. Hence, GUVNL having agreed to extend the Scheduled Commercial Operation Date for both unit no -1 and unit no -2 of Salaya Power Project up to 180 days from the date of commissioning (i.e. 25-04-2011) of 400 KV Vadinar –Hadala D/c line or actual commissioning of unit no.-1 and unit no.-2, whichever is earlier, without any financial implications on either side is adequate for EPGL to ensure the same.....”*

The EPGL's request was not considered by the GETCO. Further, as per the EPGL's letter dated 06.02.2012, the Petitioner himself had requested two months' time gap after commissioning of Unit-1 to commission Unit-2.

After analysing the submissions and Impugned Order dated 08.08.2013, we deem it proper to consider two months or 60 days gap between Unit-1 and Unit-2.

13.25 In view of the above conclusion, we hold the Appellant in Appeal No. 273 of 2014 and Respondent No. 2 in Appeal No. 85 of 2014 i.e. Essar Power Gujarat Ltd. is liable to pay liquidated damages for delay in commissioning both units 1 & 2 of its power plant at Salaya. For this SCODs of unit 1 & 2 would be respectively 210 days and 270 days from 2<sup>nd</sup> July, 2011.

The State Commission's Impugned Order is liable to be modified accordingly and GETCO/GUVNL should be directed to levy L.D. charges accordingly. Accordingly, the Appeal Nos. 85 of 2014 and 273 of 2014 are disposed of.

### **ORDER**

The Appellant/Petitioner, Essar Gujarat Power Ltd. is liable to pay the liquidated damages considering the availability of evacuation line from 02.07.2011 onwards, for this SCODs of Unit 1& 2 would be respectively 210 days and 270 days from 2<sup>nd</sup> July, 2011. The State Commission is directed to issue suitable instructions to GETCO/GUVNL to compute the LD charges accordingly. Further, if any excess amount is recovered from the EPGL by GETCO/GUVNL, the same has to be refunded to the Appellant. Accordingly, the Appeal Nos. 273 of 2014 and 85 of 2014 are disposed of.

No order as to costs.

Pronounced in the open Court on this **8<sup>th</sup> day of July, 2016.**

**(T. Munikrishnaiah)**  
**Technical Member**

**(Justice Surendra Kumar)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**