Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 65 of 2012

Dated : 5th November, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member
Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

M/s Shah Alloys Ltd.
A company incorporated under the
Prvosions of the Companies Act, 1956
Having its registered office at
5/1. Shreeji House, b/h M.J. Library,
Ashram Road, Ahmedabad – 380 009.
Represented through Vinod Kumar Shah,
Head Legal cum Company Secretary

…Appellant(s)

Versus

1. Gujarat Electricity Regulatory Commission
   1st Floor, Neptune Tower,
   Opposite Nehru Bridge,
   Ashram Road, Ahemdabad – 380 009.
   Gujarat – India.

2. Gujarat Energy Transmission Corporation Ltd.,
   Sardar Patel Vidyut Bhavan,
   Race Course,
   Vadodara – 390 007.

3. Madhya Gujarat Vij Company Ltd.,
   Sardar Patel Vidyut Bhavan,
   Race Course,
   Vadodara – 390 007.

4. Dakshin Gujarat Vij Company Ltd.,
   Nana Varachh Road,
   Near Gajjar Petrol Pump,
   Kapodra,
   Surat – 395 006.

5. Uttar Gujarat Vij Company Ltd.,
   Corporate Office-Vis Nagar Road,
   Mehsana-384 001.

6. Parchim Gujarat Vij Company Ltd.,
   Laxmi Nagar,
   Nana Mava Road,
   Rajkot – 360 004.

7. Chief Electrical Inspector
   Office of the Chief Electrical Inspector,
   Block No.18, 6th Floor, Udyog Bhavan,
   Gandhinagar-382 011.

…Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Ms. Shikha Ohri,
Mr. Anurag Sharma and
Ms. Surbhi Sharma

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan,
Ms. Swapna Seshadri and
Ms. Swagatika Sahoo for
R-2 to R-6
Mr. Satyabrata Panda for R-7

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The appeal presents a pure question of fact, namely, whether parallel operation charges on account of the alleged non--connectivity of the captive power plant of the appellant to the grid of the respondent

no.2, namely, Gujarat Energy Transmission Corporation Ltd., was still payable for the period in question by the appellant as has been answered against the appellant by the respondent no.1, namely, Gujarat Electricity Regulatory Commission in its order dated 18.01.2012

2. The appellant is a consumer of Uttar Gujarat Vij Company Ltd., respondent no.5 herein. It also has a furnace fuel oil based on captive power plant of 45 MW at Santej in order to meet its requirements of continuance and cost effective electricity. Initially, the appellant's captive power plant had 8 DG sets with a total capacity of 545000 KVA but 2 DG sets were subsequently discarded sometime in the year 2007 and remaining capacity was of 41100 KVA. On 08.09.2003, the Gujarat Electricity Board filed a petition being Petition no. 256 of 2003 in the matter of levy of parallel operation charges on captive power plants running in parallel with the grid. The Commission by order dated 25.06.2004 held that parallel operation charges was leviable under the Electricity Act, 2003. Some of the respondents in the aforesaid Petition no. 256 of 2003 challenged the order dated 25.06.2004 before the High Court of Gujarat and while the Special Leave Application before the High Court was pending, the Gujarat Energy Transmission Corporation Ltd., who is the respondent no.2, herein filed a petition before the

Commission being Petition no. 867 of 2006 praying for determination of parallel operation charges in terms of the Order dated 25.6.2004. Meanwhile, on 29.7.2008, the appellant by a letter requested the Chief Electrical Inspector who is the respondent no.7 herein to derate the capacity of the DG Sets in the appellant's Captive Power Plant because of the DG Sets being around 31 to 37 years old and the respondent no.7 by letter dated 20.8.2008 replied to say that the total derated capacity of six sets worked out at 22595 KVA in the concluding paragraph of the letter it was noted that the certificate so granted on 20.8.2008 was for the purpose of extension of load from UGVCL and shall not be used for any other purpose. Be that as it may, the Gujarat High Court by Order dated 21.8.2008 disposed of the special leave applications setting aside the Commission's order dated 25.6.2004 and directing the Commission to rehear the Petition No. 256 of 2003 and the respondent no.2 's Petition no.867 of 2006 together. Some Captive Power Plant owners sought review of the High Court's order dated 1.10.2008 and then the High Court passed a fresh order on 28.4.2009 allowing the review application and directed the power utilities and the companies having captive power plants to opt for either of the two options and it is not necessary at the moment to reproduce the order of the High Court dated 28.4.2009 passed in review. Now, the appellant filed a petition of objection against the two petitions one filed by the Gujarat Electricity

Board being Petition no.256 of 2003 and other by the Gujarat Transmission Power Corporation Ltd. being petition no. 863 of 2006 on 14.9.2010 challenging sustainability of the parallel operation charges. Though the Commission heard the matter at length it reserved its order. Now, according to the appellant, because of steep hike in fuel prices the operation of the appellant's power plant was completely shut down by the end of October, 2010 and it approached the officers of the respondent no.5 and 7 in November, 2010 for discussion of the matter. However, the appellant wrote a letter on 12.11.2010 to the respondent no.7, Chief Electrical Inspector allegedly informing non-operation of the DG Sets. Meanwhile, came the Commission's order dated 1.6.2011 passed in Petition no. 256 of 2003 and Petition no. 867 of 2006 upholding validity of parallel operation charges. It held in the said order that the parallel operation charges as decided in the order was applicable to the respondents of the said two petitions who have not executed any agreement with the respondent no.5 as per the High Court's Order passed in review dated 28.4.2009. On 13.7.2011, the appellant informed the respondent no. 7 by a letter that DG Sets have stopped its operation with effect from October, 2010 and, as such, there was no electricity duty payable by the appellant. This letter dated 13.7.2011 makes a reference to their earlier letter dated 12.11.2010. Yet, according to the appellant, surprisingly the respondent no.5

submitted supplementary bill on account of parallel operation charges. On 17.9.2011 the appellant wrote back to the respondent no.5 that the DG Sets were not in operation since October, 2010, that intimation was given to the respondent no.5 and, that it was assured that no action would be taken against the appellant, but yet then the bills surprisingly were raised and accordingly necessary instruction was solicited in this regard. As no reply was given, the appellant wrote to the respondent no.2 on 28.9.2011 reminding the Additional Chief Engineer, R&C of GETCO, stoppage of operation of the DG Sets and requesting for delinking of the captive power plant from the GETCO's transmission line. On 3.10.2011, the respondent no.2 wrote a letter to the appellant that the field officer of the GETCO had been requested to visit the premises of the appellant for inspection so as to get confirmation about alleged disconnection of captive power plant from the grid of the GETCO and till approval was not granted, the appellant would have to pay parallel operation charges. A copy of the letter of respondent no.2 was forwarded to respondent no.7 by the respondent no.2. Then, came the minutes of the meeting upon inspection of the respondent no.2 and the minutes of the meeting held between the appellant and respondent no.2 dated 13.10.2011 recorded that at the time of the visit CPP was found to be disconnected from the grid. Again, on 21.10.2011, another inspection was held, this time, by the respondent no 7and the same

minutes were recorded in the minutes of meeting held on 21.10.2011. According to the appellant, in the minutes of the meeting held on 21.10.2011, it was recorded also inter alia that the consumer had already applied before the respondent no.7 on 12.11.2010 for disconnection of the CPP. According to the appellant, reference in this minutes of meeting dated 21.10.2011 to the letter addressed to the respondent no.7 on 12.11.2010 fortifies the position that CPP was not in operation with the grid of the respondent no.2 since October, 2010. In this situation, appellant filed a miscellaneous application before the Commission, the respondent no.1 herein, being application no.1140 of 2011 in connection with Petition Nos.256 of 2003 and 867 of 2006 challenging the bills and demanding payment by the respondent no.5 as against the bills so forwarded to it. The total amount of the bill in question was Rs.32,67,450/-. Respondent nos.2 and 5 filed their replies, appellant filed its rejoinder and a written submission was also filed by the parties. The Commission dismissed the appellant's petition by the Order dated 18.1.2012 which is impugned herein and pursuant to this order, the GETCO by letter dated 16.1.2012 informed that unless outstanding dues were payable, the appellant's application seeking concurrence / standing clearance through inter-state collective transaction for purchase of power could not be accepted.

3. The Gujarat Energy Transmission Corporation Ltd. (GETCO) filed a reply contending as follows:-

a) The Commission's order dated 1.6.2011 pursuant to the High Court's order directing the Commission to rehear the two petitions being Petition No. 256 of 2003 and Petition no. 857 of 2006 holding that POC were payable by the captive power plant owners having agreement with the GETCO in terms of the High Court's order passed in review dated 28.4.2009 has not been challenged by the appellant and the position has now come to this that the captive power plant owners are liable to pay POC.

b) The present appeal of the appellant is only to avoid payment of POC and the reasons assigned in favour of non-payment of POC are wholly unsustainable.

c) Certain letters written by the appellant to respondent no.7 cannot be construed to be the applications or letters to the respondent no.2 requesting for delinking the CPP from the grid.

d) The letter dated 12.11.2010 was not at all a letter for delinking as it was only stated that the appellant was finding difficulty to operate the entire DG Sets and in case of emergency, if needed they will operate one DG Set to generate electricity. This letter, on the other hand, clearly suggested that it would operate CPP whenever necessary which proves and means that the appellant's CPP remained connected to the grid.

e) Again, the letter dated 13.7.2011, addressed to the respondent no.7 was meant for not levying the electricity duty and this letter refers to the letter dated 12.11.2010.

f) The letter dated 17.9.2011, addressed to respondent no.5 contended that POC ought not to be levied and once again interpreted its earlier letter dated 12.11.2010 to be an application for delinking the CPP which is not a fact. The letter of the appellant dated 28.9.2011 is actually the first letter requesting the respondent no.2 for delinking the CPP from the grid.

g) The correspondences as mentioned above would reveal that none of the documents support the case of the appellant that the CPP was De-linked and for non-payment of parallel operation charges. In fact, at no point of time prior to 28.9.2011 the appellant applied for delinking the CPP from the grid. On the contrary, in the letter dated 12.11.2010 the appellant stated that it would operate the captive power plant as and when necessary.

h) It was already upon inspection by the respondent no.2 and 7 that it was certified that the delinking was done.

i) The respondent nos.2 to 6 are operating the grid system in the State of Gujarat and have prescribed formats / procedure for application for any service required from the respondents by various categories of consumers including CPPs. If a CPP / consumer does not follow the prescribed procedure, the respondents cannot be held responsible for any delay in execution of any service or work.

4. The appellant filed a rejoinder to the reply of the respondent no.2 denying the versions of the said respondent no.2 and in course of the discussion of the merit of the appeal, we will have occasion to deal with the averments made in the rejoinder.

5. Of the seven respondents, the main contesting respondents are the respondent nos.2 to 6 led by the learned advocate Mr. M.G. Ramachandran, although respondent no.3 to 6 did not separately file any counter-affidavit. On behalf of the State Commission, the respondent no.1, there has been no appearance. The respondent nos.3 to 6 are the distribution companies in the State of Gujarat, respectively called Madhya Gujarat Vij Company Ltd., Dakshin Gujarat Vij Company Ltd., Uttar Gujarat Vij Company Ltd. and Paschim Gujarat Vij Company Ltd.. It is the respondent no.5, Uttar Gujarat Vij Company Ltd. under whom the appellant is a consumer.

6. We have heard Mr. Sanjay Sen, the learned advocate appearing for the appellant and Mr. Ramachandran, learned advocate for the respondent nos. 2 to 6. Though a reply to the memorandum of appeal was filed by the respondent no 2 alone, a joint written note of arguments

has been filed on behalf of the respondents nos.2 to 6.The appellant also filed a written note of argument. It is not necessary to record the submissions of the learned advocates for the parties because their arguments are broadly the elaboration of the pleadings and the written submissions which will be reflected in course of deliberation on the issues canvassed in the appeal.

7. The Commission passed a 11-page order dismissing the petition of the appellant being Petition No.1140 of 2011 praying for setting aside the demand for Rs.32,67,450/-. The Commission held, inter alia, that the appellant's letter dated 12.11.2010 which has been referred to in the subsequent letters does not indicate that the appellant's DG sets were disconnected from the Grid. The appellant's letter dated 28.9.2011 informing the GETCO for delinking the CPP from the GETCO's transmission line was replied to by the GETCO on 3.10.2011 in the line that a necessary inspection would follow prior to disconnection. The minutes of the meeting between GETCO and the appellant was recorded on 13.10.2011 and thus connectivity has to be held till 13.10.2011. The Commission further held that the appellant objected to the levy of POC in course of the hearing the Petitions no.256 of 2003 and 867 of 2006 and the appellant did not opt for any of the options

provided by the High Court in its order dated 21.10.2008. The appellant thus consciously decided to oppose levy of POC till the completion of the proceedings in Petition no.256 of 2003 and Petition no.867 of 2006. The Commission passed its order on 1.6.2011 holding that the POC was leviable. Supplementary bill was issued on 16.9.2011 in terms of the Commission's order dated 1.6.2011. Accordingly, the bill issued by the respondent no.5 was in accordance with the order dated 1.6.2011.

8. It has to be stated at the very outset that the Commission's order dated 1.6.2011 holding leviability of the POC is not the subject matter of challenge in this appeal. Therefore, this Tribunal in this order will desist from making any deliberations as to the legality and propriety of the Order dated 1.6.2011 passed by the Commission. The principal point that calls for consideration in this appeal is whether the Commission was justified in holding that non-connectivity of the CPP to the transmission line of the GETCO has to be held only from 13.10.2011 and not prior thereto. The second point to be considered is whether in the event of the POC being found leviable upon the appellant such levy should be on the installed capacity of 41000 KVA or on the alleged derated capacity of 22595 KVA as claimed by the appellant.

9. Certain facts are not in dispute. On 8.9.2003, the Gujarat State Electricity Board filed a Petition being no.256 of 2003 before the Commission for an Order for payment of POC against captive power plants running in parallel with the grid. The Commission passed an Order on 25.6.2004 holding that POC was leviable. It does appear that the present appellant was one of the respondents in that proceeding opposing the contention of the Gujarat Electricity Board. However, against the order dated 25.6.2004, some of the respondents of that proceeding moved the High Court of Gujarat. The High Court by the order dated 21.10.2008 set aside the order of the Commission dated 25.6.2004 and directed the Commission to re- hear the said petition along with the petition of the respondent no.2, being 867 of 2006 whereby the respondent no.2 in terms of the order dated 25.6.2004 prayed for determination of POC, although by the time the second petition was to be heard the order dated 25.6.2004 was set aside. Some captive power plant owners, however, filed a miscellaneous application praying for review of the order dated 21.10.2008. Then the High Court passed an order on 28.4.2009 which is reproduced below:-

"When the Review Applications came up for hearing I had suggested to the parties to explore possibility to resolve the dispute. I am informed that the parties met and pursuant to such meeting a broad consensus is reached which is to the following effect.

[A] The Power utilities and the Companies having Captive Power Plant(s) to agree, by way of a without prejudice settlement for 10 years, to either of the following options:
(a) Meters with the Three (3) minutes integration period for computing the Demand Charges and no POC would be levied on such CPP Units;
or
(b) Adoption of Commercial Circular No.706, with condition no.2, therein, being substituted, by the following:
Whenever the power will be sold to GUVNL the parallel operation charges to be paid shall be compensated as part of the cost of generation and rate of sale of power shall be accordingly adjusted.
[B] Meter installation or Change in the meter programming for the purpose of Meters having agreed Integration period.
After the issue of settlement order by GERC, GEB will take necessary actions for the installation of meter or modification in the program of the meter, as the case may be, for implementing the agreed integration period as suggested above. The cost of making such change for the first time viz. {i) change in setting or program of the meter or (ii) change of the meter to implement the desired integration period for computing the Demand Charges as agreed will be borne by GUVNL/GETCO.
CPP units can exercise change in the selected option mentioned above only once during the calendar year i.e. CPP unit can exercise its option from the two options mentioned above only once during the calendar year. The cost of implementation arising from the change in decision any time after exercising the first option will be borne by the CPP unit."

10. Recording of history will not be complete without mentioning the Circular No.706 dated 28.1.2007 whereby the commercial circular no. 687 was amended and by this amended circular no. 706, a modified rate of recovery of POC was determined upon certain conditions one of which was that no POC was leviable where a CPP maintains a contract demand of 25% or more of its installed CPP capacity subject to observing the limits specified in the CPP policy and the other was that if

the period for sale of power to GEB exceeds 10 days in a month no POC should be payable. A few CPPs preferred appeal before this Tribunal being, Appeal no. 276 of 2006 challenging the circular no.706 and this Tribunal by the order dated 29.8.2007 struck down the circular no.706 and brought back the circular no.687 which, however, continued to remain in force till 31.8.2000. This history is not too much relevant for the purpose of this appeal. However, as the High Court directed, both the petitions were again heard and the Commission passed a 46- page order, the concluding portion of which is, for the sake of convenience, recorded herein below:-

"*After hearing all the parties, and as discussed in the earlier para the Commission decides that POC is leviable for the CPPs operating in parallel with the state grid. The charge decided in this order is applicable to the respondents of the present petition, who have not executed any agreement with the petitioner as per the High Court of Gujarat order dated 28th April, 2009 in Misc. Civil Application No.2967 of 2008. Moreover, the charges decided in this Judgment at the rate of Rs.26.50 /KVA shall apply to the new CPPs, operating in parallel with State transmission utilities (Transmission Licensee) and/or distribution licensee network in the grid.*"

11. It is to be noted here that pursuant to the remand order of the High Court the Commission directed the respondents to submit a list of all the CPPs operating in parallel with the grid. By order dated 13.11.2009, the Commission recorded that the appellant and some other CPPs had objected to the levy of parallel operation charges and they were directed to submit their written objection which they did. It appears from the Commission's order that the present appellant did not opt for execution of any agreement with the respondent no.2 in terms of the order of the High Court and the appellant as also other objectors positively refused acceptance of the proposal made by the High Court. It is in this perspective that the merit of the present appeal has to be appreciated.

12. In this situation, we are not concerned with the question of legality of imposition of the POC. The question would be whether the claim of the appellant that the connectivity of the CPP to the grid of respondent no.2 had come to an end in October, 2010 as alleged in the memo of appeal. The order dated 1.6.2011 by which the two petitions as mentioned above were disposed of finally has not been challenged so far. Admittedly, the total installed capacity of eight DG Sets appertaining to the CPP of the appellant was 54500 KVA. Subsequently, two DG Sets were discarded and the remaining capacity of six DG Sets was

41100 KVA. By the order of the Gujarat Electricity Board dated 18.8.1999, permission was accorded to the appellant for parallel operation of CPP with the grid. This is not in dispute. The foundation of the case of the appellant is a letter dated 12.11.2010 written by the appellant to the respondent no.7, not to the respondent no.2 with whose grid the CPP was connected although a copy of the such letter was given to the Additional Chief Engineer of the respondent no.2. The letter is very brief and we reproduce it as hereunder:-

"*With reference to the above subject, we have to inform your good self that we have captive power plant comprising of DG Sets. We generate electricity by using furnace oil. Due to very much rise in price of furnace oil and less efficiency of DG Sets it becomes non-viable to operate and get electricity from DG Sets. Besides our company become BIFR (sick unit) under SICA (Sick Industrial Companies Special Provisions Act, 1985). In view of the above, now it becomes very difficult for us to operate our entire DG Sets to get electricity. In the case of emergency, if needed we will operate one DG set to generate electricity.* "

This letter, if read closely, depicts a difficult situation the appellant was allegedly experiencing in running the DG sets because of rise in price of furnace oil. This letter does not at all indicate that the DG sets were not in operation or that connectivity with the grid had been totally lost. The letter does not also make any request for non-connectivity with the grid. Therefore, it is difficult to concede to the submission of Mr. Sen that, since way back in October, 2010, the DG sets had not been in

operation and that the CPP was not running in parallel with the grid of the respondent no.2. Even this letter does not say either explicitly or implicitly that since October, 2010 the CPP was in no way related to the grid of the respondent no.2. Interestingly, it is this letter which is said to be the foundation of the case of the appellant and it is this letter which has been referred to in the successive correspondences of the appellant which we will advert to in the sequel.

13. The next correspondence is one dated 13.7.2011 written by the appellant to the respondent no.7 with copy to the respondent no.2. The first paragraph of this letter is reproduction of the first paragraph of the earlier letter dated 12.11.2010 and this letter dated 13.7.2011 concludes with the following words:-

"*Pl. note that we have stopped our DGs Operation with effect from Oct-2010 and there is no electricity duty payable by us on its generation. To this effect, we have already written to the concern authority by our letter dated 12.11.2010. (Copy attached herewith). Pl, take this as priority to delink our CPP from the Grid.*"

Between 12.11.2010 and 13.7.2011 which is a period of about nine months, there has been no correspondence made by the appellant to

the respondent no.2 or to the respondent no.7 with request for delinking the CPP from the grid. Be that as it may, this letter dated 13.7.2011 is virtually a request to the respondent no.7 not to levy electricity duty. This letter does not at all indicate that the CPP was not running in parallel with the grid. This letter can at the most be a request to the respondent no 7 for delinking the CPP from the grid and nothing more. Unless delinking becomes a fact or non-connectivity comes to an established position, the appellant cannot have any case for non-payment of parallel operation charges. As noted earlier, in the letter dated 12.11.2010, it was not at all claimed that the operation of the DG sets was stopped with effect from October, 2010. It is this letter dated 13.7.2011 where the alleged position as was allegedly there in October, 2010 has been claimed.

14. Then followed supplementary bill dated 16.9.2011 for an amount of Rs.32,67,450/- for the months of June, July and August, 2011 which has been the subject matter of dispute before the Commission and then in appeal before us. This bill dated 16.9.2011 has been replied to by the appellant by a letter dated 17.9.2011. This letter refers to the earlier two letters dated 12.11.2010 and 13.7.2011. This letter is reproduced in its material portion as follows:-

"In this connection it submitted that our CPP is based on furnace oil and due to high cost of furnace oil, Company has not been suing its CPP since long. We had discussed the issue with the officials of Collector of Electricity Duty, Gandhinagar and requested to intimate us the process for delinking CPP from GETCO line. We had been given an understanding that since we are not using the CPP, no action is required to be taken at the end of Shah Alloys and further informed that no bill can be raised by UGVCL for POC. As per the advice of the concern officer, we had not intimated. In writing to any agency regarding delinking of CPP from GETCO line. However, the fact that our company has been intimating by way of Monthly Statement of Generation to the Office of Collector of Electricity, Gandhinagar wherein we have mentioned NIL generation of power. In view of this present ill is not justified. Further, this is to inform that on receipt of the order of Hon'ble GERC mentioned herein above, our office vide letter 12.11.2010 followed by letter dated 13.7.2011 intimated regarding delinking of our CPP from UGVCL/GETCO Grid. We enclose herewith copy of our letter dated 12.11.2010 marked Annexure "B" and copy of our letter dated 13.7.2011 marked Annexure "C". In these letters, we have clearly mentioned that our CPP comprising of DG Sets have been discontinued. In view of this also present bill is not justified. It is worth to refer letter dated 20.8.2008 of the Office of Chief Electrical Inspector, Gandhinagar wherein it is clearly mentioned that capacity of CPP is derated and comes to 22595 KVA only. Bill raised by UGVCL, as mentioned at Annexure "A" shows POC on 41100 KVA. This also shows that presuming POC is required to be paid then also it can be levied only on 22595 KVA."

This letter again is not a request for delinking the CPP from the grid. Importantly, it claims that it has already intimated regarding delinking of CPP from the respondent no.5 but the letter dated 12.11.2010 is not a request for delinking. The question of delinking was first raised in the letter dated 13.7.2011 and it is significant to record that by the letter dated 17.9.2011, the appellant claimed that if at all POC was payable the same should be payable not on 41100 KVA, but on 22595 KVA because of derating. Within a week or so, the appellant wrote on

28.9.2011 to the respondent no 2 for the first time praying for delinking. Upon receipt of this letter the respondent no.2 informed the appellant on 3.10.2011 regarding requirements for obtaining a confirmation from the respondent no.7 and till such time approval was not granted, POC was payable. On 13.10.2011, site inspection was made by the Executive Engineer of the respondent no.2 and a minutes of the meeting was drawn up recording delinking of the CPP from the grid as was found at the time of inspection. Then the respondent no.7 checked the position and upon inspection of the site on 21.10.2011certified through minutes of the meeting that CPPs were not in working condition. Then, on 13.12.2011 the delinking was formally done. The bill was for the period from June to August, 2011. Mr. Sen argues that in the minutes of the meeting of the respondent no.7 upon inspection on 21.10.2011, there is a reference to the letter dated 12.11.2010 and as such it is clear that delinking was done at least from that date with no generation. This argument cannot be accepted because the letter dated 12.11.2010 does not at all show that delinking was an established fact right since October, 2010 nor any prayer was made in that letter for delinking. At paragraph 8.15 of memo of appeal, the appellant contended that in the matter of delinking talks were held with the respondent no.5 and 7 sometime in November, 2010 and the respondents represented to the appellant that no action was required to be taken by the appellant and the closure of

the captive power plant could be ascertained from the bills. But the letter dated 12.11.2010 does not show that this letter was preceded by any verbal talk or verbal assurances. The subsequent letters also do not reveal holding of any meeting at any point of time prior to 12.11.2010 in the matter of delinking. Mr. Sen refers to the letters dated 18.8. 1999, 30.6.2001 and 18.01.2003 , more particularly, condition no 7 of the first and the third letters of the Gujarat Electricity Board wherein it has been stated that arrangement can be terminated by prior intimation of one month. But this stipulation was not complied with in as much as no one month's prior notice was served upon the respondent no 2, the successor of the Gujarat Electricity Board. All correspondences were made with the respondent no 7 with whom no agreement was entered into, save service of copies of those correspondences upon the respondent no 2, but these correspondences cannot be construed to be the notice upon the respondent no 2 as contemplated in the permission letters referred to above. It was on 28.9.2011 that a formal communication was made with the respondent no. 2 for the first time whereafter without loss of time the respondent no. 2 arranged for procedural inspection by it and upon final satisfaction of the respondent no 7 approval was accorded of delinking from the grid.

15. The appellant contended that the respondents in the case of Sterling Biotech Ltd. made favourable consideration but no such consideration has been shown in the case of the present appellant. A letter dated 8.6.2009 by Sterling Biotech Ltd. addressed to the respondent no.2 in connection with Petition nos.256 of 2003 and 867 of 2006 has been produced. From that letter it appeared that the Sterling Biotech Ltd. upon detailed explanation of the condition of the DG Sets and their non-operation requested the GETCO to remove their name from the list of the companies operating in parallel with the grid. Some CPPs clarified before the Commission that they were wrongly shown in the list though they had been delinked and, then only the Commission deleted those CPPs from the proceedings. It was not the case of the appellant that it was wrongly shown in the list. The order dated 13.11.2009 and the order dated 1.6.2011 do not show that the appellant ever made out any case before the Commission in course of hearing of the proceedings in connection with Petition nos.256 of 2003 and 867 of 2006 that its name be delinked. On the other hand, it strongly contested the two petitions meaning thereby that it was a CPP running in parallel with the grid. Accordingly, it cannot be said that any discriminatory treatment was meted out to the appellant. Therefore, the principal point has to be answered against the appellant and the finding of the Commission has to be affirmed.

16. According to the appellant, the respondent no.7 derated the capacity of the captive power plant from 41100 KVA to 22595 KVA but the bill dated 16.9.2011 was raised by the respondent no 5 on the original capacity of 41100 KVA. In this connection, the observation of the Commission as we find in paragraph no. 8.1 of the impugned order requires mentioning:-

"8.1 As regards the capacity of the CGP, the record of the petition shows that the Parallel Operation of the CGPof 18 MW was approved by erstwhile GEB vide letter dated 18th August,1999. The said letter provides that the synchronization arrangement can be initially agreed up to a period of 3 years subject to termination of this agreement by service of one month notice by either of the parties. On the other hand, subject further to review thereafter in case the agreement does not happen to be terminated, the same will be deemed as continued. The same provision is also repeated in letter dated 30th June,2001 written by the erstwhile GEB to the petitioner in clause No.7 in which parallel operation of the petitioner was approved for 23.76 MW of the CGP. Thereafter the erstwhile GEB in its letter dated 18.1.2003 confirmed Parallel Operation of the CGP set up by the petitioner of having capacity of 46 MW. Clause 7 of the said approval provides the terms and conditions similar to letter dated 18th August,1999. The petitioner has submitted a letter from Chief Electrical Inspector's office dated 20th August,2008 which states that the captive generating plant's capacity works out to 22595 KVA and 2 DG sets of 13400 KVA have been discarded. Scrutiny of the said letter reveals that the total installed capacity of the six generating sets (excluding the two discarded sets and two LT emergency diesel generating sets) is 41.100 KVA. The figure of 22.595 KVA has been arrived on the basis of certificate issued by the Chartered Engineer on the presumption that these units can generate only 50 to 60 percent of their installed capacity. As such, it is established that the total installed capacity of the generating sets in operation was 41,100 MW. UGVCL has in its supplementary bill dated 19.09.2011 assumed the net capacity of the CGP as 41.100 KVA, which seems to be correct".

This is a reasoned order which is difficult to be not acceptable. The appellant relies on a letter dated 20.8.2008 which is a reply to the letter of the appellant dated 29.7.2008. This letter of the office of the Chief Electrical Inspector records that the Chartered Engineer certified that the DG Sets were capable of generating electricity of about 40 to 60 % and the total derated capacity of the six sets except the two sets discarded earlier worked out at 22595 KVA. This letter concludes with the sentence *"The above certificate is issued for the purpose of extension of load from UGVCL only and shall not be used for any other purpose".* A close look at the letter shows that the Chief Electrical Inspector addressed this letter to the appellant on the basis of a letter of the Chartered Engineer. The Chief Electrical Inspector gets a derivative knowledge and that is only to the extent that the records revealed that the sets were capable of generating electricity to the extent of 40% to 60%. The Chief Electrical Inspector did not himself or through any of his officer conducted any requisite test for derating. It is not that upon necessary tests it has been found that the engines were not at all able to generate electricity beyond 60%. It is also not clear that the Chartered Engineer who issued the letter on 29.7.2008 himself performed the tests for the purpose of certification about derating. The letter dated 20.8.2008 which is banked upon by the appellant is with reference to the appellant's letter to the Chief Electrical Inspector dated 29.7.2008 and it

is not known what was the content of that letter dated 29.7.2008. It is only beyond dispute that two DG Sets were discarded as it was verified by the Inspectorate. In the circumstance, the observation of the Commission to the effect that the certificate was issued by the Chartered Engineer on the 'presumption' that the units could generate only 50 to 60% of the installed capacity cannot be assailed to be preposterous because the author of the letter also did not appear to have personally conducted any tests. Presumption cannot be equated with certification. Certification is preceded by all permissible engineering tests which this letter does not reveal. And, delinking cannot be a one way traffic as it requires affirmation from the authority alone which accorded permission for parallel operation. Mr. Sen, learned advocate appearing for the appellant cites a decision of this Tribunal in Appeal no. 120 of 2009 decided on 18.2.2011. The facts and circumstances of the case in that appeal were completely different. A number of issues including the issue on jurisdiction of the Commission was raised in that appeal but the important fact that needs to be recorded here is that it was only upon inspection in that case that it was found that the power cable connections of the two TG Sets were removed and the said TG Sets were found to be out of service and this was not a disputed fact and in such circumstances, the Commission itself came to the opinion that the effective connectivity of the generating plant with the grid would be 40

MW, not 60 MW and this Tribunal also did not disturb the finding, yet holding that parallel operation charges are payable on the installed capacity of the captive power plant. These facts cannot be said to be identical with the facts of the present appeal.

17. In the result, the appeal fails and same is dismissed without costs.

(V.J. Talwar)
Technical Member

(P.S. Datta)
Judicial Member

Reportable/Not Reportable

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