IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APL No. 363 OF 2022 & IA No. 1289 OF 2022

Dated: 17th December, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member (Electricity)

In the matter of:

1. **AMRELI POWER PROJECTS LTD.,**
Represented by Director
10th Floor, Sangeeta Complex,
Near Parimal Crossing, Ellisbridge,
Ahmedabad - 380006, Gujarat … Appellant No.1

2. **BHAVNAGAR BIOMASS POWER PROJECTS PVT. LTD.**
Represented by Director
10th Floor, Sangeeta Complex,
Nr. Parimal Crossing, Ellisbridge,
Ahmedabad - 380006, Gujarat … Appellant No.2

3. **JUNAGADH POWER PROJECTS PVT. LTD.**
Represented by Director
10th Floor, Sangeeta Complex,
Near Parimal Crossing, Ellisbridge, … Appellant No.3
Ahmedabad - 380006, Gujarat

Versus

1. **GUJARAT ELECTRICITY REGULATORY COMMISSION**
Through its Secretary
6th Floor, GIFT ONE,
Road 5C, Zone 5, GIFT City, … Respondent No.1
Gandhinagar – 382355, Gujarat, India.

2. **GUJARAT URJA VIKAS NIGAM LIMITED**
Through its CMD
Shri K.P. Jangid, General Manager(Comm.)
Sardar Patel Vidyut Bhavan, Racecourse**,**
Vadodara-390 007, Gujarat … Respondent No.2

3. **STATE LOAD DESPATCH CENTRE**
Through its CMD
Gujarat Energy Transmission Corporation Limited,
132kV Gotri Sub Station Compound,
Near T.B. Hospital, Gotri Road,
Vadodara 390021, Gujarat, India … Respondent No.3

Counsel on record for the Appellant(s)	:	Poonam Verma Sengupta for App. 1, 2 & 3
Counsel on record for the Respondent(s)	:	Suparna Srivastava for Res. 1 Anand K. Ganesan Swapna Seshadri Srishti Khindaria Harsha Manav for Res. 2 Abiha Zaidi for Res. 3

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The origin of the present appeal is traceable to the notices dated 05.08.2020, issued by Gujarat Urja Vikas Nigam Limited ("GUVNL" for short) in terms of Article 9.2 of the PPAs, relating to the event of default on the part of the three Appellants-Biomass power project developers. The PPAs were entered into for generation and supply of electricity by use of

agriculture residues / Biomass, a renewable power source, which entitled the Appellants to a higher preferential tariff. The three Biomass Plants of Abellon Clean Energy Ltd (i.e., the holding company of the Appellants) are, according to the appellants, the first Biomass based power projects in Gujarat established with the objective of processing and disposing of waste in a scientific manner, with electricity generation as a by-product. These bio-mass plants are said to be under shut down since August 2020.

The present Appeal has been filed challenging the Order passed by the Gujarat Electricity Regulatory Commission (the "*GERC*" for short) in Petition No.1888 of 2020 dated 13.7.2022. The said Petition was filed by the Appellants challenging the default notices dated 05.08.2020 issued by GUVNL under Article 9.2.1 and 9.3.1 of the Power Purchase Agreements (PPAs) dated 28.09.2010, alleging that the Appellants, by deliberately under-injected energy for a quantum lesser than the scheduled energy in FY 2018-19 and FY 2019-20 and making undue gain, had indulged in 'gaming'. Under the said notices, GUVNL had called upon the Appellants to remedy their default within 30 days by refunding the wrongly recovered amounts, failing which GUVNL would terminate the PPAs dated 28.09.2010, and proceed to take other appropriate legal remedies.

During the pendency of proceedings in Petition No.1888 of 2020, the GERC passed interim Order dated 09.10.2020 (i) directing that the default notices dated 5.8.2020 shall not be implemented till the main Petition is decided by the Commission; (ii) directing the Appellants to refund 75% of the claimed differential amount to GUVNL within 15 days, subject to adjustment at the time of the final outcome of the Petition; and (iii) directing GUVNL to start buying power from the Appellants and pay the tariff, including past dues, if any, subject to the outcome of Petition No.1888 of 2020. The GERC also observed that, in the present case, it

was SLDC which had the prime responsibility of grid operation, and its management on real time basis, and to give instructions to the constituents who violated the provisions of the GERC Grid Code-2013, ABT Orders, provisions of the Electricity Act, Regulations affecting the frequency of the grid, its security and safe operation, to take corrective actions at the relevant time; and, while it was an undisputed fact that the Appellants had consistently under-injected power without any attempt at revision, they were permitted to do so for around 2 years or more and were not restrained from such activity by SLDC, despite having the power to do so. The GERC observed that, in the absence of any report or petition filed by SLDC, it would not, at that stage, be able to decide the matter referred by SLDC in respect of the Appellants or other parties. Considering that the matter was already taken up by it, the GERC directed SLDC to submit a comprehensive report detailing necessary issues, analysis, observations along with relevant documents and data within 30 days; and further directed that, in case SLDC had noticed similar situations regarding other constituents, it was to forthwith approach the GERC through an appropriate Petition as per the applicable Regulations.

Aggrieved by the aforesaid interim Order passed by the GERC dated 09.10.2020 (to the extent directions were issued to them), the Appellant filed Appeal No. 175 of 2020 before this Tribunal. This Tribunal, vide interim Order dated 20.01.2021, stayed the interim directions of the GERC regarding refund of 75% of the amount by the Appellants, directed GUVNL not to take any coercive action till disposal of the appeal on merits, and to continue to off take power from the Appellants. The interim order, passed by this Tribunal on 20.01.2021, was challenged by GUVNL before the Supreme Court in Civil Appeal No. 705/2021. By its Order dated 21.09.2021, the Supreme Court permitted the Appellants to supply power

to GUVNL, which could be accepted during the interregnum, without paying any amount to the Appellants till the disposal of the Appeal by this Tribunal. By its final Order dated 12.11.2021, this Tribunal disposed of the above Appeal directing that the Order dated 21.09.2021 passed by the Supreme Court be adopted as an interim arrangement, in substitution of the directions of the GERC in its Order dated 09.10.2020, till a final decision on merits was taken thereupon by the Commission.

Subsequently on 09.11.2020, in compliance with the interim order passed by the GERC dated 09.10.2020, the SLDC filed a comprehensive report before the Commission wherein it provided data analysis of the following generation parameters of the Appellants generating stations: (i) year-wise scheduled and actual injection; (ii) sample day wise injection where injection adhered to the schedule for the year prior to April 2019; (iii) year wise/plant wise working days in year 'NO DC Declared' ; (iv) year wise analysis for block in which DC submitted was maximum; (v) yearly analysis of comparison of biomass energy with respect to total energy scheduled in Gujarat; (vi) year wise average frequency analysis; and (vii) year wise UI payment and outstanding analysis and analysis impact of net UI payable/receivable with respect to the amount payable the Appellants.

On the basis of the above data, SLDC in its report, inter-alia, submitted as under: (i) the biomass-based plants of the Appellants failed to inject energy as per their declared capacity/schedule in terms of Clause 6.70 and 4.14 of Order No.3/1010 dated 1.4.2010 passed by the Commission; (ii) despite biomass-based generation of power being predictable, as held by the Commission in its various Orders, the Appellants had failed to follow the regulatory direction to faithfully declare their capacity; (iii) the Appellants never revised their DC nor requested to revise the schedule on account of any technical or operational issues

during FY 2018-19 and 2019-20; (iv) the Appellants had not followed the instructions/directions of SLDC as per Section 33 of the Electricity Act, 2003; (v) the plants of the Appellants had consistently violated the provisions of the GERC Grid Code-2013, ABT Orders, provisions of the 2003 Act, and Regulations which has polluted the grid by continuously under-injecting less energy than the schedule; and (vi) since SLDC is enjoined to continuously monitor a grid of 16000 MW, it is a challenge for SLDC to monitor and maintain grid parameters in 15 minutes time blocks and technology has not yet matured to forecast variations very accurately.

By the impugned Order, passed in Petition No.1888 of 2020 dated 13.7.2022, the GERC has, inter-alia, (I) rejected the prayers of the Appellants to declare the default notices issued by GUVNL as without authority under law; (ii) declared that the Appellants had indulged in 'gaming' during FY 2018-19 to FY 2019-20, and consequently directed the Appellants to refund the amounts recovered by it from GUVNL through gaming along with interest as per Article 6 of the PPAs executed between the parties; and (iii) restrained GUVNL from taking coercive action for terminating the PPAs with the Appellants.

In the present Appeal the Appellants mainly contend that, while passing the impugned Order, the GERC has (i) acted in contravention of the provisions of the GERC Grid Code, 2013, GERC Availability Based Tariff (ABT) Orders and the terms of the PPAs between the parties; (ii) it has erroneously re-written the contract between the parties by directing refund of amounts by the Appellants; (iii) failed to appreciate the objective of Waste to Energy power plants, and ignored the policy for promotion of renewable power generation; (iv) failed to consider that GUVNL had no authority to raise the issue of 'gaming', rather it was the responsibility of SLDC to monitor the schedules between the Appellant and GUVNL; (v)

failed to appreciate that no losses had been caused to GUVNL or its consumers by the alleged acts of the Appellants; (vi) failed to appreciate that the directions to refund the monies amounted to double penalty since the Appellants have already paid UI charges for the energy under-injected by them; and (vii) failed to appreciate that any under-injection by the Appellants was beyond its control and due to the very nature of biomass fuel, and as such cannot be a deliberate act of 'gaming.'

According to GUVNL, the Appellants had deliberately acted contrary to the terms of the PPAs; they had indulged in intentional 'Gaming' by not generating and supplying such Bio mass fueled renewable power for a substantial part, instead taking advantage of Unscheduled Interchange ('**UI**') mechanism; thereby the Appellants without generation, and by adjustment of significantly lower cost - an average cost of Rs.2.69 per unit in FY 2018-19 and Rs. 2.78 per unit in FY 2019-20, had received substantially higher preferential tariff of Rs 5.56 per unit and Rs 5.86 per unit respectively meant for renewable power; and the differential amount of Rs. 2.97 per unit for FY 2018-19 and Rs. 3.08 per unit for FY 2019-20, aggregating for Appellant No. 1 to Rs. 17.49 Crores, Appellant No. 2 for Rs. 20.04 Crores, and Appellant No. 3 for Rs. 16.33 Crores were windfall gains secured in breach of the terms of the PPAs, and were liable to be compensated to GUVNL with interest and cost.

II. CONTENTS OF THE IMPUGNED ORDER:

Petition No. 1888 of 2020, along with I.A. Nos. 07 of 2020 and 08 of 2020, was filed by the Appellant herein, before the GERC, under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of the dispute under the Power Purchase Agreements entered between the appellant and GUVNL qua issuance of Default Notices by GUVNL. The appellants sought to have the default notices dated 05.08.2020 issued by the

Respondent GUVNL declared as bad in law, and to direct GUVNL to continue to honour invoices towards tariff payment issued by them in terms of the PPA, and that no coercive action, including termination of the PPA, be taken during the pendency of the Petition.

In the impugned order dated 13.07.2022, the GERC noted that it had, vide its earlier Order No. 5 of 2010 dated 17.05.2010, decided and determined the tariff for Procurement of Power by Distribution Licensees from Bio-mass based Power Generators and Other Commercial Issues; the subject three PPAs were executed by the appellants with GUVNL, based on Order No. 5 of 2010 dated 17.05.2010, for generation and supply of power by using biomass fuel in the State of Gujarat; the appellants had earlier filed Petition No. 1113 of 2011 (Amreli Power Projects Limited), Petition No. 1114 of 2011 (Junagadh Power Projects Pvt. Ltd.) and Petition No. 1244 of 2012 (Bhavnagar Biomass Power Projects Private Limited); the Commission, vide its Common Order dated 10.05.2012 in Petition No. 1113 of 2011 and Petition No. 1114 of 2011, had decided that the Petitions succeeded partially to the extent indicated in the relevant paragraphs of the Order; aggrieved by the aforesaid Order dated 10.05.2012 of the Commission, the appellants had filed two separate Appeals being Appeals No. 132 of 2012 (Junagadh) and Appeal No. 133 of 2012 (Amreli); APTEL, by its Order dated 02.12.2013, had remanded the matters back to the Commission for re-consideration of the biomass fuel price and consequent re- fixation of tariff of biomass projects in the State; the said Order dated 02.12.2013 in Appeals No. 132 and 133 of 2012 and Order dated 31.05.2012 (Tarini) passed by APTEL were challenged by GUVNL before the Supreme Court by filing Civil Appeal No. 1973 - 1974 of 2014; the Supreme Court vide its interim Order dated 28.02.2014 directed the Commission not to pass any final Order with regard to fixation of tariff;

subsequently, the Supreme Court, vide its judgment dated 05.07.2016, dismissed Civil Appeals No. 1973 & 1974 of 2014 and confirmed the aforesaid Orders including the Order dated 02.12.2013 passed by APTEL in Appeals No. 132 and 133 of 2014; in compliance with the directives of APTEL, as confirmed by the Supreme Court, the Commission had appointed TERI as a consultant to study availability of different biomass in the State of Gujarat and its price as well as GCV of such biomass; TERI submitted its report on the aforesaid parameters to the Commission on 09.06.2017; after considering the submissions made by the parties, the Commission has passed Order dated 09.02.2018 deciding the availability of different types of biomass fuel in the State, their GCV and price; thereafter, the Commission passed the Generic Tariff Order No. 01 of 2018 dated 15.03.2018 with consideration of the above, determining the energy/variable charge for (1) Biomass based energy Projects utilizing (i) Water cooled condenser (ii) Air cooled condenser and (2) Bagasse based generation projects, which would be commissioned during the control period specified in the said Order i.e. for FY 2017-18 to FY 2019-20; the Commission passed Order dated 22.05.2018 in Petition No. 1113 of 2011 and Petition No. 1114 of 2011 and Order dated 31.07.2018 in Petition No. 1244 of 2012; the tariff decided by the Commission for biomass based power project, which is a sum of fixed cost and variable cost, is Rs. 5.66 per unit for FY 2018-19 and Rs. 5.86 per unit for FY 2019-20; after the Orders dated 22.05.2018 in Petition No. 1113 of 2011 and Petition No. 1114 of 2011 and Order dated 31.07.2018 in Petition No. 1244 of 2012, the appellants and GUVNL amended their Original PPAs; and both the parties, apart from relying on various aspects of the Biomass Tariff Orders passed by the Commission, had also relied on the provisions of the ABT Orders of the Commission and the GERC (Grid Code), 2013 Regulations notified by the Commission.

After referring to certain provisions of the ABT Orders dated 11.08.2006 and 01.04.2010, and the GERC Grid Code, 2013, the GERC observed that, in the aforesaid Orders, the Commission had decided to bring generation stations (IPPs, CPPs), and distribution licensees of the State under the provisions of the Intra-State Availability-Based Tariff (ABT); the tariff specified under the ABT regime consisted of three components, (i) Capacity charge, (ii) Energy charge, and (iii) Unscheduled Interchange (UI) charge; the Unscheduled Interchange charge was to be applicable whenever there was deviation between actual generation or actual drawal and scheduled generation or scheduled drawal; it had to be worked out for each 15-minute time block with consideration of frequency of the aforesaid time blocks; gaming was specified as when the generating company generates beyond 105% of the declared capacity in any time block of 15 minutes and averaging up to 101% of the average declared capacity over a day; and whenever any gaming was found by SLDC on account of higher generation/extra generation, it shall be reduced to zero and the amount shall be adjusted in the UI account of the beneficiaries in the ratio of their capacity share in the generating station.

After taking note of the Amendment dated 01.04.2010, to the ABT Order o. 03 of 2006 dated 11.08.2006, the GERC observed that, in the aforesaid Order, the limit of 5 MW and 15 MW of generating station had been removed and all generating stations were brought under the provisions of the ABT Orders; further, the Commission had issued Scheduling and Dispatch Code to be followed by the beneficiaries; the said Code provided for the procedure for scheduling and dispatch to be carried under the ABT mechanism; in the said Code, it was provided that generating stations/ beneficiaries were eligible to revise their schedule and declared capacity during the day; however, such revision shall become

effective from the 6th time block; clause 14 of the said Code provided that the generators shall faithfully declare their plant capacity with best assessment; any deliberate over/under declaration of the plant capacity, contemplating to deviate from the schedule given by them on the basis of plant capability and make money as undue capacity charge for deviation from schedule, the SLDC should ask the generators with explanation of such situation with necessary backup data; Clause 17 of the scheduling and dispatch Code of the ABT Order dated 01.04.2010 provided that the SLDC shall periodically review the actual deviation from the dispatch and, if it was found that any constituent was indulging in unfair gaming or collusion, it shall be reported to the Commission for further investigation / action; thus, by the aforesaid provisions of the scheduling and dispatch Code which were part of the amendment Order dated 01.04.2010, the Commission had recognized that any over /under declaration of the plant capacity or injection of energy constituted gaming; and, if such eventuality was detected by SLDC, it shall be reported to the Commission for necessary action.

The GERC then took note of the relevant provisions of the GERC (Electricity Grid Code), 2013, and observed that, as per Clause 11.1, the GERC Grid Code is applicable to SLDC, sub- SLDC, STU, Distribution Licensees, other Intra-State entities, including generators/captive generating plants/independent power producers; as per Clause 11.2, SLDC is responsible for real-time monitoring of the generating stations as well as checking that there is no gaming in the availability declaration by the generating stations; moreover, the said clause specifies gaming as an intentional mis- declaration of a parameter related to commercial mechanism in vogue, in order to make an undue commercial gain; clause 11.7 provides that the generators shall be responsible for power

generation/power injection generally according to the daily schedules; Clause 11.14 provides that it shall be incumbent upon the generating station to declare the plant capabilities faithfully; Clause 11.18 provides that SLDC shall review the actual deviation from the dispatch and net drawl schedule and verify whether any entity/constituent is indulging in unfair gaming or collusion; if such matter is detected, the same should be reported to the Commission for further investigation /action; as per Clause 11.23, the generators have to advise SLDC, by 9 A.M. every day, for the ex-power plant MW and MWh capabilities foreseen for the next day, i.e., from 00.00 hours to 2400 hours of the following day; as per Clause 11.28, if the generators want any modifications/changes to be made in foreseen capabilities, it shall inform SLDC by 10 P.M. or preferably earlier; Clause 11.26 provides that the SLDC shall convey the schedule of each generating station in MW for different time blocks for the next day; the ex-summation of ex-power plant drawl schedule advised by the self-beneficiaries, the ex-power plant station wise dispatch schedule; the net drawl schedule to each Intra-State entities in MW for different time block for the next day; the net drawl by beneficiaries is the schedule generation minus transmission loss as schedule drawl of the beneficiaries; Clause 11.28 provides that the modifications/changes to be made in drawal schedule/foreseen capabilities, if any, found by generating stations shall be informed to SLDC by 10 P.M. or preferably earlier; clause 11.31 provides that, in case of forced outages of the unit, the SLDC shall revise the schedule on the basis of revised declared capacity; the same shall become effective from the 4th time block, counting the time block in which the revision is advised by the generating station to be the first one; Clause 11.34 provides for revision of schedule capacity of the generating station; the same should be effective from the 6th time block, counting the time block in which the request for revision has been received by SLDC to be

the first one; Clause 11.44 provides that the final schedule to be implemented during the day shall be issued by SLDC; these schedules shall be the datum for commercial accounting; the average ex-bus capability for each generating station shall also be worked out, based on all before- the-fact advice to SLDC; Clause 11.46 provides for maintaining the information by the SLDC with regard to station-wise foreseen ex-power plant capabilities advised by the generating stations, the drawl schedules advised by Intra-State entities, all schedules issued by the SLDC, and all revisions/updating of the above; Clause 11.48 provides that, while availability declaration by generating station shall have a resolution of one (1) MW and one (1) MWh, all entitlements, requisitions and schedules shall be rounded off to the nearest two decimals at each control area boundary for each of the transaction, to have a resolution of 0.01 MW and 0.01 MWh; Clause 11.52 provides that the beneficiaries shall ensure to minimize the VAr drawal at an interchange point when the voltage at that point is below 95% of the rated voltage and shall not return VAr when the voltage is above 105%; transformer taps at the respective drawal points may be changed to control the VAr interchange as per the beneficiary's request to SLDC, but only at reasonable intervals; a beneficiary may also request the SLDC for increase/decrease of VAr generation at a generating station for addressing a voltage problem; Clause 11.56 provides that the beneficiaries shall pay generating stations, capacity charges corresponding to plant availability and energy charges for the scheduled despatch, as per the relevant notifications and orders of GERC; the bills for these charges shall be issued by the respective generating stations to each beneficiary on a monthly basis; Clause 11.57 provides that the sum of the above fixed and energy charges from all beneficiaries shall fully reimburse the generating station for generation according to the given despatch schedule; in case of deviation from the despatch schedule, the

concerned generating station shall be additionally paid for excess generation through the UI mechanism approved by CERC; in case of actual generation being below the given despatch schedule, the concerned station shall pay back through the UI mechanism for the shortfall in generation; Clause 11.60 provides that monthly energy accounts and weekly statement of UI charges shall be prepared by the SLDC; the weekly statement of UI charges shall be issued to all constituents by Thursday for the seven-day period ending on the penultimate Sunday at midnight; payment of UI charges shall have a high priority and the concerned constituents shall pay the indicated amounts within 10 (ten) days of the statement issue into a State UI pool account operated by SLDC; the agencies that have to receive the money on account of UI charges would then be paid from out of the State UI pool account, within three (3) working days; Clause 11.66 provides that all 15-minute energy figures (net scheduled, actually metered and UI) shall be rounded off to the nearest 0.01 MWh; the aforesaid provisions of the ABT Orders read with the provisions of the GERC Grid Code provides that the over / under schedule and injection of energy as mis-declaration with intent to make undue commercial benefit qualify as gaming; whenever any such incident is recognized or comes to the notice of SLDC, it shall inform the Commission; the Commission may investigate and decide about gaming and take appropriate action; therefore, the contentions of the appellants that only over injection of energy against the Schedule qualifies as gaming, in such eventuality SLDC reduces the energy supplied as over injection/ over schedule as zero and no payment for such energy is receivable by the generator, is not correct; as over / under schedule/injection of energy qualifies as gaming, in case such act of the generator is mis-declaration with intent to obtain commercial gain; and, hence, the contention of the appellants could not be accepted.

The GERC, thereafter, observed that SLDC had also served notices based on real-time operations to the appellants for maintaining their generation as per the schedule advised by SLDC, since they were under injecting energy against their schedule; further, SLDC had carried out analysis of DSM bills for Q4 of FY 2018-19, and had informed the generators, vide letter dated 10.06.2019, about consistent under-injection of energy against schedule; the under-injection observed was 60.84%, 59.42% and 56.49% of schedule in case of M/s Amreli Power Projects Limited, M/s Bhavnagar Biomass Power Projects Pvt. Limited and M/s Junagadh Power Projects Pvt. Limited respectively; the appellants had filed their generation and injection data vide affidavit dated 14.09.2020 in compliance to the directives of the Commission as per Daily Order dated 10.09.2020; similarly, SLDC has also complied with the directives of the Commission given vide above referred Daily Order, and had filed the 15 minutes' time block-wise data for FY 2018-19 and FY 2019-20 vide their reply dated 15.09.2020, including injection data; on a comparison of the injection data submitted by both these parties, it was clear that the difference in the percentage between injection data submitted by the Appellants and SLDC was only marginal.

The GERC then examined details of 'Schedule' and 'Injection' in respect of the Biomass based power projects of the appellants ie out of total number of time-blocks in FY 2018-19 and FY 2019-20, in how many number of time blocks: (i) Declared Capacity was 'Zero'; (ii) Schedule was there but injection was 'Zero'; (iii) Number of events when continuously for four number of Time Blocks, the Schedule was there but injection was 'Zero'; (iv) Schedule was more than injection; (v) Schedule was less than injection; (vi) when DSM/UI rate was below Rs. 5.66 per unit / Rs. 5.86 per unit; and (vii) when DSM/UI rate was above Rs. 5.66 per unit / Rs. 5.86

per unit; and the above details along with relevant Schedule, Injection and percentage injection for FY 2018-19 and FY 2019-20 was extracted in the form of a table for each of the appellants separately.

The GERC observed that, from the said data in respect of M/s Amreli Power Projects Limited, it transpired that: (i) about 50% of time in FY 2018-19 and 30% in FY 2019-20, the plant had declared 'zero' capacity; (ii) in the remaining period, 99.70% time in FY 2018-19 and 99.2% in FY 2019-20, the plant had scheduled more than actual generation, and that means under injecting; (iii) actual generation was only 31.3% of schedule in FY 2018-19 and 38.4% of scheduled in FY 2019-20; (iv) there were 300 events in FY 2018-19, and 242 events in FY 2019-20, where injection was zero for continuous 4 time blocks (1 hour); (v) during FY 2018-19, 95.4% time of under injection was done when UI rate was less than preferential tariff i.e. Rs. 5.66; (vi) similarly, during FY 2019-20, 94% time of under injection was done where UI rate was less than preferential tariff i.e. Rs. 5.86; and (vii) it was only 4.6% in FY 2018-19 and 6.0% time in FY 2019-20, where under injection was done when UI rate was above Rs. 5.66/5.86.

The GERC observed that, from the data in respect of M/s Bhavnagar Biomass Power Projects Private Limited, it transpired that: (i) about 29% of time in FY 2018-19 and 22% in FY 2019-20 the plant had declared 'zero' capacity; (ii) in remaining period, 99.1% time in FY 2018-19 and 99.4% in FY 2019-20, the plant had scheduled more than actual generation, which meant under injecting; (iii) actual generation was only 37.7% of scheduled in FY 2018-19 and 40.7% of scheduled in FY 2019-20; (iv) there were 133 events in FY 2018-19 and 259 events in FY 2019-20, where injection was zero for continuous 4 time blocks (1 hour); (v) during FY 2018-19, 95.5% time of under injection was done when UI rate was less than preferential

tariff i.e. Rs. 5.66; (vi) similarly, during FY 2019-20, 94.2% time of under injection was done where UI rate was less than preferential tariff i.e. Rs. 5.86; and (vii) it was only 4.5% in FY 2018-19 and 5.8% time in FY 2019-20, where under injection was done when UI rate was above Rs. 5.66/5.86.

The GERC held that, from the data in respect of M/s Junagadh Power Projects Private Limited, it transpired that: (i) about 43% of time in FY 2018-19 and 26% in FY 2019-20 the plant had declared 'zero' capacity; (ii) in remaining period, 99.9% time in FY 2018-19 and 99% in FY 2019-20, the plant had scheduled more than actual generation which meant under injecting; (iii) actual generation was only 41.2% of schedule in FY 2018-19 and 46.6% of schedule in FY 2019-20; (iv) there were 161 events in FY 2018-19 and 119 events in FY 2019-20, where injection was zero for continuous 4 time blocks (1 hour); (v) during FY 2018-19, 95.7% time of under injection was done when UI rate was less than preferential tariff i.e. Rs. 5.66; (vi) similarly, during FY 2019-20, 93.3% time of under injection was done where UI rate was less than preferential tariff i.e. Rs. 5.86; and (vii) it was only 4.3% in FY 2018-19 and 6.7% time in FY 2019-20, where under injection was done when UI rate was above Rs. 5.66/5.86.

The GERC then extracted the details regarding number of days having certain Schedule per day with corresponding MW and percentage injection against such Schedule per day by the Appellants for FY 2018-19 and FY 2019-20, in the form of separate tables for each of the appellants.

The GERC then took note of instances when the declared Capacity/Availability made by the Appellants was of around 8 to 9 MW throughout the day i.e. for all 96 time-blocks in a day for a continuous

period of 4 to 39 days, but the actual energy injected during that period was much less than the Schedule; a few instances were as under: (i) during FY 2018-19, M/s Amreli Power Projects Limited had declared their Availability/Capability of generating 9 MW in all 96 time-blocks in a day (i.e. 216 MWh per day) for 15 days from 11.02.2019 to 25.02.2019, whereas actual energy injected was in the range of only 25% to 46% of the Schedule; similarly, from 24.10.2019 to 14.11.2019 (22 days) of FY 2019-20, the Availability/Capability declared was for generating 9 MW in all 96 time-blocks in a day (i.e. 216 MWh per day), whereas actual energy injected was in the range of 10% to 39% of the Schedule; (ii) M/s Bhavnagar Biomass Power Projects Pvt. Limited had declared their Availability/Capability for generation of 204 MWh for each day from 16.08.2018 to 15.09.2018 of FY 2018- 19 for 31 days i.e. 8.5 MW throughout each day (i.e. for all 96 Time blocks), whereas actual energy injected in the range of 4% to 25% of Schedule; even they had declared their Capability for- generation of 192 MWh for each day from 23.12.2018 to 21.01.2019 of the same FY for another 30 days i.e. 8 MW throughout each day (i.e. for all 96 Time blocks), whereas actual energy injected was in the range of 14% to 44% of the Schedule; similarly, they declared Availability/Capability for generation of 216 MWh for each day from 13.10.2019 to 04.11.2019 of FY 2019-20 for 23 days i.e. 9 MW throughout each day (i.e. for all 96 Time blocks), whereas actual energy injected in the range of 10% to 38% of Schedule; (iii) M/s Junagadh Power Projects Pvt. Limited had also declared their Capability for generation of 192 MWh for each day from 8.10.2018 to 24.10.2018 of FY 2018-19 for 17 days i.e. 8 MW throughout each day (i.e. for all 96 Time blocks), whereas actual energy injected was in the range of 41% to 59% of Schedule; and, similarly, the ‘Declared Capability’ for generation of 216 MWh for each day was made from 21.10.2019 to 12.11.2019 of FY 2019-20 for 23 days i.e.

9 MW throughout each day (i.e. for all 96 Time blocks), whereas actual energy injected in the range of 12% to 29% of Schedule.

The GERC observed that, from the data and analysis, it clearly emerged that there were ample instances when the Appellants for days together, continuously, be it for 14 days, 21 days or 28 days, had declared the plant capabilities, on day ahead basis, of either 8 MW or 8.5 MW or 9 MW against the installed plant capacity of 10 MW despite knowing that the actual generation, against the Schedule, was very less , and that they could generate only around 1/3rd of the Schedule based on their declared capabilities; the Appellants ought to have declared the capabilities of their plant faithfully and, in any case, once it was realised that the actual generation was far below the scheduled energy, the option of revision in their declared capability and schedule ought to have been exercised; on the contrary no revision was exercised despite the actual generation being much lower qua the Scheduled Energy; thus, even after knowing the factual situation of less generation against the higher schedule in the range of 80% to 90% of the installed capacity, they had not acted upon it, but continued to mis-declare capability/capacity and corresponding schedule on consistent basis; it was incumbent upon the generating stations to declare their plant capacity/capabilities faithfully, and according to their best assessment; the provisions under 'Scheduling and Dispatch' of GERC (Gujarat Grid Code) Regulations, 2013 specify the procedure for revising the declaration of plant capacity/capabilities with corresponding revision of scheduled Energy; the facts and data revealed that actual average generation was about 31% of scheduled energy for FY 2018-19 and 38% of scheduled energy for FY 2019-20 in case of M/s Amreli Power Projects Limited, whereas in the case of M/s Bhavnagar Biomass Power Projects Pvt. Limited, it was 38% of scheduled energy for FY 2018-19 and

41% of scheduled energy for FY 2019-20, while in case of M/s Junagadh Power Projects Pvt. Limited, it was 41% of scheduled energy for FY 2018-19 and 47% of scheduled energy for FY 2019-20; these factual aspects were not disputed by the Appellants; on the contrary, they had admitted the same, while submitting that they had scheduled units much below the units which could have been scheduled using the same fuel as per Commission's norms; the appellants had contended that, despite best efforts, the desired / expected input-output ratio, as envisaged in the Biomass Tariff Orders of the Commission, could not be achieved; it could also be seen from the above analysis that the mis-declaration of the plant capacity/capabilities by the Appellants were on a consistent basis because against the said 'Declared Capacity' or 'Availability Declaration', which became the 'Scheduled Energy' on account of the fact that their power projects fall under 'Must run' status as per the decision of the Commission, the 'Actual Energy' injected by the Appellants was much lower against such 'Scheduled Energy', more particularly when the UI rate was much lower compared to the preferential tariff decided by the Commission; there was no dispute that the Appellants claimed and received the preferential tariff of Rs. 5.66 per unit for FY 2018-19 and Rs. 5.86 per unit for FY 2019-20 as per the 'Scheduled Energy' from GUVNL, while paying UI charges towards 'Under-injected' energy; it also emerged that the 'under-injection' at much lower UI rates as compared to the preferential tariff was predominant and quantum of under- injected energy was much higher when compared to the quantum of 'under-injection' when the UI rate was more than the preferential tariff; even, the corresponding number of time-blocks with less UI rate compared to preferential tariff when under-injection had occurred were substantially higher than the number of time- blocks with UI rate more than the preferential tariff when under-injection had occurred which naturally implied that the intention was to Over-Schedule

coupled with Under- injection, and thereby earn huge undue gains; and, from the data and analysis, it clearly emerged that the mis-declarations were made intentionally in order to make undue commercial gains.

The GERC observed that, without generating any unit through utilisation of biomass fuel and merely supplying such energy under UI Mechanism by under-injecting, the Appellants were receiving an excess rate of about Rs. 3 per unit or above, being the differential amount between the preferential tariff for Scheduled energy as determined by the Commission and UI charges payable against difference between actual generation and scheduled generation; this excess rate of around Rs. 3/- or so appeared to have been recovered for the entire quantum of under-injected energy for generation and supply from their Biomass based power projects; the afore-said practice started from 01.04.2018, and the same was continued up to 31.03.2020 by the Appellants; as per the submissions of GUVNL, it continued post 31.03.2020 during FY 2020- 21 despite issuance of default Notices by them; thus, it is a clear case of 'Mis-Declaration' with intent to receive higher amount from GUVNL without carrying out any generation by use of biomass as fuel through the UI mechanism, and thereby earn money from GUVNL, which is ultimately recoverable from the public at large; it was the duty of the Appellants to manage affairs relating to biomass fuel and ensure that the requisite quantum with necessary GCV and other relevant characteristics is available at their power projects to enable generating and injecting power nearby the Scheduled Energy; merely, stating that biomass, which consists of various types of agro-waste, its quantum, its GCV, price, moisture, sand, dust, ash content etc. and heterogeneity of Biomass, does not serve any purpose because it is the obligation of the Appellants that the capacity declarations are faithfully done considering all relevant factors

which otherwise do not come in the way or impede generation of electricity near to the scheduled energy; it is the duty of the Appellants to faithfully and genuinely declare the capacity of generation with consideration of availability of fuel, its characteristics, GCV and avoid intentional under-injection, being the difference between actual generation of energy and the scheduled generation, and supply the same through UI mechanism; the act of the Appellants was to maximize their profits by making consistent mis-declarations; during the hearings, the Appellants admitted that, with the quantum of fuel which was utilised by them, they were able to generate on an average only 35% to 45% of Scheduled Energy; the Order dated 22.05.2018 in Petitions No. 1113/2011 & 1114/2011 and Order dated 31.07.2018 in Petition No. 1244/2012, have neither been challenged nor any review thereof is sought by any parties; even the Order dated 09.02.2018 in the matter of 'Study on biomass availability and determination of biomass prices in the six districts of Gujarat carried out by TERI as an Independent Consultant engaged by the Commission' was also not challenged; these Orders have attained finality and, therefore, any issues related to parameters, decisions, tariff etc. by the Commission cannot be accepted since the same have no relevance in the present matter.

The GERC further observed that, while declaring availability of plants and generation of electricity, there were huge deviations in energy injected qua the Schedule, which resulted in huge profiteering to the Appellants generators; such acts are against the provisions of the GERC Grid Code, 2013 and the provisions of the PPAs; the appellants were governed by the provisions of the ABT Order and its amendments issued by the Commission from time to time; the said Order contains provision regarding 'Gaming' as stated in para 12 of the ABT Order dated

11.08.2006 read with Amendment dated 01.04.2010; deviation from schedule in any time block is governed by the ABT Orders of the Commission; generators are required to take corrective measures once it comes to the knowledge of generators, on the basis of actual generation achieved, that the Declared capacity which is getting Scheduled is not achievable; option is given for corrective measures that, after four/six time blocks, revision in the Schedule/Capacity Declaration and to avoid the difference between Declared capacity of generation and actual generation achieved; the intent of introduction of ABT mechanism is to bring grid discipline amongst players associated in grid operation on real time basis; the ABT Orders, therefore, provided for revision of DC or Schedule to be effective from six time blocks so that the generator or distribution licensee or consumer of licensee get an option of revision of DC or Scheduled Energy and revise their Schedule, and avoid disturbance in grid operation; the appellants continuously violated the aforesaid provisions of the ABT Orders and under-injected energy against the Scheduled energy; and, considering the period of 2 years i.e. FY 2018-19 and FY 2019- 20, the details of Scheduled Energy, Actual Energy and Unscheduled Interchange in respect of the Appellants were being given in the form of a table.

The GERC observed that the aforesaid table showed that the appellants had continuously injected less energy against the Scheduled Energy, and had polluted the grid by way of under-injection; Biomass based generation is considered as 'Renewable Energy Generation' and the Commission has given preferential tariff by way of deciding and determining the same in its Tariff Order; the appellants had continuously under injected in comparison to the Scheduled Energy knowing the fact that, by less injection, they are required to pay UI charges against the injected energy while they are eligible to get the preferential tariff against

Scheduled Energy; the UI charges, which are payable against such under-injection, are also very less in comparison to the preferential tariff of Rs. 5.66 to Rs. 5.86 per unit; the appellants were well aware that under injection against the Scheduled Energy, on account of actual generation being much lower, is beneficial to them and also a source of generation of income and undue profit making mechanism available to them; the aforesaid acts were continued for a period of two years and, as a result of the difference between Preferential Tariff for biomass and UI charges, the appellants made huge profits by recovering such amounts from GUVNL, a government company supplying power to consumers.

The GERC further observed that the appellants M/s Junagadh Power Projects Limited and Amreli Power Projects Limited had executed supplemental PPAs dated 06.07.2018 and M/s Bhavnagar biomass Power Projects and GUVNL had executed supplemental PPA dated 28.08.2018; in the said PPAs, it was agreed to amend the tariff, stated in their earlier PPAs, as per the tariff determined by the Commission vide its Orders dated 22.05.2018 in Petition No. 1113/2011 & 1114/2011 in case of M/s. Junagadh Power Projects Limited & Amreli Power Projects Limited, and Order dated 31.07.2018 in Petition No. 1244/2012 in case of M/s. Bhavnagar Biomass Power Projects Pvt. Limited; the tariff determined by the Commission in the aforesaid Orders was on consideration of biomass GCV and pricings based on TERI Report, and Order dated 09.02.2018 passed by the Commission on such report; thus, the appellants had accepted and acted upon the Orders of the Commission wherein the Commission determined the biomass GCV and its pricing; and, hence, the contention that there were deficiencies in the TERI Report could not be accepted.

The GERC observed that, from the submissions made by the parties the following facts emerged : (i) the appellants had generated less against the Schedule energy/Declared capacity; (ii) payment received by them was against the Scheduled Energy based on Capacity Declaration of the power plants; (iii) actual quantum of Energy injected was quite low against the payment received by the Applicants for such energy; (iv) the Unscheduled Interchange seemed quite huge, and on continuous basis for the subject period; (v) the appellants did not obey and follow the decision of the Commission in ABT Orders specifically for the following aspects: (a) they had not revised their schedule on a daily basis when it was found by the Appellant generators that Scheduled Energy was far higher than that which ought to have been scheduled; (b) there was continuous under-injection against the Scheduled energy, and hence, continuous violation of the ABT Orders of the Commission; (c) they had not made required variation in fuel composition of biomass though knowing that the biomass with given GCV being utilised by them was not able to generate upto the Scheduled Energy; (d) the distribution licensee and its consumers paid higher cost to such power plants of the Appellants though they had not generated electricity from their power plants and supplied to the consumers and still recovered the preferential tariff; (e) at the cost of renewable energy, consumers of the State had actually received 35% renewable energy which is against environmental norms; from the above it was clear that the case was not in favour of the Petitioners but it was in favour of GUVNL from whom the Petitioners had recovered huge amount of Rs. 53.86 Crore and ultimately the said amount which is paid by GUVNL to the appellants can be claimed in the ARR/Tariff Petitions and thereby passed on to the consumers of the subsidiary distribution licensees of GUVNL; this is against the spirit of the Electricity Act, 2003 as well as the provisions of Tariff Policy, National Electricity

Policy, Regulations, Orders of the Commission to promote renewable energy and provisions of the PPAs; payment at lower rates for under-injected energy through the UI Mechanism, and claiming higher preferential tariff for Scheduled Energy, qualifies as unjust enrichment by the appellants; payments, as per preferential tariff as per the Scheduled Energy, is an admitted fact; such payment was received by the appellants as per Scheduled Energy, without actually generating up to the Schedule; the appellants had deviated from their schedules on a continuous basis for many time blocks of the day and generated electricity quite lower than scheduled energy and supplied energy to GUVNL through UI mechanism having quite low cost in comparison to the generic tariff of biomass receivable by the appellants at Rs. 5.66 per kWh for FY 2018-19 and Rs. 5.86 per kWh for FY 2019-20, while the UI charges were quite lower in comparison to aforesaid rates and recovered higher cost of energy supplied than receivable by them.

The GERC then referred to Articles 3.9, 4.1 (ii), 4.1 (iii), 4.1 (ix), 9.2, 9.2.1, 9.3.1, and 10 of the PPA, and to the judgements relied on behalf of the appellants that under injection was not gaming, and observed that gaming can occur both in over injection as well as under-injection in relation to the schedule; in the present case, the contention of GUVNL was that the appellants had carried out under-injection and commercially gained therefrom; under-injection was by intentional mis-declaration, and therefore, it qualified as gaming; the Commission, in its Generic Tariff Orders dated 17.05.2010, 08.08.2013 and 15.03.2018, had decided that biomass power projects have ‘Must Run’ status and they are subjected to scheduling and dispatch provisions; they are governed by ABT Orders; and these Orders have attained finality as there is no challenge to the said Orders by any parties.

After extracting the relevant portions of the said Orders, the GERC observed that it had also, in its Order dated 30.03.2015 in Petition No. 1455/2014 filed by M/s Abellon Limited, decided that the prayer of the Petitioners to exempt the biomass projects from the ABT mechanism was not accepted and the same was rejected; from the aforesaid orders, it was clear that generation from biomass based projects was recognized as predictable and governed by the ABT mechanism; Amreli biomass Power Projects and Junagadh Biomass Power Projects had challenged the orders of the Commission dated 17.05.2010 before the Appellate Tribunal and raised the issues of the energy charge determined by the Commission for the project life; subsequently, the said matters also went to the Supreme Court; however, there was no challenge on the issue of scheduling of generation before the Appellate Tribunal as well as the Supreme Court; hence, the decision dated 17.05.2010 had attained finality including on the issue of scheduling of biomass based generation; the contention of the appellants, that the schedule generation was not achievable, was not acceptable; the plant of the appellants which were operated during FY 2018-19 and FY 2019-20, and the data submitted on record, showed that the deviation continued during the operation of the plant from the schedule given by the generators; the deviations were substantial and there was no effort in reducing the said deviations by way of revision of the schedule given in the orders available to generator as well as the improvement in the schedule methodology; the appellants failed to prove the same based on the data submitted by them as well as the data submitted by the SLDC; thus, mis-declaration between scheduled energy and actual energy was on a continuous basis for a long time during FY 2018-19 and FY 2019-20, when UI charges were quite low in the range of Rs. 2.66 to Rs.2.82, while preferential tariff receivable by the appellants was Rs. 5.66/unit for FY 2018-19 and Rs. 5.86/unit for FY 2019-20; and

this proved beyond doubt that an additional amount of about Rs. 3/unit was received by the Appellants-Biomass generators by supplying energy through UI, by way of continuous mis-declaration and under injection of energy, with the intent of obtaining commercial gain, which qualified as ‘gaming’.

The GERC observed that the issue in the present cases pertained to under- injection lower than the schedule energy by the generators and recovery of tariff determined by the Commission against the energy interchange through the UI mechanism; it was undisputed that the preferential tariff determined by the Commission as a promotional measure was Rs. 5.66 per unit and Rs. 5.86 per unit for FY 2018-19 and FY 2019-20; the aforesaid tariff was determined by the Commission with consideration of various technical and commercial parameters as well as consideration of the fuel and its cost etc; the objective of said tariff was provided to the generators to increase the renewable energy generation for biomass based projects; further, the Commission had also allowed utilisation of 15% of coal as fuel in addition to biomass in the projects; thus, the duty cast upon the generators was to arrange biomass of the requisite quantum with requisite GCV of fuel and achieve scheduled generation and supply to the licensee i.e. GUVNL; however, in the present case, the appellants, who were biomass based generators, had failed to achieve scheduled generation, and they had supplied energy through UI mechanism to the procurer GUVNL; the aforesaid plants had operated initially during FY 2011-12 to FY 2017-18, and at that time the plants were also generating energy and supplied the same to GUVNL; however, the deviations observed were quite lower in comparison to the deviations observed during operation of plants in FY 2018-19 and FY 2019-20; and the contentions of the appellants, that the deviations in scheduled

generation was due to biomass fuel having varying characteristics of fuel, could not be accepted.

With respect to the appellants contention, that in case of gaming the duty cast upon SLDC is to inform the Commission about such eventuality and the Commission may investigate the matter and decide regarding gaming and GUVNL is not empowered to issue default notices on the ground of gaming without any decision of the Commission on the aforesaid issues, the GERC observed that gaming is an event of over injection as per the provision of the ABT Order dated 11.06.2006 read with Order No. 1 of 2010 passed by the Commission; further any mis-declaration of scheduled energy and its injection with the intention to make commercial gain also qualified as gaming as per provisions of the Grid Code notified by the Commission; this was also recognised by CERC, in Neyveli Lignite Corporation Limited v. Tamil Nadu Electricity Board, (2011) SCC Online CERC 88; in the present case, mis-declaration/scheduling was done by the Appellants, energy was supplied through UI Mechanism to GUVNL, and preferential tariff of Rs. 5.66 per unit and Rs. 5.86 per unit for FY 2018-19 and FY 2019-20 was recovered respectively; SLDC is a statutory body carrying out grid operation, management and safety on a real time basis; SLDC has submitted that the notices were issued by it to the appellants power plants on different dates during the years 2018, 2019 and 2020; receipt of these notices was not disputed by the parties; these notices issued by SLDC recognised that the appellants plants had actually under injected energy against scheduled energy given by them; moreover, the data submitted by SLDC, in compliance with the directions given by the Commission, also proved that mis-declaration and under-injection was higher during FY 2018-19 and FY 2019-20 when UI rates were quite lower; and in this regard it was necessary to refer and analyse the data submitted

by SLDC from FY 2011-12 to FY 2019-20 which is reproduced in the order in the form of a table. The GERC further observed that SLDC had also submitted details pertaining to appellants' plants with regard to schedule energy and actual energy injection, its impact on the Gujarat Energy Grid, details of number of time blocks when maximum DC is submitted and its impact and average system frequency and rates, revision in the schedule made by the appellants after giving declaration of schedule.

After extracting the same in the form of a table, the GERC observed that, from the said table, the following inferences were drawn: (i) Amreli Biomass Power Plant was commissioned during FY 2011-12; during that year the schedule energy and actual energy generation was having a variance with under-injection percentage of 2.71%; in FY 2012-13, the schedule generation drastically reduced by about 40% in comparison to the earlier year i.e. FY 2011-12; similarly, there was reduction in actual generation in FY 2012-13 in comparison to FY 2011-12, whereby under-injection against scheduled generation was observed to be about 11.53%; in FY 2013-14, the scheduled generation had increased by about 190% in comparison to scheduled generation during FY 2012-13; however, it was lower than the scheduled generation of FY 2011-12; the deviation observed between scheduled energy and actual energy as under- injection during FY 2013-14 was 9.32%; in FY 2014-15, the scheduled generation and actual injection had further reduced compared to FY 2013-14, and the deviation between schedule and actual generation was observed as 5.73%; from FY 2015-16 to FY 2017-18, the schedule energy generation and actual energy generation were negligible and deviation in schedule and actual energy generation was within the range of 20.50% to 77.15% with under-injection in FY 2016-17 and FY 2017-18 while in FY 2015-16 an over injection of 47.86% was observed; the Scheduled and Actual

generation were negligible in comparison to generation of electricity with consideration of the capacity of the biomass based power plant and was ignorable; during FY 2018-19, the schedule energy generation had increased substantially and corresponding actual energy generation had also increased, but deviation between scheduled energy and actual energy was quite high; the deviation between scheduled energy and actual energy was substantial, and the percentage of under-injection was 68.66%; it was also noteworthy that UI energy was more than double of actual energy generation/injection during said FY 2018-19; in FY 2019-20, it was observed that scheduled energy had substantially increased in comparison to FY 2018-19; it was found that percentage of under injection was 61.58%; thus, the deviation in schedule and actual energy generation was substantial during FY 2018-19 and FY 2019-20; and it was also observed that the energy supplied through UI energy was higher than actual energy generation and supplied during FY 2018-19 and FY 2019-20 from this biomass based power plant at Amreli.

In so far as the Bhavnagar biomass-based power plant was concerned, the GERC observed that the said plant was commissioned during FY 2011-12, wherein the schedule energy and actual energy generation was quite low and variance between the scheduled energy and actual energy was with an under-injection of 5.06%; in FY 2012-13, the schedule generation had substantially increased in comparison to the earlier year i.e. FY 2011-12; similarly, actual generation had also increased in FY 2012- 13 when compared to FY 2011-12, whereby under-injection against scheduled generation was observed to be about 1.66%; in FY 2013-14, the scheduled generation had substantially decreased by about 44% in comparison to scheduled generation during FY 2012-13; the deviation observed, between scheduled energy and actual energy, as

under-injection during FY 2013-14, was 7.63%; in FY 2014-15, the scheduled generation and actual injection had further increased as compared to FY 2013-14 and deviation between schedule and actual generation was observed as under-injection of 3.79%; from FY 2015-16 to FY 2017-18, the scheduled energy generation and actual energy generation were quite negligible, and deviation in schedule and actual energy generation was within the range of 2.72% to 19.28% with under-injection in FY 2015-16 to FY 2017-18; the Scheduled and Actual generation were negligible in comparison to generation of electricity with consideration of the capacity of biomass based power plant and ignorable; during FY 2018-19, the schedule energy generation had increased substantially and corresponding actual energy generation had also increased, but deviation between scheduled energy and actual energy was quite high; the deviation between scheduled energy and actual energy was substantial and percentage of under-injection was 62.27%; UI energy was almost around 165% of actual energy generation/injection during the said FY 2018-19; in FY 2019-20, scheduled energy had further substantially increased in comparison to FY 2018-19; it was found that the percentage of under injection was 59.26%; the deviation in schedule and actual energy generation was also substantial during FY 2018-19 and FY 2019-20; and the energy supplied through UI energy was higher than actual energy generation and supplied during FY 2018-19 and FY 2019-20 from this biomass based power plant at Bhavnagar.

The GERC observed that the Junagadh Biomass based power plant, was commissioned in FY 2011-12 wherein the schedule energy and actual energy generation was having variance with an under- injection of 6.30%; in FY 2012-13, the schedule generation had marginally increased in comparison to the earlier year i.e. FY 2011-12; similarly, actual generation

had also marginally increased in FY 2012-13 when compared to FY 2011-12, whereby under-injection against scheduled generation was observed to be about 3.99%; in FY 2013- 14, the scheduled generation had reduced to almost 33.69% of scheduled generation during FY 2012-13; the deviation observed between scheduled energy and actual energy was under-injection during FY 2013-14 of 7.82%; during the period from FY 2014-15 to FY 2017-18, the scheduled generation and actual injection had substantially reduced as compared to the previous financial years, and was quite negligible and deviation in schedule and actual energy generation was within the range of 35.79% to 43.99% with under-injection, except FY 2015-16 when there was over-injection; the Scheduled and Actual generation were negligible in comparison to generation of electricity with consideration of the capacity of the biomass based power plant and ignorable; during FY 2018-19, the scheduled energy generation had increased substantially, but deviation between scheduled energy and actual energy was quite high; the deviation between scheduled energy and actual energy was substantial and percentage of under-injection was 58.82%; UI energy was almost around 142% of actual energy generation/injection during the said FY 2018-19; in FY 2019-20, the scheduled energy had further substantially increased in comparison to FY 2018-19; it was found that percentage of under injection was 53.40%; the deviation in schedule and actual energy generation was also substantial during FY 2018-19 and FY 2019-20; and the energy supplied through UI energy was higher than actual energy generation and supplied during FY 2018- 19 and FY 2019-20 from this biomass based power plant at Junagadh.

The GERC further held that, from the aforesaid, the following observations were also drawn: (i) after commercial operationalisation of

the aforesaid power plants, the schedule generation by the generators was quite high in certain years; thereafter, it reduced drastically except in FY 2014-15; during FY 2015-16 to FY 2017-18, the declared scheduled energy and the actual energy was quite low or negligible; and the error observed between scheduled generation and actual generation, and reflected as under-injection, was also quite low in initial years of operationalisation of power plant up to FY 2013-14; thereafter, in FY 2018-19 and FY 2019-20, the scheduled energy was quite high in comparison to scheduled energy of earlier years, whereas corresponding actual energy was quite low; thus, deviation of energy was quite high and was reflected as under-injection; supply of energy through UI energy percentage was quite high in FY 2018-19 and FY 2019- 20 in comparison to generation and supply of actual energy from the power plant during the above years. (ii) generation of energy scheduled had reduced from FY 2011-12 to FY 2017-18, and thereafter in FY 2018-19 and FY 2019-20 there was substantial increase in scheduled generation; however, actual generation was quite low. (iii) in all the three biomass power projects, disputes arose with regard to under-injection for FY 2018-19 and FY 2019-20, and as per GUVNL submission for some months of FY 2020-21; there was no dispute pertaining to under-injection for earlier years. (iv) deviations in the biomass power plants were observed from the inception i.e., from the commissioning of the plants and the same were continued for every year; however, the issue of under- injection reflected as a dispute during FY 2018-19 and FY 2019-20 between the parties; the State Energy Accounts were also prepared by SLDC, and settled during the aforesaid years; however, the disputes were with regard to under- injection by all the three Biomass based Power Projects which had recovered substantial amounts from GUVNL against the energy supplied through UI Energy Mechanism having a lower rate than the preferential tariff determined by

the Commission, and they had obtained undue benefit by way of mis-declaration in scheduled generation. (v) the under-injection in energy terms was substantially lower in quantum by way of actual injection compared to scheduled energy from the biomass-based power plants of the Appellants during FY 2011-12 to FY 2013-14; the actual energy generation were quite higher in comparison to scheduled energy and it was varying in the range of 89% to 95% during the aforesaid years. (vi) the total number of time-blocks when maximum DC was submitted by the appellants during FY 2018-19 and FY 2019-20 were stated in the tables from which it transpired that the appellants had never revised the schedule generation either upward and downward during FY 2018-19. (vii) during FY 2018-19, the appellants had punched declared capacity for different time blocks at maximum capacity; however, actual energy generated was quite low against such scheduled energy in the aforesaid maximum declared capacity in different time blocks; under-injection was found substantially higher in case of Amreli, Bhavnagar and Junagadh power projects; the time blocks, where the actual energy generation is equal to or more than 2 MWh when declared capacity at maximum value are quite lower were, in case of Amreli, it was in 5 time blocks, in case of Bhavnagar it was 36 time blocks and in case of Junagadh there are no such time blocks; (vii) the time blocks when the generators/ appellants paid DSM rate equivalent or greater than Rs. 8 was 82 time blocks in case of Amreli, 124 time blocks in case of Bhavnagar and 117 time blocks in case of Junagadh Power Plant; similarly, during FY 2019-20, the situation like FY 2018-19 was continued; the Appellants had never revised the schedule generation either upward or downward during FY 2019-20. (viii) the declared capacity punched for the different time blocks at maximum capacity were substantially higher during FY 2019-20; however, actual energy generated was observed quite lower in comparison to scheduled

energy generation in the maximum declared capacity time blocks; under-injection was found substantially higher in case of Amreli, Bhavnagar and Junagadh biomass projects; the time blocks, where the actual energy generation was more than 2 MWh when declared capacity at maximum value, were quite lower; in case of Amreli, there were 121 time blocks, in case of Bhavnagar there were 169 time blocks, and in case of Junagadh there were 155 time blocks. (ix) the time blocks, when the generators/ appellants paid DSM rate equivalent or greater than Rs. 8 per unit were 269 time blocks in case of Amreli Power Plant, 327 time blocks in case of Bhavnagar Power Plant, and 339 time blocks in case of Junagadh Power Plant. (x) SLDC had reported that none of the biomass based generators of the appellants had made upward or downward revisions during FY 2018-19, FY 2019-20 and FY 2020-21 (i.e. disputed period) when UI–DSM rate was less than Rs. 3 per unit, though declared capacity availability was full; moreover, full DC were submitted by all three generators / appellants during the aforesaid period in more than 50% time blocks while the energy injected against such full capacity of DC was only 42% on average basis during FY 2019-20; and the generators could not have submitted/punched declared capacity without consideration of actual injection.

From the details provided by SLDC, and upon analysing the same, the GERC observed that the issue of under-injection from the schedules given by the appellants continued, since the commissioning of the plant; only in one year, in Bhavnagar plant and in Junagadh plant, there was over injection than scheduled injection given by the generators; further, such over injection was of a negligible quantum with consideration of scheduled declared capacity of the generators; the under-injection varying in percentage continued from FY 2011-12 to FY 2019-20 by the

generators; however, notices for under- injection/ over injection were given during FY 2018-19, FY 2019-20 and for some months of FY 2020-21 by SLDC; the Declared Capacity (DC) during FY 2018-19 and FY 2019-20, in different time blocks submitted by the appellants for their three biomass based power projects, was substantially higher but actual energy generated and supplied was quite lower by way of under- injection.

The GERC observed that, for FY 2018-19, the following inferences were drawn: (i) from the aforesaid data and details submitted by SLDC in its report, it was clear that during FY 2018-19, the total time blocks of the year were 35040. (ii) the time block in which maximum DC capacity punched by the appellants (2.25 MwH) was varying from project to project. In case of Amreli it was 4516 time block, in Bhavnagar it was 4458 time block and in Junagadh it was 3919 time block. (iii) it was 13% of the total time blocks in case of Amreli and Bhavnagar projects and 11% of time block in case of Junagadh project. (iv) Total Scheduled energy when DC was maximum (2.25 MwH) worked out to 10161 MwH in case of Amreli, 10030.50 MwH in case of Bhavnagar and 8817.75 MwH in case of Junagadh Power projects. (iv) the Actual Energy generated when DC was maximum (2.25 MwH) was 3781.70 MwH in case of Amreli Power Project, 4548.88 MwH in case of Bhavnagar Power Projects and 4169.30 MwH in case of Junagadh Power Project. (v) considering the scheduled energy generation and corresponding actual energy generated stated above, it was clear that the under-injection (mis-match in declared capacity of scheduled energy and actual energy) works out 63% in case of Amreli Power Project, 55% in case of Bhavnagar Power Projects and 53% in case of Junagadh Power Project. (vi) the actual energy was more than the DC punched value in case of Amreli in 5 time blocks, in case of Bhavnagar 36 time blocks and in case of Junagadh is ‘Nil’ time block. (vii) the UI rate

paid higher than or equal to Rs. 8 per unit (Basic UI rate + Additional UI) in case of Amreli was 82 time blocks, 124 in case of Bhavnagar and 117 in case of Junagadh. (viii) there was schedule for energy generation given by the appellants biomass-based power plants. However, there was 'Zero' injection against such schedule of energy given by them. In case of Amreli project, the energy was scheduled in 1498 time blocks with corresponding scheduled energy of 2985 MwH but against which injection was 'Zero'. Similarly, in case of Bhavnagar project the energy was scheduled in 812 time blocks with corresponding scheduled energy of 1685.525 MwH but against which injection was 'Zero'. Also, in case of Junagadh project, the energy was scheduled in 825 time blocks with corresponding scheduled energy of 1694.875 MwH but against which injection was 'Zero'.

The GERC observed that, for FY 2019-20, the following inferences were drawn: (i) from the data and details submitted by SLDC in its report, it was clear that during FY 2019-20, the total time blocks of the year were 35136. (ii) the time block in which maximum DC capacity punched by the appellants (2.25 MwH) was varying from project to project; in case of Amreli, it was 19068 time blocks, in Bhavnagar it was 20031 time blocks and in Junagadh it was 20826 time blocks. (iii) it was 54% of total time blocks in case of Amreli, 57% in case of Bhavnagar projects and 59% of time blocks in case of Junagadh project. (iv) total Scheduled energy when DC was maximum (2.25 MwH) worked out to 42903 MwH in case of Amreli, 45069.75 MwH in case of Bhavnagar and 46458.50 MwH in case of Junagadh Power projects. The Actual Energy generated when DC was maximum (2.25 MwH) was 16452.57 MwH in case of Amreli Power Project, 19092.24 MwH in case of Bhavnagar Power Projects and 22128.16 MwH in case of Junagadh Power Project. (v) considering the scheduled energy generation and corresponding actual energy generated

stated above, it was clear that the under-injection (mismatch in declared capacity of scheduled energy and actual energy) worked out to 62% in case of Amreli Power Project, 58% in case of Bhavnagar Power Projects and 53% in case of Junagadh Power Project. (vi) the actual energy was more than the DC punched value in case of Amreli in 121 time blocks, in case of Bhavnagar 169 time blocks and in case of Junagadh in 155 time blocks. (vii) the UI rate paid higher than or equal to Rs. 8 per unit (Basic UI rate + Additional UI) in case of Amreli was 269 time blocks, 327 in case of Bhavnagar and 339 in case of Junagadh. (viii) there was schedule for energy generation given by the appellants' biomass-based power plants. However, there was 'Zero' injection against such schedule of energy given by them. In case of Amreli project, the energy was scheduled in1336 time blocks with corresponding scheduled energy of 2729.300 MwH but against which injection was 'Zero'. Similarly, in case of Bhavnagar project the energy was scheduled in 1411 time blocks with corresponding scheduled energy of 2896.150 MwH but against which injection was 'Zero'. Also, in case of Junagadh project, the energy was scheduled in 721 time blocks with corresponding scheduled energy of 1460.875 MwH but against which injection was 'Zero'.(ix) though the appellants had declared maximum capacity and scheduled energy generation, they were unable to achieve the generation as schedule and substantial lower generation / under injection was done by it. Further, the actual higher generation and injection when UI charges were higher was also quite lower. (x) SLDC had submitted the details with regards to prevailing average frequency and UI rate during FY 2018- 19, FY 2019-20, which indicated that whenever there was higher frequency during FY 2018-19 and FY 2019-20 above 50.05 Hz but tno revision in declared capacity by the generators. Similarly, whenever frequency was lower than 50 Hz say 49.80 in that case also no revision in scheduled was done by the appellants/generators. Thus, the

appellants had not changed in their schedules once it was given though the revision in the schedule is permissible as per Regulations/Orders. (xi) under-injection was done by the appellants whenever UI / DSM charges were quite low i.e., less than Rs. 3 per unit while the receivable revenue for supply of energy against the scheduled energy was Rs. 5.66 per unit during FY 2018-19 and Rs. 5.86 per unit FY 2019-20. Thus, by consistent mis- declaration between scheduled and actual energy, commercial gains was about Rs. 3 per unit to the appellants. There were very few instances when the under-injection/over- injection done by the Petitioners when UI charges are at higher rate than preferential tariff receivable by them during FY 2018-19 and FY 2019-20.

After taking note of the data submitted by SLDC, with regard to over injection/under-injection by the Appellants' biomass power plants during the FY 2011-12 to FY 2019-20, and after reproducing them in the form of tables, the GERC observed that the appellants had carried out under-injection by giving higher schedule and not revising the same though the said option was available to them; such under-injection of energy was a substantial quantum of the scheduled energy; the scheduled energy, which was renewable in nature, was having higher rate of Rs. 5.66 per unit and Rs. 5.86 per unit in FY 2018-19 and FY 2019-20 respectively as decided by the Commission; this amount, receivable by the appellants, was far higher than the UI rates which were in the range of Rs.2.66 per kWh to 2.82 per kWh; a substantial quantum of scheduled energy was not generated by the appellants, and was diverted to UI energy at a lower rate to GUVNL on a continuous basis as and when scheduling of energy was carried out by them; the aforesaid practise continued for a long period of about 2 years and more, and the appellants thereby earned higher revenue from GUVNL by supplying power through UI energy instead of

actual generation; this was a clear case of mis-declaration for a long time with intent to obtain financial and commercial gain; the over-injection done by the appellants' plant were lower than scheduled energy; moreover, the scheduled energy quantum was quite lower, when UI charges were higher than the tariff of Rs. 5.66 per unit and Rs. 5.86 per unit during FY 2018-19 and FY 2019-20; the tables clarified that, by way of under-injection, the appellants had earned higher revenue or tariff and obtained commercial gain by supplying energy under UI Mechanism on a consistent and continuous basis with mis-declaration in the declared Capacity/Scheduled Energy versus the actual energy.

With regards the appellants contention, that GUVNL had no authority under the Orders passed by the Commission as well as the provisions of PPAs, Grid Code notified by the Commission, to issue notices, the GERC held that these contentions were not acceptable for the following reasons: (i) the provisions of the ABT Orders and Grid Code provided that, whenever there was gaming, such events were required to be notified by the SLDC to the Commission, (ii) the Commission was required to carry out inquires and decide whether there was gaming, (iii) the ABT Orders recognised that over injection more than scheduled generation was gaming; the said Order was silent about continuous mis-declaration with intent to obtain commercial gain by diverting UI energy as supply of energy from the generating plants, if any, carried out against the scheduled energy and obtaining commercial gain by such an act of the entity concerned, when the preferential tariff/rate of Rs. 5.66/unit or Rs. 5.86/unit is substantially higher than the UI rate in the range of Rs. 2.66/unit to Rs. 2.86/unit; thus, the deliberate act of the entity concerned, which obtained commercial gain through the act of mis- declaration of energy which is against the spirit of the said Mechanism, is not

permissible. (iv) ABT Orders state that the said Mechanism was introduced with the intent to bring grid discipline amongst the constituents associated with grid operation, and some flexibility between scheduled and actual generation permitted; the intent of said Order is not to allow unjust commercial gain by mis-declaration in scheduled energy, and (v) the provision of scheduling code, provided under ABT Order and some of the provisions of the Grid Code, stipulated that any mis-declaration of schedule intentionally by the generator with intent to obtain commercial gain qualified as gaming.

With respect to the contention of the appellants that they had utilised normative quantum of fuel with consideration of the schedule generation as per the Orders of the Commission, and they had also paid UI charges for the under-injection as per the State Energy Account reports regularly issued by SLDC, but were unable to achieve the requisite generation due to heterogeneous quality of biomass, its characteristics etc, the GERC observed that it was the duty of the generator to generate electricity scheduled by them taking into consideration the characteristics of fuel, GCV of fuel, plant, technical parameters etc; merely stating that utilisation of fuel is as per the normative quantum required as per the Order of the Commission is not acceptable, because the Commission has determined the quantum of fuel utilised by biomass power projects taking into consideration different type of biomass, its GCV etc; the quantum of fuel requirement vary on taking into consideration different parameters like SHR of the plant, GCV of the fuel, operating capacity of the plant, auxiliary consumption etc; it is duty of the generator to verify availability of fuel, its characteristics and GCV before it schedules and generates electricity; no data was placed on record to show the different types of biomass and GCV of such biomass fuel utilised by the appellants on day to day basis;

verification of such GCV of fuel, quantum of fuel required with consideration of GCV of fuel is as considered and determined by the Commission while passing the generic tariff order for biomass power projects which was accepted by the appellants, and based on which the PPAs and supplemental PPAs were executed with GUVNL; it was the duty of generators, as a prudent practice, to see/verify the GCV of fuel, its characteristics, the quantum of fuel required to generate energy therefrom; only quantum of fuel is not sufficient to hold that generation of energy is not possible on utilisation of such fuel; the GCV of fuel is also essential to see while determining the generation of energy by utilisation of such fuels; and the contention that the deviation, in the schedule and the actual generation, was beyond their control though they had utilised quantum of fuel higher than normative quantum of fuel, was not acceptable.

The GERC noted that, while the appellants had contended that there was no intentional mis- declaration on their part and it was beyond their control, GUVNL had contended that the declaration of schedule was with the intent to obtain commercial gain. It then observed that the plants of the appellants were commissioned during FY 2011-12; initially for one or two years after COD, the plants had generated electricity by giving schedules to SLDC for about 25% to 35% of their capacity; the deviations observed between scheduled energy and actual energy were quite low in the initial years i.e. FY 2011-12 to FY 2014-15; the appellants' Power Plants had given schedules for generation in FY 2018-19 and FY 2019-20, and for some months of FY 2020-21; during the aforesaid periods, the scheduled energy was given substantially higher in comparison to earlier years; the tariff payable for energy supplied from biomass power projects of the appellants for FY 2018-19 was Rs. 5.66 per unit and Rs. 5.86 per unit for FY 2019-20; the average UI charges payable, as per the data

submitted by SLDC for deviation between scheduled energy and actual energy injected with consideration of matched UI charges paid and corresponding UI energy for Amreli Biomass Power Project was Rs. 2.67 per unit for FY 2018-19 and Rs. 2.74 per unit for FY 2019-20; similarly, in case of Bhavnagar Biomass Power Project it was observed to be Rs. 2.66 per unit for FY 2018-19 and Rs. 2.82 per unit for FY 2019-20, while in case of Junagadh Biomass Power Project it was Rs.2.75 per unit for FY 2018-19 and Rs. 2.78 per unit for FY 2019-20; thus, the difference between the tariff receivable for the scheduled energy (actual energy supplied) from the plant was higher than the UI rate payable for deviation between schedule and actual energy generation by the generators; there were only few instances when the energy supplied through UI Mechanism by the appellants were higher than Rs. 5.66/unit in FY 2018-19 and Rs. 5.86/unit for FY 2019-20; it was thus clear that supply of energy through UI energy was of a high quantum and at rates far lower than the tariff payable by it, for such UI energy; the appellants had not rescheduled generation, though the provision of ABT Order, scheduling and dispatch code and provisions of the Grid code provided for it; thus, it was clear that, though the mechanism for revision of schedule was provided in the aforesaid Orders and Regulations, no attempt was made by the appellants to do so; and they had earned huge amount from GUVNL by supplying energy through UI mechanism; the appellants had declared the capacity of the plants for generation for more than 2 years with substantial deviation between schedule energy and actual energy; there was no evidence to show that any attempt was made by the appellants to reduce the deviations between actual and scheduled energy generation; it was thus clear that the mis-declaration between scheduled energy and actual energy done by the appellants for a long period knowing that there was substantial deviation between scheduled and actual generation, and the schedule given by

them were not as per the industrial practices; the deviations between scheduled energy and actual energy reduce in FY 2019-20 in comparison to FY 2018-19, however, that reduction was quite lower in comparison to overall deviation; the scheduled energy increased substantially in FY 2019-20 in comparison to FY 2018-19; correspondingly, the UI energy percentage also increased substantially; thus, though the percentage of UI energy supplied was lower in FY 2019-20 in comparison to FY 2018-19, but as the quantum of UI energy supplied was higher, the energy supplied by the appellants through UI to GUVNL resulted in higher charges being paid to them by GUVNL; the aforesaid acts clearly proved that the mis- declaration in schedule and actual energy generation was resorted to intentionally to earn higher revenue by supplying energy through UI mechanism available at a lower rate. and to obtain commercial gain.

After extracting details of the average per unit rate of UI mechanism provided by SLDC for over injection and under-injection by the Appellants' plants in the form of tables, the GERC observed that (1) the UI charge paid by Amreli Power Plant was Rs. 6,68,84,513 for 2,50,95,300 units. The average rate of energy works out to Rs. 2.67 per unit. Similarly, for FY 2019-20 UI amount paid was Rs. 8,92,31,101 for 32540560 units. The average rate of energy worked out to Rs. 2.74 per unit. Thus, the UI charges paid by the appellants was quite lower in comparison to prevailing tariff of Rs. 5.66 per unit for FY 2018-19 and Rs. 5.86 per unit for FY 2019-20 received against scheduled energy though the quantum was not supplied as per schedule.

(2) Similarly, the UI charge paid by Bhavnagar Power Plant was Rs. 8,49,39,733 for 3196969 units. The average rate of energy worked out to Rs. 2.66 per unit. While for FY 2019-20 UI amount paid Rs. 9,52,76,667 for 33833050 units. The average rate of energy works out to Rs. 2.82 per

unit. Thus, the UI charges paid was quite lower in comparison to prevailing tariff of Rs. 5.66 per unit in case of FY 2018-19 and Rs. 5.86 per unit for FY 2019-20 received against scheduled energy though the quantum is not supplied as per scheduled. (3) Similarly, the UI charge paid by the Junagadh Power Plant was Rs. 6,80,09,280 for 24747410 units. The average rate of energy works out to Rs. 2.75 per unit. Similarly, for FY 2019-20 UI amount paid Rs. 8,2294,423 for 29607000 units. The average rate of energy works out to Rs. 2.78 per unit. Thus, the UI charges paid was lower in comparison to prevailing tariff of Rs. 5.66 per unit in case of FY 2018-19 and Rs. 5.86 for FY 2019-20 received against scheduled energy though the quantum is not supplied as per scheduled; from the aforesaid analysis, it was clear that the appellants Power Plants had, by mis-declaration in scheduled and actual energy and by way of under-injection generated less actual energy and supplied more energy through UI mechanism and obtained commercial gain by way of paying quite less amount for UI charges and recovered higher revenue at the rate of preferential tariff/rate of biomass energy.

With respect to the contention that GUVNL was not affected as they had been supplied the schedule energy quantum, consisting of energy generated from biomass fuel and the energy supplied through UI, and GUVNL was benefitted by way of utilisation of the energy supplied by generation from biomass as well as UI mechanism and the same were also shown for fulfilment of RPO, the GERC found them un acceptable for following reasons: (1) the deviations in schedule energy and actual energy supplied by the Petitioners was fulfilled through the energy supplied under UI mechanism which consists of the energy supplied from the conventional as well as renewable energy sources. There was no bifurcation of such energy available. However, the energy supplied from UI mechanism did

not qualify as fulfilment of RPO as per the provisions of the Regulations notified by the Commission. (2) the energy supplied under UI mechanism by the appellants, as a part of under injection from schedule, did not qualify for fulfilment of RPO; and (3) The Commission in its Order dated 21.04.2022 in Petition No. 1808 of 2019 filed by GUVNL for compliance of RPO for FY 2018-19 has not allowed the energy supplied through UI energy mechanism from biomass power plants for fulfilment of RPO; and the energy supplied by the appellants, through UI mechanism, enriched them by way of receiving higher amount of Rs. 5.66 per unit in FY 2018-19 and Rs. 5.86 per unit in FY 2019-20 against the energy supplied through UI mechanism having quite lower rates.

With respect to the contention that the Central Electricity Authority, CERC and MNRE have considered the characteristics of the biomass as heterogeneous and decided that the generation from biomass was not predictable, the GERC observed that the appellants request to grant higher deviations between scheduled and actual generation by relying on MNRE/CEA/CERC documents were not acceptable for the following reasons: (i) no relevant documents were submitted by them in supports of the aforesaid submissions; (ii) the appellants' Power Plants were governed by various Orders passed by the Commission, APTEL and the Supreme Court, and the provisions of the PPAs executed between the parties, (iii) the appellants Power Projects were governed by the Generic Tariff Orders dated 17.05.2010, 08.08.2013, and 15.03.2018; the aforesaid Orders specifically provided that biomass power projects are governed by ABT Orders. They are having must run status. Thus, the aforesaid Orders recognised that the appellants power plants are governed by ABT Orders. (iv) the data of the appellants biomass power plants established that, after COD of the plants in initial three years,

deviations between the scheduled and actual generations was quite low. Hence, it was incorrect to say that the deviations limit needs to increase. (v) Amreli Power Project and Junagadh Power Projects had challenged the order dated 17.05.2010 of the Commission before APTEL and the aforesaid disputes later on reached the Supreme Court; in the said disputes, the issues raised by the appellants pertained to energy charge and non-applicability of ABT Orders or scheduling and despatch code to their power plants. Thus, the Order of the Commission with regard to scheduling biomass power projects, had attained finality. (vi) the appellants had executed PPAs with GUVNL wherein it was specifically agreed that the power plants had must run status, they were governed by the ABT Orders of the Commission, and they were required to carry out scheduling and despatch of energy. (vii) the Commission, in the remand matter from APTEL and the Supreme Court, had re-determined energy charges for biomass projects with consideration of biomass availability, its GCV, and price which was considered by the Commission and the tariff of biomass power projects was determined. (viii) the appellants Junagadh and Amreli Power Projects had executed supplemental PPA dated 6.07.2018, and Bhavnagar Power Project had executed supplemental PPA dated 28.08.2018 wherein the provision of the governing ABT Order mechanism of the plant were agreed to be continued by the parties; it was therefore clear that the appellants plants were governed by the provisions of the ABT Orders, including the scheduling and dispatch codes, and they recognised that intentional mis-declaration of scheduling qualified as the gaming; moreover, the said Orders did not provide any limits with regard to deviations permissible as per the ABT Orders.

The GERC further observed that, on verification of the data submitted by SLDC, it was clear that over injection during FY 2018-19 by

the Amreli Power Plant was only 1.10% of the time blocks from out of the total no. of time blocks when maximum capacity was declared; similarly, in case of Bhavnagar the same was about 1% of total number of time blocks, while in case of Junagadh the same was 0%; similarly, during FY 2019-20 the over injection in case of Amreli Power Projects was 0.63% of the time blocks i.e. less than 1% of the time blocks; in case of Bhavnagar it was 0.84% and in case of Junagadh Power Plant, it was 0.75% of the total time block; and, hence, over injection in certain time blocks were negligible in comparison to scheduled energy generation given by them.

With respect to the contention that the appellants had paid UI charges higher than the tariff determined by the Commission, and had paid about Rs. 8 per unit, the GERC observed that, on verification of data submitted by SLDC, it was clear that (i) in case of Amreli Power Plant the UI rates paid higher than tariff determined by the Commission during FY 2018-19 was 1.82% of the total time blocks, and in case of FY 2019-20 it was 1.42% of total time block when the maximum capacity was declared by the appellants. (ii) similarly, in case of Bhavnagar Power Plant, the UI rates paid higher than tariff determined by the Commission during FY 2018-19 was 2.78% of the total time blocks and in case of FY 2019-20 it was 1.63% of total time block when the maximum capacity was declared by the appellants (iii) in case of Junagadh Power Plant, the UI rates paid higher than tariff determined by the Commission during FY 2018-19 was 2.98% of the total time blocks and in case of FY 2019-20 it was 1.65% of total time block when the maximum capacity was declared by the appellants; from the above analysis, it was clear that the time blocks, when higher injection of actual energy than scheduled energy was supplied by the appellants to GUVNL during FY 2018-19 and FY 2019-20 were negligible in comparison to under injection against the schedule; and,

similarly, the UI charges paid higher than the tariff receivable for supply of energy from biomass power plant were also a negligible percentage in comparison to the lower UI charges paid for under injection by the appellants during FY 2018-19 and FY 2019-20.

With respect to the contention that the claim of GUVNL, in the default notices, run contrary to the provisions of the PPAs, the GERC, after taking note of Articles 4.2, Article 5 of the PPA, both before and after amendment, Article 9.2.1, Article 9.3.1 and Article 10 of the PPA, the provisions of Orders dated 17.05.2010, 07.02.2011, 08.08.2013 and 15.03.2018, the provisions of the GERC Grid Code, and the ABT Orders, observed that the provisions of Article 4.2 read with Articles 5.1, 5.2, 5.4 and 9.2.1 of the PPA states about the scheduling of energy by the Power producers and, based on it, the SEA is issued by SLDC, and GUVNL is liable to pay tariff to the appellants; further, it also recognises that the tariff payable by GUVNL as per Orders of the Commission, and that agreed between the parties in the PPA; the power plants are governed by ABT Orders also; the settlement of UI is to be carried out by the power producers directly with SLDC; Article 9.2.1 (f) states regarding the event of default of the power producer when the plants are not operated by the power producer as per the Grid Code notified by the Commission, SLDC instructions and prudent practises of the industries; the aforesaid provisions are interconnected and linked with scheduling of energy carried out by the appellants' plants as per the provisions of the Grid Code notified by the Commission, SLDC instructions and prudent practises of the industries and tariff against such scheduled energy payable by GUVNL; moreover, non-compliance of the provisions of the Grid Code, SLDC instructions qualifies as Event of Default by the power producers; and, hence, it

requires harmonious interpretation of the aforesaid provisions so that no provisions become reductant or ultra vires.

The GERC further observed that misdeclaration of the schedule energy intentionally to obtain commercial gains qualifies as gaming as per the provisions of the Intra-State ABT Orders passed by the Commission and the Grid Code notified by the Commission; further, the provisions of Intra-State ABT Orders read with tariff orders, Grid Code and PPAs, whenever violated with regard to scheduling of energy, qualified as Power producers default specified under Article 9.2.1 (f) of the PPA; in that event, GUVNL had the right to issue termination notice under Article 9.3 of the PPA; recovery of the disputed amount by GUVNL is on the ground of mis-declaration of schedule by the appellants for commercial gain which is illegal, and the appellants are liable to refund the illegal recovery of amount with mis-declaration which attract s interest as per the provision of Article 6 of the PPA; recovery of the amount claimed by GUVNL, for which default notices were issued, was valid and legal; such amount also attracts interest as agreed between the parties in Article 6 of the PPAs; therefore, recovery of interest amount as agreed between the parties at the rate stated in Article 6.3 of the PPAs applicable on the amount recovered through mis-declaration of scheduled by the appellants, was valid.

The GERC then observed that the power projects operated by the appellants were biomass based power generating projects which utilized biomass i.e. agriculture waste as fuel and generated electricity; it was helpful in disposal of agricultural waste; the energy generated from such plants were renewable in nature; the Central Government as well as State Government were promoting generation of electricity from renewable energy sources; a duty was also cast upon the Commission to promote renewable energy source based generation for which the Commission had

notified the GERC (Procurement of Energy from Renewable Sources) Regulations, 2010, and subsequent amendments thereto from time to time, wherein the RPO percentage were specified for procurement of such energy by the obligated entities for fulfilment of their Renewable Purchase Obligation; energy generated from biomass based projects falls in category of 'Other Sources'; it is the duty of the obligated entities to procure energy from renewable sources consisting of biomass based energy generation; the PPAs executed between the Petitioners and GUVNL provides useful life of the projects for 20 years; the plants were commissioned during FY 2010-11, FY 2011-12 and, therefore, useful life of the projects was still pending; and it was in the overall interest of the sector that such plants shall function.

The GERC observed that it was the duty of the appellants to pay the excess amount recovered by them by mis-declaration of scheduled and supplied energy through UI mechanism to GUVNL, instead of the energy generated from biomass fuel and take commercial gain from such supply. The appellants were directed to refund 70% of such excess amount immediately within a period of one (1) month and the remaining amount along with interest shall be payable in equal 9 monthly instalments from the date of the Order, failing which GUVNL shall be entitled to recourse to the law.

The GERC disposed of the Petition with the following directions: (i) the prayers of the appellants to declare default notices issued by GUVNL, as without authority under law and to direct them to withdraw it immediately was not accepted and the same was rejected. (ii) the appellants were ordered to refund the amount recovered by mis-declaration between scheduled and actual energy generation supplied through UI mechanism qualified as gaming during FY 2018-19 to FY 2019-

20 from GUVNL as per this Order. (III) GUVNL was held entitled to recover interest on the excess amount of difference between the preferential tariff and UI charges paid by the appellants on monthly basis as per Article 6 of the PPAs executed between the parties. (iv) GUVNL was restrained from taking coercive action for terminating the PPA (v) the energy supplied through UI mechanism under the PPA by the appellants to GUVNL was held as not to qualify for fulfilment of RPO. (vI) SLDC was directed to adhere to the provisions of the Grid Code, ABT Orders and immediately take appropriate actions, whenever, any gaming /mis-declaration was found.

III.RELEVANT PROVISIONS AND CONTENTS OF THE DEFAULT NOTICE:

As the question which arises for consideration in this appeal relates mainly to whether or not the appellants had indulged in “gaming”, it is useful, before examining the rival contentions, to take note of the relevant provisions of the ABT Order, the Grid Code, the PPA and the contents of the Default Notice issued to the appellants by GUVNL.

i.ABT Order No. 03 of 2006 DATED 11.08.2006:

Clause 7 of ABT Order No. 03 of 2006 dated 11.08.2006 stipulates that the tariff under the ABT regime will have three components namely the capacity charge, the energy charge and the Unscheduled Inter-change charge (UI Charge); (a) **Capacity Charge:** Capacity Charge will be related to ‘Availability’ of the generating station. As defined in sub clause (v) of Clause 13 of the GERC Tariff Regulations, 'Availability', in relation to a thermal generating station for any period, means the average of the daily average declared capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity of the generating

station minus normative auxiliary consumption in MW. Computation and payment of Capacity Charge at various 'Availability' levels shall be regulated according to the provisions made in Clauses 20, 29 and 47 of the GERC Tariff Regulations. However, for the PPAs entered into by the erstwhile GEB, the calculation of capacity charge may be made according to the provisions made in the PPA and the Full capacity charges shall be recoverable at target Net Availability as specified in the PPAs. Recovery of capacity (fixed) charges below the level of such target availability shall be on pro rata basis. At zero availability, no capacity charges shall be payable. The requirements of Deemed Generation (DG) and Deemed Non-Generation (DNG) will not be necessary for working out availability as the incentive will be payable on ex-bus scheduled energy corresponding to scheduled generation and in excess of ex-bus energy corresponding to target Plant Load Factor as specified in the PPA; (b) **Energy Charge:** Energy Charge shall be worked out on the basis of paise per Kwh rate on ex-bus energy scheduled to be sent out from the generating station, and according to Clauses 21 and 38 of GERC Tariff Regulations. However, for the PPAs entered into by the erstwhile GEB, calculation of energy charge may be made according to the provisions made in the PPA, except that payment will be made for scheduled energy instead of actual generation; (c) **Unscheduled Interchange (UI):** (i) Regarding the third part of the tariff i.e. Unscheduled Interchange (UI) charges, the UI rate determined by the CERC is already in force for inter-state ABT and various experts, including the FOIR sub-committee, recommended adoption of the same UI rate for intra-state ABT. The Commission considered it appropriate, and incorporated the UI rates and threshold frequencies for UI rate as determined by CERC in the Tariff Regulations. So, Unscheduled Interchange (UI) shall be according to Clauses 23 and 41 of GERC Tariff Regulations. (ii). variation between

actual generation or actual drawal and scheduled generation or scheduled drawal shall be accounted for through UI charges. (iii) UI for a generating station shall be equal to its actual generation minus its scheduled generation. (iv). UI for a beneficiary shall be equal to its total actual drawal minus its total scheduled drawal (v) UI shall be worked out for each 15-minute time block. Charges for all UI transactions shall be based on average frequency of the time block.

Clause 8 relates to Applicability of Intra-State ABT, and provides that Intra-State ABT shall be applicable to the following: (a). All erstwhile GEB i.e. GSECL owned generating stations; (b). All generating stations owned or otherwise within the general ambit of the State Government by virtue of their being public sector entities or joint sector entities; (c) All other Generators (i.e. IPPs, CPPs etc.) in the Private Sector who have contracted to supply power to Distribution Licensees/GUVNL; and (d) All Distribution Licensees.

Clause 12 relates to Gaming and provides (a) Generating Stations (excluding generating stations having total capacity of not less than 5 MW and up to 15 MW opting for injection under UI) generating up to 105% of the declared capacity in any time block of 15 minutes and averaging up to 101% of the average declared capacity over a day shall not be construed as gaming, and the generator shall be entitled to UI charges for such excess generation above the scheduled generation (SG), (b) However, for any generation beyond the prescribed limits as cited in Para 12 (a) above, the State Load Despatch Centre shall investigate so as to ensure that there is no gaming, and if gaming is found by the State Load Despatch Centre, the corresponding UI charges due to the generating station on account of such extra generation shall be reduced to zero and the amount shall be adjusted in UI account of beneficiaries in the ratio of their capacity share in the generating station, (c) A generating station with a total

generation capacity not less than 5 MW and upto 15 MW opting for injection under UI shall not be covered under the above provisions for gaming.

By Clause 13 of Order No.3 of 2010 dated 01.04.2010, issued as an amendment to ABT Order No.3 of 2006 dated 11th August 2006, the limit of 5 MW and 15 MW of generating station has been removed, and all generating stations have been brought under the provisions of ABT Orders.

ii. ANNEXURE –III (SCHEDULING AND DISPATCH CODE) OF INTRA STATE ABT ORDER NO. 03 OF 2010 DATED 01.04.2010:

Clause (3) of the Scheduling and Dispatch Code relates to its Scope, and provides that this code will be applicable to SLDC, ALDCs and other intra-state entities including Generators/ Captive Generating Plants (CGP)/Independent Power Producers (IPPs)/Discoms/State Transmission Utilities (STUs) and other beneficiaries of the State grid.

Clause (5) relates to the Scheduling and Dispatch procedures. Clause 5(3) stipulates that, by 9 AM every day, the Generating Station shall advise the SLDC, the station-wise ex-power plant MW and MWh capabilities foreseen for the next day, i.e., from 0000 hrs to 2400 hrs of the following day. Clause 5(6) stipulates that, by 7 PM each day, the SLDC shall convey: (i) the ex-power plant “dispatch schedule” to each of the Generating Station, in MW for different hours, for the next day. The summation of the ex-power plant drawal schedules advised by all beneficiaries shall constitute the ex-power plant station-wise dispatch schedule.

Clause 5(8) enables the ALDCs/Generating Station to inform any modifications/changes to be made in station-wise drawal schedule &

bilateral interchanges /foreseen capabilities, if any, to SLDC by 10 PM. Clause 5(11) provides that, in case of forced outage of a unit, the SLDC shall revise the schedules on the basis of revised declared capability. The revised declared capability and the revised schedules shall become effective from the 4th time block, counting the time block in which the revision is advised by the Generating Station to be the first one. Clause 5(14) provides that revision of declared capability by the Generating Station(s) and requisition by beneficiary (ies) for the remaining period of the day shall also be permitted with advance notice, but only in case of a contingency. Revised schedules/declared capability in such cases shall become effective from the 6th time block, counting the time block in which the request for revision has been received in the SLDC to be the first one

Clause 14 stipulates that it shall be incumbent upon the Generating Stations to declare the plant capabilities faithfully, i.e., according to their best assessment; in case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviations from schedule), the SLDC may ask the Generating Station to explain the situation with necessary backup data. Clause 17 provides that the SLDC shall periodically review the actual deviation from the dispatch and net drawal schedules being issued, to check whether any of the constituents are indulging in unfair gaming or collusion. In case any such practice is detected, the matter shall be reported to the Commission for further investigation/action.

In the impugned order, the GERC observed that, by the aforesaid provisions of the scheduling and dispatch Code, which are part of the amendment ABT Order dated 01.04.2010, the Commission had recognized that any over /under declaration of the plant capacity or

injection of energy constituted gaming; and, if any such eventuality is detected by SLDC, it shall be reported to Commission for necessary action.

iii.GERC (ELECTRICITY GRID CODE) 2013:

In exercise of the powers conferred under Section 86(h) of the Electricity Act, 2003 (Act 36 of 2003), Section 42 (b) of the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 (Gujarat Act 24 of 2003), and all powers enabling it in that behalf, the Gujarat Electricity Regulatory Commission compiled the Gujarat Electricity Regulatory Commission (Gujarat Electricity Grid Code) Regulations, 2013, hereinafter called the Grid Code. These regulations, which came into force from the date of their publication in the official gazette, superseded the Gujarat Electricity Grid Code, 2004, which came into effect from 25-8-2004. This Grid Code is applicable for Gujarat power grid only; and for inter-state transmission, the Indian Electricity Grid Code shall be applicable. The Grid Code also lays down the rules, guidelines and standards to be followed by various persons and participants in the system to plan, develop, maintain and operate the power system, in the most secure, reliable, economic and efficient manner, while facilitating healthy competition in the generation and supply of electricity.

Clause 1.10 of the Grid Code provides that, notwithstanding anything contained in these Regulations, the Commission may also take suo-motu action against any person, in case of non-compliance of any provisions of the GEGC. Clause 3.16 (2) stipulates that, in accordance with Section 33 of the Electricity Act, 2003, the State Load Despatch Centre in a State may give such directions, and exercise such supervision and control, as may be required for ensuring the integrated grid operations, and for achieving the maximum economy and efficiency in the

operation of power system in that state; every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the State Load Despatch Centre under sub-section (1) of Section 33 of the Act; and the State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre. Clause 11 stipulates that this code will be applicable to SLDCs, sub-SLDC, STU, Distribution Licensees, other intra-state entities, including generators/ captive generating plants/independent power producers, wind and solar generating stations and other concerned persons in the state grid.

Under the head "*Demarcation of Responsibilities",* clause 11.2 stipulates that the State Load Despatch Centre is responsible for co-ordinating the scheduling of a generating station, within the control area which is not scheduled by RLDC in terms of CERC regulations, as notified from time to time; the SLDC shall also be responsible for such generating stations for (1) real-time monitoring of the station's operation, (2) checking that there is no gaming (gaming is an intentional mis- declaration of a parameter related to commercial mechanism in vogue, in order to make an undue commercial gain) in its availability declaration, (3) revision of availability declaration and injection schedule, (4) switching instructions, (5) metering and energy accounting, (6) issuance of UI accounts within the control area, (7) collection/disbursement of UI payments, and (8) outage planning etc.

Clause 11.7 stipulates that the SGS/IPP/CGP, other generating stations and sellers shall be responsible for power generation/power injection generally according to the daily schedules advised to them by the SLDC on the basis of the contracts/ requisitions received from the ALDC/buyers/power exchanges. Clause 11.12 provides that the generating station shall make an advance declaration of ex-power plant

MW and MWh capabilities foreseen for the next day, i.e. from 00.00 hrs to 2400 hrs; during fuel shortage condition, in case of thermal stations, they may specify minimum MW, maximum MW, MWh capability and declaration of fuel shortage; the generating stations shall also declare the possible ramping up / ramping down in a block; in case of a gas turbine generating station or combined cycle generating station, the generating station shall declare the capacity for units and modules on APM gas, RLNG and liquid fuel separately, and these shall be scheduled separately. Clause 11.14 makes it incumbent upon the generating station to declare the plant capabilities faithfully, i.e., according to their best assessment; in case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviations from schedule), the SLDC may ask the generating station to explain the situation with necessary back-up data. Clause 11.18 requires SLDC to periodically review the actual deviation from despatch and net drawl schedule being issued, to check whether any of the constituents are indulging in unfair gaming or collusion; and, in case any such practice is detected, the matter should be reported to the Commission for further investigation/action.

Under the head “Scheduling and Despatch Procedure”, clause 11.23 stipulates that, by 9 AM every day, the generating station shall advise the SLDC of the station-wise ex-power plant MW and MWh capabilities foreseen for the next day, i.e. from 00.00 hrs to 2400 hrs, the following day; clause 11.26 provides that, by 7 PM each day, the SLDC shall convey: (i) the ex-power plant despatch schedule to each of the generating stations, in MW for different time blocks, for the next day; and the summation of the ex-power plant drawal schedules advised by all beneficiaries shall constitute the ex-power plant station-wise despatch

schedule. Clause 11.28 requires the ALDCs/generating stations to inform any modifications/changes to be made in drawal schedule/foreseen capabilities, if any, to SLDC by 10 PM, or preferably earlier. Clause 11.31 provides that, in case of forced outage of unit, the SLDC shall revise the schedule on the basis of revised declared capacity; the revised declared capacity and the revised schedule shall become effective from the 4th time block, counting the time block in which the revision is advised by the generating station to be the first one. Clause 11.34 provides that revision of declared capability by the generating station having two part tariff with capacity charge and energy charge (except hydro stations), and requisition by beneficiary(ies) for the remaining period of the day, shall also be permitted with advance notice, but only in case of a contingency; revised schedules/declared capability in such cases shall become effective from the 6th time block, counting the time block in which the request for revision has been received in the SLDC to be the first one.

Clause 11.44 stipulates that, after the operating day is over at 2400 hours, the schedule finally implemented during the day (taking into account all before-the-fact changes in despatch schedule of generating stations and drawal schedule of the Discoms) shall be issued by SLDC; these schedules shall be the datum for commercial accounting; and the average ex-bus capability for each generating station shall also be worked out, based on all before- the-fact advice to SLDC, Clause 11.46 requires SLDC to properly document all the above information; i.e. station-wise foreseen ex-power plant capabilities advised by the generating stations, the drawal schedules advised by intra-state entities, all schedules issued by the SLDC, and all revisions/updating of the above. Clause 11.48 provides that, while availability declaration by generating station shall have a resolution of one (1) MW and one (1) MWh, all entitlements, requisitions and schedules shall be rounded off to the nearest two decimals at each

control area boundary for each of the transaction, to have a resolution of 0.01 MW and 0.01 MWh. Clause 11.52 provides that, in general, the beneficiaries shall endeavour to minimize the VAr drawal at an interchange point when the voltage at that point is below 95% of the rated voltage and shall not return VAr when the voltage is above 105%; transformer taps at the respective drawal points may be changed to control the VAr interchange as per the beneficiary's request to SLDC, but only at reasonable intervals; and a beneficiary may also request the SLDC for increase/decrease of VAr generation at a generating station for addressing a voltage problem.

Clause 11.56 stipulates that the beneficiaries shall pay to the respective generating stations, capacity charges corresponding to plant availability and energy charges for the scheduled despatch, as per the relevant notifications and orders of GERC; and the bills for these charges shall be issued by the respective generating station to each beneficiary on a monthly basis. Clause 11.57 provides that the sum of the above two charges from all beneficiaries shall fully reimburse the generating station for generation according to the given despatch schedule; in case of deviation from the despatch schedule, the concerned generating station shall be additionally paid for excess generation through the UI mechanism approved by CERC; and, in case of actual generation being below the given despatch schedule, the concerned station shall pay back through the UI mechanism for the shortfall in generation. Clause 11.60 stipulates that monthly energy accounts and weekly statement of UI charges shall be prepared by the SLDC; the weekly statement of UI charges shall be issued to all constituents by Thursday for the seven-day period ending on the penultimate Sunday at midnight; payment of UI charges shall have a high priority and the concerned constituents shall pay the indicated amounts, within 10 (ten) days of the statement issue, into a state UI pool

account operated by the SLDC; and the agencies, that have to receive the money on account of UI charges, would then be paid out from the state UI pool account, within three (3) working days. Clause 11.66 provides that all 15-minute energy figures (net scheduled, actually metered and UI) shall be rounded off to the nearest 0.01 MWh.

iv.RELEVANT CLAUSES OF THE PPA:

Article 1 of the PPA relates to definitions. Thereunder, “Scheduled energy” is defined to mean the quantum of energy to be delivered by the Power Producer at the delivery point as scheduled by the SLDC. Article 3.9 of the PPA stipulates that the Power Producer shall ensure that use of fossil fuel shall not be more than 15% of total energy consumption in kCal on annual basis as provided in GERC Order dated 17.05.2010. In Order to ensure that the use of fossil fuel is within the prescribed limit, the Power Producer shall be required to create necessary mechanism for monitoring the usage of fossil and non-fossil fuel utilized by the Power Producer. Further, as provided in the GERC Order dated 17.05.2010, the Power Producer shall be required to furnish a monthly fuel usage statement and monthly fuel procurement statement duly certified by the Chartered Accountant to the Power Procurer and the nodal agency for each month, along with the monthly energy bill which covers details as provided in the GERC Order dated 17.05.2010. In the event of non-compliance with the condition regarding limited use of fossil fuel, during any financial year, shall result in withdrawal of "Preferential Tariff” as per the GERC Order dated 17.05.2010 for this Biomass based power project, and the Power Producer shall be required to compensate the Power Procurer as per the decision of the Commission.”

Article 4.1 of the PPA relates to the obligations of the Power Producer. Article 4.1(ii) stipulates that the power producer shall construct, operate and maintain the project during the term of PPA at his cost and risk including the Interconnection Facilities. Article 4.1(iii) provides that the Power Producer shall sell all available capacity from identified Biomass based power project to the extent of contracted capacity on first priority basis to GUVNL, and not to sell to any third party. Article 4.1(ix) requires the generator to procure start-up power, required for the plant, from the respective Discoms.

Article 4.2 of the PPA relates to the obligations of GUVNL and, thereunder, GUVNL agreed (i) to allow the Power Producer, to the extent possible, to operate the project as a base load-generating station; and (ii) pay to the Power Producer, for month energy bills, for scheduled energy as certified by SLDC in SEA. Article 5 of the PPA related to Rates and Charges. Article 5.1, which related to monthly energy charges, stipulated that GUVNL shall pay to the Power Producer, every month for Scheduled Energy as certified in the monthly SEA by SLDC, the amounts (the "Tariff) set forth in Article 5.2.

Article 5.2 stipulated that GUVNL shall pay the fixed tariff mentioned hereunder for the period of 20 years for all the Scheduled Energy as certified in the monthly SEA by SLDC; the tariff is determined by the Commission vide Tariff Order for Biomass based power project dated 17.05.2010 (Order No: 5 of 2010), without considering the benefit of Accelerated Depreciation, Rs. 4.45/KWh for First 10 years, and thereafter Rs.4.80/KWh from 11th Year to 20th Year; Power Producer shall give undertaking to Power Procurer that Power Producer will not avail Accelerated Depreciation or any other benefit in lieu of Accelerated Depreciation including Generation based incentive. In case Power Producer avails Accelerated Depreciation or any other benefit in lieu of

Accelerated Depreciation Including Generation based incentive, the tariff for supply of power to Power Procurer will be in accordance with Hon'ble GERC order for the project which are availing the benefit of Accelerated Depreciation. It is the responsibility of Power Producer to satisfy the conditions for qualifying as a biomass project as specified by GERC and, in case the project is not so qualified, Power Producer shall compensate GUVNL as decided by the GERC.

Article 5.3 stipulates that, for each KVARH drawn from the grid, the Power Producer shall pay at the rate as determined by the Commission payable to GETCO from time to time for each KVARH drawn. Article 5.4 stipulates that, as per GERC's Order dated 17.5.2010, Biomass based power project are covered under Intra-State ABT; accordingly, the provision of Intra-State ABT Regulations will be applicable to Biomass based power project. Further, Power Producer shall settle Ul charges directly with SLDC.

Article 9.2 of the PPA relates to the events of Default. Article 9.2.1 relates to the Power Producer's Default and, thereunder, the occurrence of any of the following events, at any time during the term of this Agreement, shall constitute an Event of Default by the Power Producer: (a). Construction and O&M Default on part of Power Producer. (b). Failure or refusal by Power Producer to perform any of its material obligations under this Agreement. (c). Power producer fails to make any payment required to be made to Procurer under this agreement within three (3) months after the due date of a valid invoice raised by the GUVNL on the Power Producer. (d) If the Power Producer (i) assigns or purports to assign its assets or rights in violation of this agreement; or (ii) transfers or novates any of its rights and / or obligations under this agreement, in violation of this agreement, (e) If the Power producer becomes voluntarily or involuntarily the subject of proceeding under any bankruptcy or insolvency

laws or goes into liquidation or dissolution or has a receiver appointed over it or liquidator is appointed, pursuant to Law, except where such dissolution of the Power producer is for the purpose of a merger, consolidated or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and creditworthiness similar to the Power Producer and expressly assumes all obligations under this agreement and is in a position to perform them; or (f). Not operating the plant as per GERC's Grid Code, SLDC Instruction and prudent practices of industries. (g). disinvestment of equity below minimum percentage holding during look in period as mentioned in Article 4(h). The Power Producer repudiates this agreement."

Article 9.3 of the PPA relates to Termination. Article 9.3.1 relates to Termination for Power Producer's Default and, thereunder, upon the occurrence of an event of default as set out in sub-clause 9.2.1 above, GUVNL may deliver a Default Notice to the Power Producer in writing which shall specify, in reasonable detail, the Event of Default giving the same. At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the default notice has been remedied, GUVNL may deliver a Termination Notice to the Power Producer. GUVNL may terminate this Agreement by delivering such a Termination Notice to the Power Producer and intimate the same to the Commission. Upon delivery of the Termination Notice, this Agreement shall stand terminated and GUVNL shall stand discharged of all its obligations. The Power Producer shall have liability to make payment within 30 days from the date of termination notice toward compensation to GUVNL equivalent to ensuing three years billing based on tariff and normative PLF considered while determining the tariff by GERC. However, all payment obligations as per

the Article 6 prior to the date of termination of the Agreement shall be met by the Parties.

Where a Default Notice has been issued with respect to an Event of Default, which requires the co-operation of both GUVNL and the Power Producer to remedy, GUVNL shall render all reasonable co-operation to enable the Event of Default to be remedied without any legal obligations."

Article 10 of the PPA relates to Dispute Resolution. Article 10.1 stipulates that all disputes or differences between the Parties, arising out of or in connection with this Agreement, shall be first tried to be settled through mutual negotiation. Article 10.2 stipulates that the Parties hereto agree to attempt to resolve all disputes arising hereunder promptly, equitably and in good faith. Article 10.3 requires each Party to designate in writing and communicate to the other Party its own representative who shall be authorised to resolve any dispute arising under this Agreement in an equitable manner and, unless otherwise expressly provided herein, to exercise the authority of the Parties hereto to make decisions by mutual agreement. Article 10.4 provides that, in the event that such differences or disputes between the Parties are not settled through mutual negotiations within sixty (60) days, after such dispute arises, then it shall be adjudicated by the Commission in accordance with Law.

v.DEFAULT NOTICE:

In the default notice issued to M/s Amreli Power Projects Ltd under the PPA dated 28.09.2010, for refund of the benefits of gaming and calling upon them to cease such actions in future, GUVNL informed them that the notice was being issued with reference to the actions of their Company in regard to the declaration and actual generation of electricity from the 10 MW

biomass based power project at Dist-Amreli; the biomass based power projects were considered as renewable source of energy and was sought to be promoted under the Electricity Act, 2003 and under the general policy of the Government of India and Government of Gujarat and, accordingly, GUVNL had entered into a Power Purchase Agreement dated 28.09.2010 with M/s. Amreli Power Projects Limited for procurement of energy generated from the biomass based power project; as renewable power, the projects were granted preferential tariff which was much higher than the tariff/rates at which power was otherwise available to GUVNL; the project had been availing a tariff of Rs. 5.66 per unit for 2018-19 and 5.86 per unit for 2019-20; being in the nature of renewable power, the project had also been granted Must Run Status and, therefore. the power declared available had been scheduled; it had been observed, while analyzing details of the declared capacity/scheduled generation and actual generation for FY 2018-19 and 2019-20, that the project had consistently and continuously generated at much lower levels than the scheduled energy/declared availability; it had been noted that the actual average generation was about 31% of the scheduled energy for FY 2018-19 and 38% for FY 2019-20; this meant that their company had claimed significantly higher tariff, which was intended for the high price of biomass, while not generating to that extent, and thereby not actually using the biomass; their company had claimed higher tariff without actually expending such amount; this had resulted in an undue and unfair gain of Rs. 17.49 Crores to their company (difference between the tariff charged by their company and the unscheduled interchange being paid by their company); the computation of the gain was enclosed herewith as Annexure A; the tariff was payable by GUVNL

to their company for renewable power to be generated, and not for supply through unscheduled interchange; such actions were also in nature of gaming where the Project had intentionally mis-dectared parameters in order to make undue commercial gain; the project had declared availability for much higher capacity than its generation; and the GERC Grid Code had recognized gaming, and it had to be ensured that there was no gaming (Clause 11.2).

After extracting Article 9.2 and Article 9.2.1(f) of the PPA, GUVNL informed the appellant that their Company had defaulted by not operating the plant as per the Grid Code, and further intentionally defrauding GUVNL by claiming tariff as applicable to biomass based generation without such generation; the intention of entering into the PPA with the project was to encourage and promote renewable power and, by such action, the entire objective was getting frustrated and was being used to make undue and unfair monetary gains at the cost of consumers, grid safety and security as welt as environment; in view of the above, and in accordance with sub-clauses 9.2.1 and 9.3.1 of the PPA, GUVNL was hereby giving a Notice to them of default under Article 9.2.1 read with 9.3.1 of the PPA, and was calling upon them to remedy the default by refunding the amount of Rs. 17.49 Crores (atong with interest as per the PPA) to GUVNL, and by undertaking not to indulge in such actions, within 30 days of receipt of the notice, failing which GUVNL would terminate the PPA dated 28.09.2010, take appropriate steps, and exercise other legal remedies.

A copy of the said letter was marked to the Secretary, GERC and the Chief Engineer, SLDC. Similar default notices calling upon them to refund Rs.16.33 Crores was issued to Junagadh Power

Projects Ltd, and to Bhavnagar Power Projects Ltd calling upon them to refund Rs. 20.04 Crores.

IV. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri Amit Kapur, Learned Counsel for the Appellant, Mrs Suparna Srivastava, Learned Counsel for the GERC, Mr. M.G. Ramachandran, Learned Senior Counsel appearing on behalf of GUVNL, and Ms. Abiha Zaidi, Learned Counsel for the SLDC. It is convenient to examine the rival contentions, urged by Learned Senior Counsel and Learned Counsel on either side, under different heads.

V. DID THE APPELLANTS INDULGE IN GAMING?

A. CONTENTIONS URGED ON BEHALF OF THE APPELLANTS:

Mr. Amit Kapur, Learned Counsel for the appellant, would submit that the appellant made no commercial gain during FY 2019 and FY 2020**;** (a) for Gaming to be established, two ingredients must be satisfied, i.e., (i) 'intention' to mis-declare, and (ii) the mis-declaring party making undue commercial gain; (b) Appellants have actually suffered losses during FY 2019 and FY 2020: -(i) to meet the schedule during the relevant months of FY 2019 and FY 2020, the appellants utilized more fuel than normative requirement as per GERC's Biomass Tariff Orders for FY-2010, FY-2013 and FY-2018; consequently, they suffered significant losses since:- (1) output of biomass plants based on agri-waste is dependent on several uncontrollable factors linked to the unchartered realm of crop residue; (2) appellants could only gather experience over several seasons to stabilize operations; (3) in FY 2019, inspite of using 10% to 11% more fuel than normative requirement, the Plants under-injected by 59 to 69%; (4)

learning from its experience in FY 2019, the Appellants used **~40%** more fuel than normative requirement as per GERC Tariff Orders [*~60,000 Tonnes more fuel than normative req*; yet, the plants under-injected by 54% to 62%; (5) had GUVNL let the Projects run beyond August 2020, the Plants would have achieved better scheduling, reducing under-injection; (ii) GUVNL was all along aware of fuel usage since the monthly fuel usage and procurement statements were shared with GUVNL with monthly energy bills in terms of Article 3.9 of the PPA; (c) losses suffered during FY 2019 and FY 2020, along with the CA certificate substantiating the same, are reflected at Attachment 2;(d) UI rate is based on UI regime established by CERC and adopted by GERC which is beyond the control of the generator; the following is noteworthy: -(i) Appellants often paid much higher UI charges than variable costs; (ii) as seen from the table at Attachment-3, when the UI rates were high, under injection remained the same; (iii) had the intention been to profiteer, under injection would have reduced when the UI rates went up; this is not the case; (e) all fuel cost was incurred and UI charges paid, and the uncontrollable under-injection has, in fact, caused losses and not gains to the appellants; (f) Sri Amit Kapur, Learned Counsel, would submit that (a) the Appellants lowered their schedule during FY 2019 and FY 2020 - much below the units which could have been scheduled using the same fuel as per GERC norms: - (i) Amreli scheduled only 93% and 76% below GERC's norms; (ii) Bhavnagar scheduled only 87% and 68% below GERC's norms; (iii) Junagadh scheduled only 88% and 67% below GERC's norms; (b) had the Plants lowered schedule further to average actual generation level, for 49% to 56% of the time blocks, Plants would have over-injected; and (c) this performance must be evaluated in the context of the prevailing regulatory framework and real time directions of SLDC (grid monitor) conveying to the Appellants that only over-injection 'qualifies' as Gaming *viz.*: - (i) Paras

12(a)-(b) of the GERC ABT Order, 2006 treats over-injection as Gaming, though the definition of Gaming as per the GERC Grid Code, 2013 will prevail over the stipulations in GERC ABT Order, 2006.

Sri Amit Kapur, Learned Counsel, would further submit that the SLDC acted on such interpretation on a consistent basis, and conveyed the same to the Appellants through the weekly UI Bills during FY 2019 and FY 2020 (*common for all intra-state entities*) which consistently state: -

"7. UI Reduction in respect of State Generating Stations due to violation of ceiling construed as a Gaming.

Name of SGS	*For Date*	*Block No.*	*Reduction in UI*

SLDC has yet not declared gaming for any state generating plant. If gaming is observed for any state generating plant by SLDC, account will be revised accordingly."

Use of the word 'ceiling' evidences SLDC's interpretation that, for an entity to be liable for gaming, there ought to be generation in excess of a 'ceiling'; (iii) had the intention been to profiteer, instead of under-injecting and paying UI charges, the Appellants would have deliberately lowered their schedule, to over-inject and receive UI charges for the over-injected power in terms of Regulation 11.57 of the GERC Grid Code r/w Para 7(c) of GERC ABT Order, 2006, and that is not the case; (d) the Appellants had a choice – either to over-inject, receive UI charges (thereby profiteer) while being exposed to gaming allegations or to schedule at peak-availability based on the quantum of fuel available; infuse much more fuel than normative at their own cost; get paid on schedule energy in terms of the PPA; and pay UI charges (thereby making loss); the Appellants chose the latter; and receiving a regulated tariff under the signed PPA as per the terms stipulated, and paying UI charges for under-injection was considered a better compliance option.

Sri Amit Kapur, Learned Counsel for the Appellant, would also submit that the Plants were not in a position to reschedule in a given day: - (i) Intra-day variability is extremely high and ranges between 1 MW to 9 MW within the day during different time blocks; (ii) on 90% of the days, there is more than 70%-80% variability in generation; (iii) even though the quantity of fuel kept constant, it was impossible to predict the generation output during different time blocks in a day; as such, intra-day rescheduling was not possible for the Appellants; and, in view of the above, neither the Appellants under-injected on a continuous basis 'intentionally' to make undue gains, nor does the Appellants' conduct qualify as Gaming.

B. CONTENTIONS URGED ON BEHALF OF GERC:

With respect to the appellants contentions that (i) GUVNL was not statutorily empowered to raise the issue of 'gaming' as the SLDC has been vested with such power as per Regulation 11.2 read with Regulation 11.18 of the GERC (Grid Code) Regulations, 2013, (ii) the alleged under-injection of energy is not contemplated as one of the situations for considering 'gaming' under the provisions of the Availability Based Tariff (ABT) Order dated 01.08.2006 in Order No. 3/2006, and the Order dated 01.04.2010 in Order No. 3/2010 passed by the Commission, (iii) neither any material/reason in support of allegation of gaming had been provided by GUVNL nor the ingredients for gaming in terms of the Regulations were fulfilled, and (iv) due to the very nature of generation of electricity, by using biomass as fuel by the power plants of the Appellants, there were instances when the Appellants were not able to generate as per the scheduled energy resulting in under injection while the actual use of biomass is much beyond the input: output ratio as envisaged by the Commission in its Tariff Orders; and such under-injection is beyond the

control of the Appellants and not a deliberate act, Mrs. Suparna Srivastava, Learned Counsel for the GERC, would submit that, under the default notices, the allegation of GUVNL was that, during FY 2018-19 and 2019-20, the three Biomass based Power Plants of the Appellants had consistently and deliberately under-injected energy lesser than the energy scheduled; considering that it was a renewable energy-based electricity generation project, the said plants enjoyed a 'Must Run' status, meaning thereby that all energy generated by such plants was to be mandatorily purchased by GUVNL; the energy declared to be available, by the plants of the Appellants, was to be construed as energy scheduled by GUVNL, without any option to schedule a lesser quantum; it was found by GUVNL that the Appellants had consistently and deliberately under-injected energy lesser than the energy declared to be available by them; while the Appellants had received a preferential tariff under the PPAs ranging at Rs. 5.66 per unit for FY 2018-19 and Rs. 5.86 per unit for FY 2019-20 for the energy quantum declared by them, the Appellants paid a significantly lower UI charge in the range of Rs.2.66/- to Rs.2.82/- per unit for the difference between their declared quantum and actual injection; and the Appellants had made unfair gains through the differential amounts (of Rs.3 per unit) between the preferential tariff and the applicable UI rate by indulging in 'gaming' in violation of the GERC (Grid Code), 2013 Regulations notified by the Commission, which gains were liable to be refunded to GUVNL.

Mrs. Suparna Srivastava, Learned Counsel for the GERC, would further submit that the Commission was firstly required to determine whether, on an analysis of the generation and injection data of the Appellants, the acts of the Appellants could be considered as 'gaming' as understood under the applicable regulatory framework and, secondly,

whether GUVNL or the Appellants were entitled to their respective claims under the provisions of the PPAs. The Commission, after examining the regulatory position under the ABT Orders of the Commission and the GERC (Grid Code), 2013, observed as under: (A) Under the ABT Order No. 3 of 2006 dated 11.08.2006, (i) the Commission had decided to bring the generation stations and distribution licensees of the State under the provisions of Intra-State Availability-Based Tariff (ABT); (ii) the tariff specified under ABT regime consisted of three components, (a) Capacity charge, (b) Energy charge, and (c) Unscheduled Interchange (UI) charge; (iii) the UI charge was applicable whenever there was deviation between actual generation or actual drawl and scheduled generation or scheduled drawl, worked out for each 15-minute time block with consideration of frequency of the aforesaid time blocks; (iv) 'gaming' was specified as an act where a generating company generated beyond 105% of the declared capacity in any time block of 15 minutes and averaging up to 101% of the average declared capacity over a day; and (v) whenever any 'gaming' was found by SLDC on account of higher generation/extra generation, the same was to be reduced to zero and the amount to be adjusted in UI account of beneficiaries in the ratio of their capacity share in the generating station; (B) under the amendment dated 01.04.2010 to ABT Order No. 3 of 2006 dated 11.08.2006, the Commission issued Scheduling and Dispatch Code (as Annexure –III to the Order) to be followed by the beneficiaries, which provided as under: (i) SLDC was responsible for real time monitoring of generating station operations and checking that there are no instances of 'gaming'; (ii) as per the procedure for scheduling and despatch, generating stations are required to inform SLDC every morning (at 9AM) of their ex-power plant capability for the next day, which information is compiled and supplied by SLDC to distribution utilities (by 11 AM) based on which final schedules are prepared by SLDC (by 7PM)

each day for the next day; (iii) generating stations/beneficiaries were eligible to revise their schedule and declared capacity during the day, however, such revision was to become effective from the 6th time block; (iv) the generators were mandated to faithfully declare their plant capacity with best assessment and upon any deliberate over/under declaration of the plant capacity contemplating to deviate from schedule given by them on the basis of plant capability, and make money as undue capacity charge for deviation from schedule, SLDC was mandated to ask the generators to explain such situation with necessary backup data; (v) SLDC was mandated to periodically review the actual deviation from the dispatch, and if it found that any constituent was indulging in unfair gaming or collusion, the same was required to be reported to the Commission for further investigation/action; (c) under the provisions of GERC (Electricity Grid Code), 2013, the Scheduling and Dispatch Code under Regulation 11: (i) SLDC is responsible for real-time monitoring of the generating stations as well as checking that there is no gaming in the availability declaration by the generating stations (Sub-Regulation 11.2); (ii) gaming' has been defined as an intentional mis-declaration of a parameter related to commercial mechanism in vogue, in order to make an undue commercial gain (Sub-Regulation 11.2); (iii) the generators shall be responsible for power generation/power injection generally according to the daily schedules (Sub-Regulation 11.7); (iv) it shall be incumbent upon the generating station to declare the plant capabilities faithfully; the generators had an option to revise their declared capacity and schedule after every 4th Time Block; however, such revision was to become effective from the 6th time block (Sub-Regulation 11.34); (v) SLDC shall review the actual deviation from the dispatch and net drawl schedule and verify that any entity/constituent indulging in unfair gaming or collusion; if such matter is detected, the same should be reported to the Commission

for further investigation/action (Sub-Regulation 11.18); and (vi) in case of deviation from the despatch schedule, the concerned generating station shall be additionally paid for excess generation through the UI mechanism approved by CERC; in case of actual generation being below the given despatch schedule, the concerned station shall pay back through the UI mechanism for the shortfall in generation (Sub-Regulation 11.8); the aforesaid provisions of the ABT Orders read with the provisions of the GERC Grid Code provides that the over/under schedule and injection of energy as mis-declaration with intent to gain undue commercial benefit qualify as 'gaming'; and whenever any such incidents come to the notice of SLDC, it was the duty of SLDC to inform the same to the Commission for further investigation and take appropriate actions.

Mrs. Suparna Srivastava, Learned Counsel for the GERC, would further submit that the Commission undertook a detailed exercise of examining the generation data of the Appellants' power plants; the Commission examined the generation and injection data submitted by the Appellants vide their Affidavit dated 14.09.2020 and the 15 minutes' time blocks-wise data for FY 2018-19 and FY 2019-20 submitted by SLDC vide their reply dated 15.09.2020 including injection data; a comparison of both revealed that the difference in the percentage (%) between injection data submitted by the Appellants and by SLDC was only marginal (Ref. Para 13.49 of the impugned Order); the Commission, thereafter, analysed the data submitted by SLDC in its Report dated 09.11.2020, and examined the details of 'Schedule' and 'Injection' in respect of the biomass-based power projects of the Appellants based on total number of time-blocks in FY 2018-19 and FY 2019-20, and the deviation therein on the parameters enumerated in Para 13.50 of the impugned Order); upon examination (Ref. Para 13.50-13.52 of impugned Order), it was found that there were ample

instances when the Appellants, for days together, had continuously declared the plant capabilities on day ahead basis of either 8 MW or 8.5 MW or 9 MW against the installed plant capacity of 10 MW despite knowing the fact that the actual generation against the schedule was very less, and the fact that they could generate only around 1/3rd of the schedule based on their declared capabilities; the Commission thus held that the Appellants ought to have declared the capabilities of their plant faithfully and, in any case, once it was realised that the actual generation was far below scheduled energy, the option of revision in their declared capability and schedule ought to have been exercised by the Appellants; however, on the contrary, no revision was exercised; thus, even after knowing the factual situation of less generation against the higher schedule in the range of 80% to 90% of installed capacity, the Appellants did not act upon it, but continued to deliberately mis-declare capability/capacity and corresponding schedule on consistent basis (Ref. Para 13.53 of impugned Order); further, the Commission took note of the fact that the above data remained un-disputed, rather the Appellants admitted to the same; it had been the contention of the Appellants that, despite best efforts, the desired/expected input-output ratio as envisaged in the Tariff Orders of the Commission could not be achieved; however, considering that the Appellants never even revised their declared capacity during the relevant period and continued to mis-declare despite the stated operational issues being faced by them, the Commission concluded that, from the data, it was evident that 'under-injection', at much lower UI rates as compared to the preferential tariff, was predominant and quantum of under- injected energy was much higher when compared to quantum of 'under-injection' when the UI rate was more than the preferential tariff; further, the corresponding number of time-blocks with less UI rate compared to preferential tariff when under-injection had occurred were

substantially higher than the number of time- blocks with UI rate more than preferential tariff when under-injection had occurred which naturally implied that the intention was to over-schedule coupled with under-injection, and thereby earn huge undue gains; and, from the data and above analysis, the Commission held that the mis-declarations were made by the Appellants intentionally to make undue commercial gains thereby qualifying as 'gaming.'(Ref. Para 13.54-61 of impugned Order).

Mrs. Suparna Srivastava, Learned Counsel for the GERC, would also submit that, having held as above, the Commission examined the contractual commitments of the parties under the PPAs dated 28.09.2010, particularly, the definition of Scheduled energy, Articles 3.9, 4.1 (ii), 4.1 (iii), 4.1 (ix), 9.2, 9.2.1, 9.3.1, 10, and observed that: (i) under the PPAs, *'scheduled energy'* meant the quantum of energy to be delivered by the power producers at the delivery point as scheduled by the SLDC; (ii) the Appellants, being renewable energy producers, were entitled to receive a preferential tariff ranging at Rs. 5.66 per unit for the FY 2018-19, and Rs 5.86 per unit for FY 2019-20; (iii) not operating the power plant as per the provisions of the GERC Grid Code, SLDC instructions and prudent practice qualified as 'power producer default' (Article 9.2.1(f)); and (iv) on occurrence of any event of default(s) as stated in sub-clause 9.2.1, the GUVNL had the option to give a default notice to the Appellants in writing specifying reasonable details of event of default giving the Appellants an opportunity to remedy the same (9.2.1(f)).

With respect to the appellants contention that the default notices had been issued by GUVNL contrary to the conditions stipulated in the PPAs, Mrs. Suparna Srivastava, Learned Counsel for the GERC, would submit that the Commission took note of the express obligation of the Appellants, under the PPAs, to adhere to the provisions of the GERC Grid Code, 2013,

provisions of the ABT Orders issued by the Commission, instructions issued by SLDC from time to time and prudent practice of the electricity industry (Ref. Para 13.69 of impugned Order); the acts of the Appellant, having already been held to be an act of 'gaming' thereby violating the provisions of the GERC Grid Code, 2013 and the ABT Order, the Appellants were clearly in breach of the PPAs and had committed a 'power producers event of default' under the PPAs; the Commission further took note that, in terms of Article 4.2 read with Articles 5.1, 5.2, 5.4 and 9.2.1 and the SEA issued by SLDC, GUVNL was liable to pay the tariff to the Appellants; the Commission found that provisions were inter-connected and linked with scheduling of energy carried out by the Appellants' plants as per the provisions of the Grid Code, SLDC instructions and prudent practices of the industry, and tariff against such scheduled energy was payable by GUVNL; however in the present case, by indulging in 'gaming', the Appellants had recovered a huge amount of Rs. 53.86 Cr, and ultimately the said amount which had been paid by GUVNL was now to be claimed in the ARR/Tariff Petitions and passed on to the consumers of the subsidiary distribution licensees of GUVNL; therefore, the Commission held that GUVNL had rightly issued the default notice under Article 9.3 of the PPA, and it was entitled to recover Rs.53.83 Crores (cumulatively) from the Appellants being the unfair commercial gain made by them along with interest as per the provisions of Article 6.3 of the PPAs (Ref. Para 13.123, 13.137, 13.151, 13.154-157 of impugned Order).

Mrs. Suparna Srivastava, Learned Counsel for the GERC, would further state that, taking the above facts and circumstances into consideration, the Commission, while restraining GUVNL from terminating the PPAs, had declared that the Appellants had indulged in 'gaming' in terms of the applicable Regulations during FY 2018-19 to FY 2019-20, and

consequently directed the Appellants to refund the amount recovered by mis-declaration between scheduled and actual energy generation to GUVNL along with interest as per Article 6 of the PPAs executed between the parties (Ref. Para 13.158-13.165 of impugned Order)**.**

C. CONTENTIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that availability is always declared on a day ahead basis, with the full knowledge of the fuel stock available with the Appellants, the mix of biomass fuel, the quality of fuel and the quantum that can be generated using such fuel; this issue is dealt in Paras 13.57 and 13.62 of the Impugned Order; even otherwise, the Appellants have not challenged the tariff or parameters for FY 2018-19 and 2019-20 which is the period in issue; this is the essential difference between biomass generators being predictable in nature, as against wind and solar generators which are based on the vagaries of nature on a real time basis; even for wind and solar generators, the provisions of forecasting and scheduling is now made applicable; and the stand taken by the Appellants that biomass generation is not predictable or that it is not possible to undertake actual generation closer to scheduled generation, is therefore a plea, false to the knowledge of the Appellants and an attempt to cover up the intentional gaming and violation of the Grid Code and the PPA.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would further submit that the Table under Para 13.92, and conclusion in Paras 13.93 to 13.107 of the Impugned Order**,** clearly brings out the following position: (a) in the case of Appellant No. 1, of the total declared availability/schedule during the two financial years, 68.66 % and 61.58% of the power was not generated at all and

adjustment under UI mechanism was resorted to; the actual renewable generation was therefore only 31.33% and 38.42% respectively, of what was declared available as Biomass generation; in the case of Appellant No. 2 such percentages of non-generation was 62.27% and 59.26%, and Appellant No. 3 - 58.82% and 53.40%; the actual generation, at the Biomass based renewable plants qua scheduled, was less than 50% through the use of Biomass as fuel: namely Appellant No. 1– 31% - 38%; Appellant No. 2– 38% - 41%; and Appellant No. 3– 41% - 47%; each of the Appellants have, on a consistent basis and day after day, declared availability/schedule of much greater quantum of electricity to be generated and supplied, whereas the actual quantum of generation was much less; the Appellants did not even revise the schedule of generation as per the scheduling and dispatch code forming part of the Grid Code; and no explanation has been furnished by the Appellants' for the above.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the contention of the Appellants that only over injection can be gaming is misplaced; reference may be made to Paras 13.37 to 13.47 of the Impugned Order, which sets out in seriatim the Codes, Regulations and Orders of GERC clearly laying down that any intentional mis-declaration or under injection/over injection are gaming and contrary to the code; even the Central Commission treats an intentional mis-declaration (which includes under injection) as gaming; it is frivolous on part of the Appellants to contend that only over injection is gaming, and not under injection, even if it is done deliberately; the claim of the Appellants would mean that, while a developer can declare availability of 10 MW at 100%, it can choose to generate anything, even 1 unit only and all the other balance units can be accounted under UI mechanism without undertaking any generation; further, CERC ABT order dated 04.01.2000 and para 5.8.1 referring to the gaming possibilities as

over declaration and under declaration, and notes it to be gaming; press releases dated 30.03.2009 and 23.07.2009 emphasize that UI is not for trading in electricity, which is what the Appellants have done; Generators are required to declare capacity faithfully (Clause 11.14 of the Grid Code), and therefore both over-declaration and under-declaration is contrary to the Grid Code and intentional misdeclaration with undue gain is gaming (Clause 11.2); and the salient aspects mentioned above clearly establish that each Appellant had not declared capacity faithfully, and in fact deliberately under-injected more than 50% of the schedule clearly with intention to make unlawful gain.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the Appellants have wrongly sought to claim that there no profit or ill-intention on the part of the Appellants, because the Appellants are loss making entities; the matter is not whether the corporate entity is profit or loss making, but whether the Appellants have indulged in gaming to make unlawful gain; the Appellants have recovered higher tariff for the following units without actually generating: Appellant No. 1 – 57.6 million units; Appellant No. 2 – 65.80 million units; and Appellant No. 3 – 54.35 million units; the Appellant's claim that, if it wanted to profit, it would have lowered the schedule and over injected to make profit out of UI rates, is misconceived and misleading; by over – declaring without injecting, the Appellant claims Tariff for the units not generated while paying lesser UI rates, whereas by under-declaring and over injecting, the Appellant could only claim UI rates and no Tariff for the units actually generated; therefore, clearly profiteering is in over declaration which is what the Appellants have done; the claim that there is a loss because of over declaration is completely erroneous; in fact there is a specific admission noted in Impugned Order that, with the quantum of fuel utilized by them, the Appellants could generated only 35-

45%; this shows that there is intentional misdeclaration; the alleged loss in operations could be for various reasons including inefficiency of plant or in arrangement of fuel etc; even otherwise, the loss made by the Appellant, due to alleged lower tariff, does not entitle them to declare higher capacity than it is capable of generating, and claim biomass tariff for the units not actually generated by biomass; the Appellants have claimed to have incurred higher cost than the tariff; the Appellants had already accepted the tariff and signed Supplementary PPA with the said tariff; even otherwise, the Appellant, not being happy with the tariff, is not a reason to violate the Grid Code and the PPA; and the plants were commissioned in 2011/2012 and the Appellants cannot claim that it is still learning operations in 2018-19 or that it is in a nascent stage.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that it is incorrectly claimed that the Appellant often paid higher UI charges than variable costs; DSM rates/UI charges being less than tariff is 93-96%;the Appellants, being aware that the UI rates are almost always lesser than the Tariff, deliberately over-declared so as to claim Tariff without generating and while incurring only UI rates; the Appellant has referred to the SLDC weekly UI bills which cannot be the basis of interpretation of the Grid Code and ABT Orders; that is only one of the aspects of gaming whereby UI receivable by the Generator is reduced if there is gaming; this does not preclude other forms of gaming such as over-declaration where there is no reduction in UI, as the UI is paid by the Generator and not paid to the Generator; further, the Appellant is misconstruing the SLDC report and there is no conclusion as sought to be implied by the Appellant; the Appellants are also wrong in claiming that GUVNL is not entitled to take any action against them for any under injection which may be a violation of the Grid Code, Regulations, Orders etc. of the GERC; GUVNL has

made it absolutely clear that its claims against the Appellants arise out of the contractual provisions under the PPA (Article 9.2), and the recovery of the loss suffered which is at least equivalent to the unlawful gain made by the Appellants; GUVNL is entitled to terminate the PPA for the default of the Appellants as per Article 9.3; GERC has dealt with these aspects in Paras 13.123, 13.149-13.157; GUVNL had issued default notices well within the limitation period and there can be no contention that GUVNL is prohibited from raising any issues; and further GUVNL has been denied RPO, for the scheduled but not generated power, by the GERC as noted in paras 13.176(6) and 14(v).

D.ANALYSIS:

In considering the allegations levelled against the Appellant, of indulging in “Gaming”, it is necessary to understand what the expression “gaming” means. In this context it is useful to refer to certain provisions. Article 4.1(iii) of the PPA requires the Appellant power producers to sell all available capacity from its identified Biomass based power project, to the extent of contracted capacity on first priority basis to the Respondent-GUVNL, and not to sell it to any third party. Article 4.2(ii) requires the Respondent-GUVNL to pay the Appellant-power producers, for monthly energy charges, for scheduled energy as certified by SLDC. Article 5.1 requires the Respondent-GUVNL to pay the Appellants-power producers every month for the scheduled energy as certified by SLDC in the monthly State Energy Account (“SEA” for short). Article 5.2 requires GUVNL to pay tariff as certified in the monthly SEA by SLDC. Scheduled Energy is defined in the PPA to mean the quantum of energy to be delivered by the power producer at the delivery point as scheduled by SLDC.

The Appellant's biomass based renewable energy power plants enjoy a "must run status", and the energy declared by such plants, as available, is the scheduled energy in terms of the PPA executed between the Appellants and GUVNL, as the option to schedule a lesser quantum is not available to SLDC. In other words, the entire energy declared to be available by such plants is required to be scheduled by SLDC, and to be procured by GUVNL. Further, payment of preferential tariff, in terms of the PPA, is for the scheduled energy which, in the case of plants with "must run status", is the energy declared by them to be available to be scheduled.

Annexure III of the Intra-State ABT Order No. 3 of 2010 dated 01.04.2010 relates to the scheduling and Despatch Code. Clause 5(3) thereof stipulates that, by 9 AM every day, the Generating Station shall advise the SLDC, the station-wise ex-power plant MW and MWh capabilities foreseen for the next day. Clause 5(6) stipulates that, by 7 PM each day, SLDC shall convey the ex-power plant "dispatch schedule" to each of the Generation Station, in MW for different hours, for the next day.

Actual generation or, in other words, actual injection of energy into the grid, assumes relevance in determining the UI charges payable under the UI mechanism. It is in this context that the distinction between Scheduled Energy and Actual Energy injected must be borne in mind. There can be a variance between the energy which the generator has scheduled i.e. intimated the SLDC that it would inject the next day, and the actual energy it injects the next day. Payment, in terms of Article 5 of the PPA, is made for the scheduled energy, and not for the actual energy injected. The variance between scheduled energy and the injected energy is adjusted under the Unscheduled Interchange (UI) mechanism whereunder the UI charges for a generating station is equal to its actual generation minus its scheduled generation.

In case the actual generation/injection is more than the scheduled generation, it is called over-injection, and in case the actual generation is lesser than the scheduled generation, it is then a case of under-injection. Since payment under the PPA is to be made by the procurer (GUVNL) to the power producer (the Appellant) for the scheduled energy, the variation between the actual generation and the scheduled generation is covered under the unscheduled interchange (UI) mechanism, where, in case of over injection, the beneficiary (GUVNL) is required to pay UI charges to the power producer (ie the Appellants herein), and in case of under-injection, UI charges are required to be paid by the Appellant power producers to GUVNL which is the power procurer.

As a biomass based renewable power project, the Appellants had been granted preferential tariff as it generated renewable energy. For the subject years 2018-19 and 2019-20, the preferential tariff payable to the Appellants, for the scheduled energy, was Rs.5.66 per unit and Rs.5.86 per unit respectively. For a substantial part of this period, the UI charges payable for 2018-19 and 2019-20 ranged between Rs.2.66 and Rs.2.82 per unit ie the UI charges were less than Rs.3.00 per unit. The GERC has, in the impugned order, held that the Appellants, had deliberately mis-declared its scheduled energy, far above the actual generation (actual energy injected into the Grid), with a view to receive higher preferential tariff for the scheduled energy, and thereby making undue gain of more than Rs.3.00 per unit, as they were required to pay a far lesser amount, ranging between Rs.2.66 and Rs.2.82 per unit ie less than Rs.3.00 per unit, for under-injection under the UI mechanism.

In the impugned order, the GERC records that the Appellants had resorted to mis-declaration of scheduled energy and under-injection of power with a view to derive monetary gain, and this act of theirs amounted

to “gaming”. The Appellants, however, contend that they had not indulged in “gaming” which, in any case, is, according to them, attracted only in the case of over-injection and not when there is under-injection. Reliance is placed by the Appellants in this regard on the invoices raised by SLDC, more particularly item 7 thereof. Item 7 of the said invoices relates to “UI reduction in respect of State Generating Stations due to violation of ceiling construed as gaming” and, thereunder, it is stated that SLDC has yet not declared “gaming” for any State Generating plant; and, if gaming is observed for any generating plant by SLDC, the account will be revised accordingly. The Appellants seek to place emphasis on the word “ceiling”, in item 7, to submit that, by the use of the said word which means the upper limit, SLDC understood only over-injection beyond the ceiling limit as gaming, and not under-injection.

What the Appellants have failed to refer is to Clause 11.12 and 11.4 of the GERC Grid Code, 2013 which came into force on its publication in the Gujarat Gazette dated 16.07.2013. The Grid Code, made in exercise of the powers conferred on the Commission under the Electricity Act, 2003 and the Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003, are statutory in character, have the force of law, and are in the nature of subordinate legislation. Consequently, it is the provisions of the Grid Code which would apply, and not the erroneous understanding of the SLDC as reflected in the invoices raised by it.

Since reliance is placed thereon on behalf of the appellant, it is necessary to take note of what Clause 12 of the Availability Based Tariff (Intra-State ABT) Order No. 3 of 2006 dated 11.08.2006, issued by the Respondent-Commission, provides, before examining the relevant provisions of the Grid Code. Clause 12 of the ABT Order relates to “Gaming”, and stipulates that generation beyond 105% of the declared

capacity in any time block of 15 minutes, and averaging up to 101% of the average declared capacity over a day, shall not be construed as gaming, and the SLDC shall investigate so as to ensure that there is no gaming; if gaming is found by the SLDC, the corresponding UI charges, due to the generating station, shall be reduced to zero, and the amount shall be adjusted in the UI account of the beneficiaries in the ratio of their capacity share in the generating station.

While Clause 12 of the ABT Order may possibly be understood as providing for “gaming” in relation to over-injection of power by a generating station, the GERC Electricity Grid Code 2013, which are Statutory Regulations made by the GERC and provide for “gaming”, make it clear that both over and under injection of power would, if the other ingredients stipulated therein are satisfied, constitute “gaming”. Clause 11.14 of the Grid Code makes it incumbent upon the generating station to declare the plant capabilities faithfully, i.e., according to their best assessment; in case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviations from schedule), the SLDC may ask the generating station to explain the situation with necessary back-up data. Clause 11.18 of the Grid Code requires SLDC to periodically review the actual deviation from despatch and net drawl schedule being issued, to check whether any of the constituents are indulging in unfair gaming or collusion and, in case any such practice is detected, the matter should be reported to the Commission for further investigation/ action.

It is clear from a conjoint reading of Clause 11.14 and 11.18 of the Grid Code that both over and under declaration of plant capability,

contemplating to deviate from the schedule given on the basis of the capacity declaration, would amount to gaming, provided it is with the intention to make money either as undue capacity charges or as a charge for deviation from the Schedule. The Grid Code is binding on the Appellant, the Respondent-GUVNL and SLDC. As the ABT orders have been passed by the GERC in the exercise of its regulatory power, the provisions of the Grid Code, which are statutory regulations, would prevail even if there be anything contrary thereto in the ABT orders passed by the Commission.

i.DATA RELIED UPON BY, AND THE CONCLUSION OF, GERC REGARDING THE APPELLANTS HAVING INDULDGED IN GAMING:

The validity of the data, which the Respondent-Commission has taken into consideration, has not been disputed before us by the Appellants. In compliance with the directions of the GERC, in its daily order dated 10.09.2020, the Appellants filed the Generation and Injection data by way of their affidavit dated 14.09.2020. Likewise, the SLDC furnished details including injection data by way of its reply dated 15.09.2020. The GERC compared the said data by way of the following table:-

F.Y	***2018-19***				***2019-20***			
Biomass Generators	*Injection as per Applicants (MWh)*	*Injection as per SLDC data (MWh)*	*Diff. (Mwh)*	*Diff. (%)*	*Injection as per Applicants (MWh)*	*Injection as per SLDC data (MWh)*	*Diff. (Mwh)*	*Diff. (%)*
Amreli	*11510.73*	*11452.831*	*57.899*	*0.50%*	*20313.18*	*20299.016*	*14.164*	*0.07%*
Junagadh	*17407.98*	*17328.936*	*79.044*	*0.45%*	*25679.28*	*25840.127*	*-160.847*	*-0.63%*
Bhavnagar	*19401.06*	*19367.157*	*33.903*	*0.17%*	*23317.26*	*23263.068*	*54.192*	*0.23%*

The GERC observed that, from the above table, it was clear that the difference in percentage, between the injection data submitted by the appellants and SLDC, was only marginal. The afore-said table, which has

also been extracted in the impugned order, does show that the difference in figures is 0.5% and below for 2018-19, and for 2019-20 the difference is 0.63% and below. In short, the data furnished, by the appellants and SLDC, was almost identical.

The GERC then examined details of 'Schedule' and 'Injection' in respect of the Biomass based power projects of the appellants to ascertain, from out of the total number of time-blocks in FY 2018-19 and FY 2019-20, in how many number of time blocks: (i). Declared Capacity was 'Zero', (ii). Schedule was there but injection was 'Zero', (iii). Number of events, when continuously for four Time Blocks, the Schedule was there but injection was 'Zero', (iv) schedule was more than injection, (v) schedule was less than injection, (vi).when DSM/UI rate was below Rs. 5.66 per unit / Rs. 5.86 per unit, and (vii) when DSM/UI rate was above Rs. 5.66 per unit / Rs. 5.86 per unit. The above details were then separately tabulated for each of the power projects of the appellants.

The Table for Amreli Power Projects Limited, as extracted in the impugned order, reads thus:-

	2018-2019				***2019-2020***			
	Nos of Time Blocks	*Schedule (MWh)*	*njection (MWh)*	*% Injection*	*Nos of Time Blocks*	*Schedule (MWh)*	*Injection (MWh)*	*% Injection*
Total Nos of Time Blocks	*35040*	*36548.13*	*11452.83*	*31.3%**	*35136*	*52839.58*	*20299.02*	*38.4%**
Nos of Time Blocks DC was Zero	*17581*	*0*	*0*		*10374*	*0*	*0*	
Nos of Time Blocks when Schedule was there but injection was Zero	*1498*	*2985*	*0*		*1336*	*2729.3*	*0*	
Nos of events when continuous 4 Nos of Time Blocks Schedule was there but injection was Zero	*300*	*2393.7*	*0*		*242*	*1992.925*	*0*	

Nos of Time Blocks when Schedule was more than injection	*17438*	*36513*	*11416.70*	*99.70%***	*24662*	*52692.70*	*20142.94*	*99.2%***
Nos of Time Blocks when Schedule was less than injection	*21*	*35.125*	*36.13*	*0.3%***	*100*	*146.88*	*156.08*	*0.8%***
Nos of Time Blocks when DSM rate was below Rs. 5.66/5.86	*33743*	*35106.18*	*10930.79*	*95.4%***	*32840*	*49701.85*	*19089.63*	*94.0%***
Nos of Time Blocks when DSM rate was above Rs. 5.66/5.86	*1297*	*1441.95*	*522.05*	*4.6%***	*2296*	*3137.73*	*1209.38*	*6.0%***

(* Percentage injection w.r.t. Scheduled Energy and ** Percentage injection w.r.t. Total Injection)

From the data, as recorded in the said table, GERC observed that, in respect of M/s Amreli Power Projects Limited, (i) about 50% of the time in FY 2018-19 and 30% in FY 2019-20, the plant had declared 'zero' capacity; (ii) in the remaining period, 99.70% of the time in FY 2018-19 and 99.2% in FY 2019-20, the plant had scheduled more than actual generation ie under injection; (iii) actual generation was only 31.3% of scheduled in FY 2018-19 and 38.4% of scheduled in FY 2019-20; (iv) there were 300 events in FY 2018-19 and 242 events in FY 2019-20, where injection was zero for continuous 4 time blocks (1 hour); (v) during FY 2018-19, 95.4% of the time, under injection was done when UI rate was less than preferential tariff i.e. Rs. 5.66 per unit; (vi) similarly, during FY 2019-20, 94% of the time, under injection was done where UI rate was less than the preferential tariff i.e. Rs. 5.86 per unit; and (vii) it was only 4.6% of the time in FY 2018-19 and 6.0% of the time in FY 2019-20, where under-injection was done when UI rate was above Rs. 5.66/5.86 per unit.

The table for Bhavnagar Biomass Power Projects Private Limited reads thus:-

	2018-2019				***2019-2020***			
	Nos of Time Blocks	*Schedule (MWh)*	*njection (MWh)*	*% Injection*	*Nos of Time Blocks*	*Schedule (MWh)*	*njection (MWh)*	*% Injection*
Total Nos of Time Blocks	*35040*	*51336.55*	*19367.16*	*37.7%**	*35136*	*57096.12*	*23263.07*	*40.7%**
Nos of Time Blocks DC was Zero	*10101*	*0*	*0*		*7885*	*0*	*0*	
Nos of Time Blocks when Schedule was there but injection was Zero	*812*	*1685.53*	*0*		*1411*	*2896.15*	*0*	
Nos of events when continuous 4 Nos of Time Blocks Schedule was there but injection was Zero	*133*	*1113.5*	*0*		*259*	*2162.9*	*0*	
Nos of Time Blocks when Schedule was more than injection	*24837*	*51161.18*	*19188.52*	*99.1%***	*27140*	*56969.13*	*23125.46*	*99.4%***
Nos of Time Blocks when Schedule was less than injection	*102*	*175.38*	*178.64*	*0.9%***	*111*	*127*	*137.61*	*0.6%***
Nos of Time Blocks when DSM rate was below Rs. 5.66/5.86	*33743*	*49187.23*	*18492.25*	*95.5%***	*32840*	*53557.65*	*21905.58*	*94.2%***
Nos of Time Blocks when DSM rate was above Rs. 5.66/5.86	*1297*	*2149.33*	*874.90*	*4.5%***	*2296*	*3538.48*	*1357.49*	*5.8%***

(Percentage injection w.r.t. Scheduled Energy and ** Percentage injection w.r.t. Total Injection)*

From the data, recorded in the afore-said table, GERC observed that, in respect of M/s Bhavnagar Biomass Power Projects Private Limited, (i) about 29% of the time in FY 2018-19 and 22% of the time in FY 2019-20, the plant had declared 'zero' capacity; (ii) in the remaining period,

99.1% of the time in FY 2018-19 and 99.4% of the time in FY 2019-20, the plant had scheduled more than actual generation ie under injection; (iii) actual generation was only 37.7% of scheduled in FY 2018-19 and 40.7% of scheduled in FY 2019-20; (iv) there were 133 events in FY 2018-19 and 259 events in FY 2019-20, where injection was zero for continuous 4 time blocks (1 hour); (v) during FY 2018-19, 95.5% of the time, under injection was done when UI rate was less than preferential tariff i.e. Rs. 5.66 per unit; (vi) similarly, during FY 2019-20, 94.2% of the time, under injection was done where UI rate was less than preferential tariff i.e. Rs. 5.86 per unit; and (vii) it was only 4.5% of the time in FY 2018-19 and 5.8% of the time in FY 2019-20, where under-injection was done when UI rate was above Rs. 5.66/5.86 per unit.

The table for Junagadh Power Projects Private Limited reads thus:-

	2018-2019				***2019-2020***			
	Nos of Time Blocks	*Schedule (MWh)*	*njection (MWh)*	*% Injection*	*Nos of Time Blocks*	*Schedule (MWh)*	*njection (MWh)*	*% Injection*
Total Nos of Time Blocks	*35040*	*42076.35*	*17328.94*	*41.2%**	*35136*	*55447.13*	*25840.13*	*46.6%**
Nos of Time Blocks DC was Zero	*14943*	*0*	*0*		*9159*	*0*	*0*	
Nos of Time Blocks when Schedule was there but injection was Zero	*825*	*1694.88*	*0*		*721*	*1460.88*	*0*	
Nos of events when continuous 4 Nos of Time Blocks Schedule was there but injection was Zero	*161*	*1322.50*	*0*		*119*	*958.90*	*0*	
Nos of Time Blocks when Schedule was more than injection	*20088*	*42061.35*	*17312.98*	*99.9%***	*25820*	*55210.75*	*25587.26*	*99.0%***
Nos of Time Blocks when Schedule was less than injection	*9*	*15.00*	*15.95*	*0.1%***	*156*	*234.13*	*250.62*	*1.0%***

Nos of Time Blocks when DSM rate was below Rs. 5.66/5.86	*33743*	*40282.20*	*16588.46*	*95.7%***	*32840*	*51779.68*	*24108.60*	*93.3%***
Nos of Time Blocks when DSM rate was above Rs. 5.66/5.86	*1297*	*1794.15*	*740.47*	*4.3%***	*2296*	*3667.45*	*1731.52*	*6.7%***

(Percentage injection w.r.t. Scheduled Energy and ** Percentage injection w.r.t. Total Injection)*

From the data, recorded in the afore-said table, GERC observed that, with respect to M/s Junagadh Power Projects Private Limited: (i) about 43% of the time in FY 2018-19 and 26% of the time in FY 2019-20, the plant had declared 'zero' capacity; (ii) in the remaining period, 99.9% of the time in FY 2018-19 and 99% of the time in FY 2019-20, the plant had scheduled more than actual generation i e under injection; (iii) actual generation was only 41.2% of scheduled in FY 2018-19 and 46.6% of scheduled in FY 2019-20; (iv) there were 161 events in FY 2018-19 and 119 events in FY 2019-20, where injection was zero for continuous 4 time blocks (1 hour); (v) during FY 2018-19, 95.7% of the time, under-injection was done when UI rate was less than preferential tariff i.e. Rs. 5.66 per unit; (vi) similarly, during FY 2019-20, 93.3% of the time, under-injection was done when UI rate was less than preferential tariff i.e. Rs. 5.86 per unit; and (vii) it was only 4.3% of the time in FY 2018-19, and 6.7% of the time in FY 2019-20, that under injection was done when UI rate was above Rs. 5.66/5.86 per unit.

The GERC opined that the above data and analysis revealed ample instances when the Appellants for days together continuously, be it for 14 days, 21 days or 28 days, had declared plant capabilities on a day ahead basis of either 8 MW or 8.5 MW or 9 MW against the installed plant capacity of 10 MW, despite knowing that the actual generation against the Schedule was far less, and they could generate only around 1/3rd of the schedule based on their declared capabilities; the appellants ought to have

declared the capabilities of their plant faithfully; once they realised that the actual generation was far below scheduled energy, the option of revision in their declared capability and schedule ought to have been exercised; however, no revision was exercised despite the actual generation being much lower qua the scheduled energy; even after knowing that actual generation was far less than the higher schedule, in the range of 80% to 90% of installed capacity, the appellants had continued to mis-declare capability/capacity, and corresponding schedule on a consistent basis; the actual average generation was about 31% of the scheduled energy for FY 2018-19, and 38% of scheduled energy for FY 2019-20 in case of M/s Amreli Power Projects Limited, whereas in the case of M/s Bhavnagar Biomass Power Projects Pvt. Limited, it was 38% of scheduled energy for FY 2018-19 and 41% of scheduled energy for FY 2019-20 and, in the case of M/s Junagadh Power Projects Pvt. Limited, it was 41% of scheduled energy for FY 2018-19 and 47% of scheduled energy for FY 2019-20; these factual aspects were not disputed by the Appellants; on the contrary, they had admitted the same while submitting that they had scheduled units much below the units which could have been scheduled using the same fuel as per Commission's norms; mis-declaration of the plant capacity/capabilities was on a consistent basis; as against the 'Declared Capacity' or 'Availability Declaration', which became the 'Scheduled Energy' on account of the power projects falling under the 'Must run' status, the 'Actual Energy' injected was much lower against such 'Scheduled Energy', more particularly when the UI rate was much lower compared to the preferential tariff; there was no dispute that the Appellants had claimed and received the preferential tariff of Rs. 5.66 per unit for FY 2018-19 and Rs. 5.86 per unit for FY 2019-20 as per the 'Scheduled Energy' from GUVNL, while paying UI charges towards 'Under-injected' energy; 'under-injection' at much lower UI rates as compared to the

preferential tariff was predominant, and the quantum of under-injected energy was much higher when compared to the quantum of 'under-injection' when the UI rate was more than the preferential tariff; the corresponding number of time-blocks with less UI rate compared to preferential tariff, when under-injection had occurred, were substantially higher than the number of time- blocks with UI rate more than preferential tariff when under-injection had occurred; this showed that the intention was to over-schedule coupled with under- injection, and thereby earn huge undue gains; and, from the data and analysis, it clearly emerged that mis-declarations were made intentionally in order to make undue commercial gain.

The GERC further observed that, without generating any units through utilisation of biomass fuel and merely supplying such energy under UI Mechanism by under-injecting, the Appellants were receiving an excess rate of about Rs. 3 per unit or above, being the differential amount between the preferential tariff for scheduled energy and UI charges payable against the difference between actual generation and scheduled generation; the afore-said excess rate of around Rs. 3/- was received for the entire quantum of under-injected energy for generation and supply from their Biomass based power projects; the aforesaid practice was started from 01.04.2018, and the same was continued up to 31.03.2020 by the Appellants; as per the submissions of GUVNL, it continued post 31.03.2020 during FY 2020-21, despite issuance of Default Notices by GUVNL; it was a clear case of 'Mis-Declaration' with intent to receive higher amount from GUVNL, (without carrying out any generation by use of biomass as fuel), through the UI mechanism and thereby earn money from GUVNL, which was ultimately recoverable from the public at large; merely stating that biomass consists of various types of agro-waste, and referring to its quantum, its GCV, price, moisture, sand, dust, ash content

etc. and its heterogeneity, did not serve any purpose; it was the obligation of the appellants to ensure that the capacity declarations were faithfully done considering all relevant factors which otherwise did not come in the way or impede generation of electricity near to the scheduled energy; and, during the hearings, the appellants had admitted that, with the quantum of fuel which was utilised by them, they were able to generate on an average only 35% to 45% of the Scheduled Energy.

While GERC has examined details of schedule and injection with respect to each of the three power projects, we shall confine our analysis only to the data relating to Amreli Power Projects Ltd, as the data relating to the other two projects are similar. From the table relating to Amreli Power Projects, as extracted in the impugned order and as referred to hereinabove, it is clear that for FY 2018-19, with respect to a total of 17438 time blocks, the scheduled energy of 36513 MWh was far more than the injection of 11416.70 MWh i.e. in 99.70% of the time blocks. It is only with respect to 21 time blocks that the scheduled energy of 35.125 MWh was less than the injected energy of 36.13 MWh i.e only in 0.3% of the time blocks. Likewise, the number of time blocks, where the UI rate was below the tariff payable in terms of the PPA of Rs.5.66/ 5.86 per unit, was 33743 for FY 2018-19, and, in around 95.4% of the said time blocks, the scheduled energy was 35106.18 MWh as against the injected energy of 10930.79 MWh; in 1297 time blocks, i.e. 4.6%, the UI rate was above 5.66/ 5.86 per unit, and the scheduled energy was 1441.95 MWh as against the injected energy of 522.05 MWh.

It is clear from the aforesaid data that the number of time blocks, when the scheduled energy was more than injection and the UI rate was more than the tariff rate, was an insignificant 4.6%, when compared to the number of time blocks, when the schedule was more than injection and

the UI rate was below the tariff rate of 5.66/ 5.86 per unit, ie around 95.4%. The Appellants' contention that it was under-injecting power, even during the period when the UI rate was more than the tariff, is misleading, as the afore-mentioned data shows that such a situation arose for an insignificant period of 4.6% of the time blocks and for an insignificant quantum of scheduled energy of 1441.95 MWh as against the injected energy of 522.05 MWh. On the other hand, for 95.4% of the time blocks, a much larger quantum of 35106.18 MWh was scheduled as against the far lesser quantum of injected energy of 10930.79 MWh.

The Appellants have laid emphasis on the fact that biomass waste as a fuel is uncontrollable, unpredictable and heterogenous; it was not possible for them to predict, with certainty, the energy which they would be able to inject the next day; and the difference between the scheduled energy and injected energy was largely on this account. The fact, however, remains that, during certain time blocks, while the Appellant-Amreli Power Projects had Scheduled Energy on a day ahead basis, their actual injection the following day was "zero". The data, in the aforesaid table, discloses that, in FY 2018-19 for 1498 time blocks, the Appellant-Amreli Power Projects had scheduled 2985 MWh of energy but had injected zero MWh. Likewise, in 2019-20 for 1336 time blocks, the Appellant- Amreli Power Projects had scheduled 2729.3 MWh of power but had injected zero MWh. Whatever be the nature of biomass fuel, it does not stand to reason that a generator, which has scheduled a particular quantum of energy a day before, would fail to inject even a single unit of energy the day after. Such a situation has arisen not in isolated instances, but in 1498 time blocks during 2018-19 and 1336 time blocks in the year 2019-20.

We find considerable force in the submission, urged on behalf of GUVNL, that the Appellant must have declared availability on a day ahead

basis, (during this two-year period FY 2018-19 and FY 2019-20), with full knowledge of the fuel stock available with them. It is not as if unpredictability of biomass as fuel has resulted in under injection of power on just a day or two. From the tables detailed in the impugned order, it is evident that under-injection of energy, by all the three appellant power producers, continued over the two-year period FY 2018-19 and FY 2019-20. The Appellants could not have been unaware, over such a long period of two years, of the approximate energy which could be generated from the available biomass fuel. Even if leeway is given for a small variation, because of the changing composition of bio-mass fuel, we find it extremely difficult to accept the submission that the appellant power producers were helpless, and could do nothing to prevent actual injection, a day later, falling as low as 31.3% for FY 2018-19, and 38.4% for FY 2019-20 (with respect to Amreli Power Project), of the scheduled energy declared just a day earlier.

As is also evident from the afore-said table, the Appellant- Amreli Power Projects was, on several other occasions, conscious of its inability to inject power and had, therefore, declared their day ahead schedule also as zero. In FY 2018-19, the appellant- Amreli Power Projects had scheduled zero MWh in 17581 time blocks, and the next day injection, during these time blocks, was also zero. Likewise, in 2019-20 for 10374 time blocks, the Appellant- Amreli Power Projects had scheduled zero MWh the day ahead, and its next day injection was also zero MWh. This shows that the Appellant was conscious, for a considerable period, of its inability to inject any power and had, therefore, declared its schedule as zero. No explanation is forthcoming as to why, for certain other time blocks, the Appellant had scheduled certain quantum of power but had not injected any power into the Grid. It is difficult for us, therefore, to hold that

the GERC has erred in concluding that mis-declaration of scheduled energy was deliberate, more so as the injected energy was just around 31.3% of the scheduled energy for 2018-19, and 38.4% of the scheduled energy in 2019-20. Further, in 1498 time blocks in 2018-19, the Appellant-Amreli Power Projects had scheduled 2985 MWh but had injected zero MWh. In 1336 time blocks during 2019-20, they had scheduled 2729.3 MWh but had injected zero MWh. The data, in the aforesaid table, also shows the number of events, when for a continuous four time blocks, their injection was zero. In 300 time blocks during 2018-19 when 2393.7 MWh was scheduled, the injection was zero, and in 242 time blocks during 2019-20 when the schedule was given as 1992.925 MWh, the injection as zero.

The aforesaid data does justify the conclusion of GERC that the Appellant had consciously mis-declared its day ahead scheduled energy, and had deliberately under-injected energy the next day and, in several instances, had not generated or injected even a single unit of energy. While we see no reason to burden this judgment with the data relating to the other two projects, suffice it to observe that the tables extracted in the impugned order, with respect to Bhavnagar Biomass Power Projects Private Limited and Junagadh Power Projects Private Limited, also tell a similar tale, on the basis of which the GERC has come to a similar conclusion with which we have no reason to disagree.

Yet another aspect which must be borne in mind is that Clause 5(8) of the Schedule and Despatching Code of the ABT Order dated 01.04.2010 enables the generating station to inform any modification/ changes to be made in the station-wise drawl schedule to SLDC by 10 PM. Similarly, Clause 11.28 of the Grid Code requires the generation station to inform any modification/ changes to be made in the drawl schedule/ foreseen capabilities, if any, to SLDC by 10 PM. It is not the

Appellant's case that, even in situations where it had injected zero units of power, they had made any attempt to inform SLDC, even by 10 PM on the previous night, of their inability to inject any power the next day.

Even after realizing that the actual generation was far below the scheduled energy, the Appellant continued to declare a far higher schedule, without resorting to revision of the schedule in terms of both the ABT Order and the Grid Code. The very fact that the actual generation was just around 1/3rd of the scheduled energy, for a substantial part of the two-year period FY 2018-19 and FY 2019-20, is itself proof that the Appellants continued to mis-declare capacity, and continued to schedule a substantially higher quantum of energy on a continuous basis, without exercising the option of revising their declared capacity, ie scheduled energy, to match the actual generation likely to be achieved the next day.

The other test to be satisfied to constitute "gaming" is in terms of Clause 11.14 of the Grid Code ie whether the Appellants, by resorting to under-declaration, had made any monetary gain as charge for deviation from the schedule. In the impugned order, the GERC has noted that, as against the preferential tariff which was paid to the Appellants by GUVNL for the scheduled energy at Rs.5.66 per unit for 2018-19 and Rs.5.86 per unit in 2019-20, the UI charges payable for under-injection of energy as compared to schedule energy was in the range of Rs.2.66 to Rs.2.82 per unit for a substantial part of the two year period ie less than Rs 3.00 per unit in both FY 2018-19 and FY 2019-20 and, thereby, the Appellants stood to gain around Rs.3.00 per unit both in FY 2018-19 and FY 2019-20. As the Appellants had made monetary gain towards charges for deviation from the schedule, the other test stipulated in Clause 11.14 of the Grid Code is also satisfied. As the Appellants' act of under-injection was, evidently, to make monetary gain as charges for deviation from the

schedule, they must be held to have indulged in “gaming”, and it matters little whether they made profits or incurred losses, as reflected in their financial statements for these two financial years.

Clause 11.2 of the Grid Code stipulates that the SLDC shall be responsible for generating stations for, among others, checking that there is no gaming. The said clause states that “gaming” is an intentional mis-declaration of a parameter relating to commercial mechanism in vogue in order to make an undue commercial gain. The twin tests to be satisfied to constitute gaming is (1) intentional mis-declaration of a parameter related to commercial mechanism in vogue, and (2) such mis-declaration is in order to make an undue commercial gain. The requirement to declare scheduled energy on a day ahead basis is a parameter relating to commercial mechanism put in place both in terms of the ABT Order and the Grid Code. The data, furnished hereinabove, shows that, in a substantial number of time blocks, the actual energy injected was far less than what was scheduled, and in several instances, while a fairly large quantum of energy was scheduled the day earlier, the actual generation/injection on the next day was zero. It is thus evident that the Appellants had deliberately mis-declared scheduled energy.

The undue commercial gain made by the Appellants is evident from the fact that in a substantial number of time blocks, when the scheduled energy was far more than the actual generated energy, the amount payable under the UI mechanism was far less than what the Appellants were receiving towards scheduled energy in terms of the PPA, and by resort to misdeclaration of scheduled energy and deliberate under-injection, the appellant made a monetary gain of more than Rs. 3.00 per unit. Both the ingredients of “gaming” are therefore satisfied in the present case.

The submission that, if they intended to indulge in gaming, the appellants would have over injected power instead of under injection, is only to be noted to be rejected. As noted hereinabove, the preferential tariff of Rs. 5.66 per unit for FY 2018-19 and Rs. 5.68 per unit for FY 2019-20 was payable to the Appellant power producers for the scheduled energy ie the declared available energy. For a substantial part of FY 2018-19 and FY 2019-20, ie for around 96% of the said period, the UI charges were far lower than the preferential tariff stipulated in the PPA. As payment of preferential tariff, in terms of the PPA, is made only for the scheduled energy, actual generation/injection of energy more than the scheduled energy (which is also referred to as over-injection), would result in the Appellants power producers not receiving any tariff for the over-injected energy, since tariff under the PPA is paid for scheduled energy and not for the actual generated/injected energy. All that the Appellant would have received, by such an act of over-injection, is for UI charges ie for the quantum of actual generated/injected energy over and above the scheduled energy. As noted hereinabove, for a substantial part of the two year period 2018-19 and 2019-2020, the UI rates were far lower than the preferential tariff stipulated in the PPA. Unlike over-injection where the appellants would have been required to procure bio-mass fuel, incur transportation and other costs for generation of energy, under injection would have enabled them to reduce such expenditure and, in situations where the actual injection was zero, to avoid such expenditure in its entirety. The Appellants would only have benefitted, as a result of the preferential tariff being far higher than the UI rates, by under injection (ie higher scheduling and lower generation/injection), and thereby claiming higher preferential tariff for the scheduled energy while, at the same time, paying lower UI charges for the difference between scheduled energy and the actual generated/injected energy.

The contention that, if their intention was to profiteer, the Appellant would have reduced its under-injection when the UI rates went up, also necessitates rejection. As noted hereinabove the tables, extracted by GERC in the impugned order, disclose that, in so far as Amreli Power Project was concerned, it is only with respect to 4.6% of the total number of time blocks for FY 2018-19, and 6% of the total number of time blocks for FY 2019-20, were the UI rates higher than the preferential tariff which the Appellant was entitled to receive under the PPA. For around 95.4% of the total number of time blocks in FY 2018-19, and 94% of the total number of time blocks in FY 2019-20, the UI rates were far lower than the preferential tariff payable by GUVNL to the Appellant under the PPA. The impugned order records the Appellants' admission that they could generate only 35 to 45 percent of the scheduled energy on the basis of the quantum of fuel utilized. If that be so, the Appellants should have, if it had no intention to profiteer, scheduled a lower quantum of energy instead of continuing to schedule 8 to 9 MW as declared plant capability on a day ahead basis against the installed capacity of 10 MW, despite knowing that, for a substantial part of this two-year period, the actual generation was just around 1/3rd of the scheduled energy.

It is clear, from the impugned order, that the amount claimed by GUVNL, and has been directed to be paid by GERC, is only the difference between the preferential tariff paid by it and the UI charges received by it during FY 2018-19 and FY 2019-20. Since the Appellants had indulged in gaming, GUVNL had, in terms of the PPA, issued default notices claiming only the amounts paid by them in excess of the amounts which the Appellant was entitled to receive, and it is these amounts which GERC had directed the appellants to pay to GUVNL.

Article 9.2.1 of the PPA relates to the power producer's default. Among the events, which would constitute default by the power producer,

include, under Article 9.2.1(f), not operating the plant as per the GERC Grid Code, SLDC instructions and prudent practices of the industry. The action of the Appellants, in intentionally mis-declaring its capacity and scheduling a far higher quantum than the actual generation/injection which they knew could be achieved the following day, would amount to the power producer's default under Article 9.2.1(f) of the PPA conferring a right on GUVNL to call upon them to remedy such a default.

While the right to terminate the PPA has also been conferred under Article 9.3 of the PPA, which right the GUVNL had exercised, GERC has set aside the termination notices issued by GUVNL, and has only held that GUVNL was entitled to recover Rs. 53.83 crores from the Appellants, (being the unfair commercial gain made by them), along with interest. GERC has also denied GUVNL its claim with respect to its Renewable Purchase Obligations for the difference between scheduled and actual generation of power.

As submitted by Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of GUVNL, by indulging in gaming, the first Appellant has recovered a higher preferential tariff for 57.6 Million Units without actual generation; the second Appellant has recovered a higher preferential tariff for 65.8 million units without actual generation, and the 3rd Appellant has recovered a higher preferential tariff for 54.35 million units without actual generation.

Suffice it to conclude our analysis, under this head, holding that GERC was justified in holding, in the order impugned in this Appeal, that the Appellants had indulged in "Gaming".

VI. REGULATIONS AND PPA MANDATE PAYMENT OF ENERGY CHARGES BASED ON THE SCHEDULED GENERATION AND NOT ON ACTUAL ENERGY INJECTED:

A. CONTENTIONS URGED ON BEHALF OF THE APPELLANTS:

Sri Amit Kapur, Learned Counsel for the Appellants, would submit that the applicable law and the PPA mandate payment of energy charges based on 'scheduled generation', and not on 'actual energy' injected: - (a) GERC Grid Code, 2013 (Regulation 11.56) *viz.* "*The beneficiaries shall pay to the respective generating stations, the capacity charges corresponding to the plant availability and* energy charges for the scheduled despatch, *as per the relevant notifications and ordersof GERC*; (b) the GERC ABT Order 2006 (Para 7(b) and Para 15(a)) *viz.* "Energy Charge shall be worked out on the basis of paise per Kwh rate on ex-bus energy scheduled *to be sent out from the generating station and according to the Clauses 21 and 38 of GERC Tariff Regulations*"; (c) PPAs dated 28.09.2010, 26.11.2010 and 11.08.2011 (Article 4.2 r/w Articles 5.1, 5.2 and 5.4) *viz.* "*GUVNL agrees … to pay to Power Producer for month energy bills for* scheduled energy *as certified by SLDC in SEA*."

Sri Amit Kapur, Learned Counsel for the appellants, would further submit that the GERC had directed the Appellants to refund the differential of scheduled energy and actual energy generated, which: - (a) violated its own Regulations (Regulation 11.56 of the GERC Grid Code, 2013), and hence is contrary to the law laid down in ***PTC India Ltd. v. CERC*, (2010) 4 SCC 603**); (b) erroneously re-wrote the contract (here PPAs) contrary to the law laid down in:- (i) ***Shin Satellite Public Co. Ltd. vs. Jain Studios Ltd.*, (2006) 2 SCC 628**, (ii) ***LIC of India vs. S. Sindhu*, (2006) 5 SCC 258**; (c) wrongly granted relief in retrospectivity: - (i) GUVNL's claim *qua* refund of difference between scheduled and actual energy is part of energy charges already paid by GUVNL to the Appellants; (ii) as per Articles 6.2 and 6.5 of the PPAs, GUVNL is obliged to pay a tariff invoice within the due date i.e., 30 days; if GUVNL wishes to dispute any part of

the invoice, GUVNL ought to intimate the Appellants through a notice within the due date itself i.e., 30 days; (iii) for the entire period of power supply in FY 2019 and FY 2020 (i.e., the period in issue), GUVNL paid tariff invoices in time without any dispute raised in terms of Article 6.5 of the PPAs; (iv) it is only on 05.08.2020 ("*Default Notices*), for the first time, that GUVNL retrospectively disputed the tariff invoices for the entire period of power supply in FY 2019 and FY 2020; (v) despite specifically having held that such disputing of tariff invoices retrospectively is contrary to the PPA (Para 13.164 of Impugned Order), GERC went ahead to give relief to GUVNL; and (vi) this Tribunal, in ***DVC vs. JSERC*** **2021 SCC OnLine APTEL 2,** criticized SERCs imposing retrospective payment liabilities*)*.

Sri Amit Kapur, Learned Counsel, would also submit that the appellants have been subjected to double penalty/double levy; clause 7(b) of GERC ABT Order 2006) states that *'Variation between actual generation or actual drawal and scheduled generation or scheduled drawal shall be accounted for through UI charges';* in the present case, the appellants have already paid UI charges corresponding to under-injection in terms of applicable regulatory framework besides incurring all costs of fuel and fixed costs; refunding portion of the appellants' energy charges being differential of schedule *minus* actual energy injected amounts to double penalty/ levy for the same transaction; GERC failed to appreciate that GUVNL's Default Notices) are in gross violation of the statutory provisions *i.e.*, without (a) any report of SLDC reporting Gaming and (b) the GERC's independent conclusion *qua* Gaming on SLDC's reporting: - (a) GUVNL is neither statutorily nor contractually empowered to allege 'Gaming'; (b) GUVNL's Default Notices are predicated on the allegation that Appellants have indulged in 'Gaming'; as per Regulation 11.2 read with 11.18 of the GERC Grid Code, 2013; it is only SLDC which has the power to detect and report 'Gaming' to the GERC; (c) subsequently, it is

only GERC which is statutorily authorized to consider an allegation and conclude if any entity is liable for 'Gaming' (*Reg. 11.18 of GERC Grid Code, 2013*)**;** (d) without detection of 'Gaming' by SLDC, coupled with an independent inquiry-based finding of GERC, w.r.t. allegations of gaming, GUVNL had no power to unilaterally declare the Appellants liable for 'Gaming' and invoke Article 9.2.1 of the PPAs, as has been done in the Default Notices; (e) every Default Notice under Article 9.3.1 of the PPAs must be a composite and self-sustaining one, in that it should contain all the reasons which prevailed in GUVNL taking the decision to arrive at its conclusion; and (f) no reasonable detail *qua* instances of (i) any violations of SLDC instructions or (ii) prudent utility practices not being followed, were made out expressly in the Default Notice.

B. CONTENTIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the contention of the Appellants on double penalty or levy is wrong; no issue is raised on the electricity actually generated and injected by the Appellants for which preferential Tariff is paid; in regard to the balance quantum, GUVNL is only claiming the difference in the preferential tariff and UI charges which was the cash outflow to the Appellants; there is no reason why the Appellant should get any part of the Tariff for the units not actually generated by it; in calculating the damages/loss, GUVNL has fairly accounted for and adjusted the UI charges as a cost to the Appellants, and has claimed only the difference between Rs. 5.66 per unit and Rs. 5.86 per unit and the UI charges; there is no penalty etc. on the Appellants in the above; the decision, in **DVC v. JSERC, 2021 SCC Online APTEL 2,** relied on by the Appellants, is on a different aspect and is related to waiver of demand charges of the distribution licensee after the period is over; there was no

violation of PPA or the Grid Code which is sought to be corrected; the action to be taken against the Appellants, for violation of the Codes, Regulations, Orders etc, are matters between SLDC, the State Commission and the Appellants herein; GUVNL's claim before the GERC, as stated above, was restricted to the contractual remedy; and the Appellants are making unnecessary, unwarranted and frivolous allegations against GUVNL of enforcing statutory Orders when GUVNL has restricted its claim to the contractual provisions.

C.ANALYSIS:

As noted hereinabove, the terms and conditions of the subject PPAs require payment to be made by GUVNL to the Appellant Generators for scheduled energy, and not for actual generated/injected energy. Taking advantage of this stipulation, and the higher preferential tariff which they were entitled to receive for the scheduled energy and the lower UI charges which they had to pay to GUVNL for having injected a lesser quantum than that scheduled, the Appellants chose not to generate/inject the quantum of energy which they had themselves scheduled a day earlier, and had thereby made undue gain which, under the Grid Code, constitutes gaming. The Appellants were paid preferential tariff of Rs.5.66 per unit in FY 2018-19 and Rs.5.86 per unit in FY 2019-20 for the energy scheduled by them. The UI charges, for a substantial part of these two years i.e. 2018-19 and 2019-20, ranged between Rs.2.66 and Rs.2.82 per unit, and were less than Rs. 3/- per unit; and, in case of under-injection i.e. generation/ injection of power below the quantum scheduled the previous day, the Appellants-Generators were required to pay the stipulated UI charges for the difference. The monetary gain they made by under-injection was the difference between the preferential tariff they received for the scheduled energy and the UI charges they paid for the actual energy

generated/injected by them below the scheduled energy. In the impugned order, the GERC has observed this monetary gain to be of around Rs.3/- per unit. During this two-year period the Appellants, through such acts of subterfuge, are said to have made a monetary gain of around Rs.53.83 Crores.

The Appellants submit that they cannot be called upon to refund the amounts received by them towards the difference between the preferential tariff for the scheduled energy, and the UI charges paid by them for under-injection, on the specious plea that it would be contrary to the contractual provisions of the PPA. Such a submission is made only to enable them to retain the illegal benefit which they received on their having indulged in gaming. Accepting this submission of the Appellant would require them to be permitted to retain the illegal benefit, they received as a result of their deliberate act of under-injection with the intent of making monetary gain by generating/injecting far less electricity than they had scheduled the day before, and instead the financial burden of the Appellants' illegal acts should be borne by the consumers of GUVNL.

Since reliance is placed by the Appellants on the judgements of the Supreme Court, it is necessary to take note of the law declared therein.

In **Shin Satellite Public Co. Ltd. v. Jain Studios Ltd., (2006) 2 SCC 628,** the contention of the petitioner was that an agreement was entered into between the parties for availing broadcasting services of the petitioner by the respondent; the agreement, *inter alia*, provided for supply of satellite services, payment of fees, etc; clause 23 provided for arbitration in case of dispute arising from the interpretation or from any matter relating to the performance of the agreement or rights or obligations of the parties; since a dispute arose between the parties, the petitioner, through an

advocate addressed a letter/notice to the respondent demanding for arbitration under clause 23.

The petitioner, however, received a letter from the respondent's advocate contending that the arbitration clause was not legal and valid and clause 23 of the arbitration agreement could not be termed as “arbitration clause”. As the respondent failed to appoint an arbitrator, the petitioner Company filed the application under Section 11(6) of the Arbitration & Conciliation Act seeking appointment of an arbitrator.

It is in this context that the Supreme Court observed that the question for consideration was whether the arbitration agreement was legal, valid and enforceable; the agreement provided for resolution of disputes, if any, arising between the parties to the agreement; clause 19 related to “governing law” and declared that the rights and responsibilities of the parties would be governed by Indian law; clause 23 dealt with arbitration and read thus:-

“23. *Arbitration.*—Any dispute arising from the interpretation or from any matter relating to the performance of this agreement or relating to any right or obligation herein contained which cannot be resolved by the parties shall be referred to and finally resolved by arbitration under the Rules of the United Nations Commission on International Trade Law (UNCITRAL). The arbitration shall be held in New Delhi and shall be in the English language. *The arbitrator's determination shall be final and binding between the parties and the parties waive all rights of appeal or objection in any jurisdiction*. The costs of the arbitration shall be shared by the parties equally.”

(emphasis supplied)

Clause 20 provided for severability and read thus:

"20. *Severability.*—If any provision of this agreement is held invalid, illegal or unenforceable for any reason, including by judgment of, or interpretation of relevant law, by any court of competent jurisdiction, the continuation in full force and effect of the remainder of them shall not be prejudiced."

The Supreme Court noted that the main contention of the respondent was that clause 23 made the arbitrator's determination "final and binding between the parties", and the parties had waived all rights of appeal or objection "in any jurisdiction", and the said provision was inconsistent with Section 28 of the Contract Act, 1872 as also against public policy. The submission urged on behalf of the petitioner, however was that clause 23 was in several parts and all parts were severable; while the italicised portion was not in consonance with law and was not enforceable, the said part was independent of the other parts and, ignoring the offending part, the remaining parts, which were legal, valid and binding, could be enforced.

It is in this context that the Supreme Court held that the agreement itself provided for severability; clause 20 of the agreement declared that, if any provision was held invalid, illegal or unenforceable for any reason, it would not affect other clauses; it was no doubt true that a court of law would read the agreement as it is and would not rewrite nor create a new one; it was also true that the contract must be read as a whole and it was not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible; but it was well settled that, if the contract was in several parts, some of which were legal and enforceable and some were unenforceable, the lawful parts could be enforced provided they were severable; the court must consider the question keeping in view the settled legal position and record a finding whether or not the agreement was severable; if the court

holds the agreement severable, it should implement and enforce that part which is legal, valid and in consonance with law; partial invalidity in contract will not *ipso facto* make the whole ontract void or unenforceable; and, wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts.

In **LIC of India v. S. Sindhu, (2006) 5 SCC 258,** the respondent approached the Consumer Disputes Redressal Forum praying for a direction to LIC to pay her the entire sum assured under the policy, with accrued bonus and interest, as also compensation for deficiency of service and costs. The appellant (LIC) resisted the said claim pointing out that it had released the paid-up value in terms of the policy, in full and final settlement, and it had no liability either to pay the assured sum or bonus or any interest. The District Forum rejected the contention of the respondent that she was entitled to the assured sum of Rs 5 lakhs or bonus. It held that the respondent was only eligible for payment of the paid-up value in terms of condition 4 of the policy. The District Forum, however, directed LIC to pay interest at 15% per annum on the paid up value from the respective dates of receipt of the amounts of premium to the date of settlement. An appeal was filed by LIC before the State Consumer Disputes Redressal Commission contending that it was not liable to pay interest from the date of receipt of the premiums. The State Commission allowed the appeal in part, holding that the direction to pay interest from the dates of payment of premium did not call for interference. The rate of interest was, however, reduced from 15% to 12% per annum. The revision filed by LIC against the order of the State Commission was rejected by the National Commission on the ground that the order of the State Commission did not suffer from any illegality or jurisdictional error. The said order was challenged by way of an appeal.

It is in this context that the Supreme Court observed that the amount that is paid by LIC in regard to a lapsed policy, is not “refund of the premiums paid on various dates”, but a reduced lump sum (calculated as per condition 4 of the policy) instead of the assured sum; when what is paid by LIC is not refund of premiums, the question of treating the amount paid by LIC as refund of premiums paid, and then directing payment of interest thereon from the respective dates of payment of premium does not arise; that would amount to treating the premiums paid, in respect of a policy which lapsed by default, as fixed deposits repayable with a hefty rate of interest; the intention was not to reward defaulting policy-holders; and, moreover, the courts and tribunals cannot rewrite contracts and direct payment contrary to the terms of the contract, that too to the defaulting party.

The law declared by the Supreme Court, in **Shin Satellite Public Co. Ltd. v. Jain Studios Ltd., (2006) 2 SCC 628,** is that courts would read the agreement as it is and would not rewrite nor create a new one; contract must be read as a whole; and if the contract was in several parts, some of which were legal and enforceable and some were unenforceable, the lawful parts could be enforced provided they were severable.

The law declared by the Supreme Court, in **LIC of India v. S. Sindhu, (2006) 5 SCC 258,** is that the premiums paid, in respect of an insurance policy which lapsed by default, could not be treated as fixed deposits repayable with a hefty rate of interest; the intention was not to reward defaulting policy-holders; and, moreover, the courts and tribunals cannot rewrite contracts and direct payment contrary to the terms of the contract, that too to the defaulting party. In the present case, the Appellants are the beneficiaries of gaming, and cannot be rewarded by being permitted to retain the illegal benefit they received as a result of their illegal act.

In **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** the Supreme Court held that, under Sections 76(1) and 79(1), the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc; these measures, which the Central Commission is empowered to take, should be in conformity with the Regulations under Section 178, wherever such regulations are applicable; measures under Section 79(1) should be in conformity with the regulations under Section 178; to regulate is an exercise which is different from making of regulations; making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1); if there is a regulation, then the measure under Section 79(1) should be in conformity with such regulation under Section 178; making of a regulation under Section 178 is not a precondition to passing of an order under Section 79(1); however, if there is a regulation under Section 178 in that regard then the order under Section 79(1)(*g*) should be in consonance with such regulation.

The Supreme Court further observed that a regulation, made under Section 178, has the effect of interfering and overriding the existing contractual relationship between the regulated entities; a regulation under Section 178 is in the nature of a subordinate legislation; such subordinate legislation can even override existing contracts, including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1).

As held by the Supreme Court, in **PTC India Ltd. v. CERC: (2010) 4 SCC 603,** statutory regulations have the effect of interfering and overriding existing contractual relationship between regulated entities. Consequently, prior agreements are also required to be aligned and brought in conformity with the later Statutory Regulations. The 2013 Grid Code is statutory in character, is in the nature of Subordinate Legislation, and has the force of law. As the PPA, executed between the Appellants and GUVNL, should also conform to the provisions of Grid Code, which expressly stipulates that over-declaration of availability, and consequent under-injection for monetary gain, would amount to gaming, the GERC cannot be said to have rewritten the PPAs. On the contrary, the GERC has only ensured that the illegal monetary gain, which the Appellants have made by this process, is recovered from them and paid back to GUVNL. Failure on the part of GERC to do so would not only have resulted in the consumers of electricity being required to bear the financial burden of the illegal gain which the Appellants had made by resorting to gaming, but would have also resulted in the Appellants being permitted to retain the amount they gained from their illegal act of gaming. The Appellants' acts of gaming, and making undue gain by mis-declaration of scheduled energy and under-injection of power, is akin to misrepresentation/ fraud. Permitting the Appellants to retain the benefit of such fraudulent acts of theirs, on their specious plea of retrospectivity, is impermissible, since the GERC, as an independent Regulator, is also obligated to protect the interests of consumers who, but for the impugned order, would, for no fault of theirs, be forced to bear the brunt of the illegal gain made by the Appellants herein. As rightly pointed out on behalf of GUVNL, reliance placed on **DVC v. JSERC, 2021 SCC Online APTEL 2** is of no avail, as the said judgement related to waiver of demand charges of the distribution licensee after the period was over; and, unlike the present case, there was

no violation of statutory regulations such as the Grid Code in the present case; and it is the statutory obligation of GERC, as a Regulator, to ensure compliance with the law ie the Grid Code.

The submission, that a double penalty/ double levy had been imposed on the Appellants, does not merit acceptance. What has been directed to be recovered from them is only the difference between the preferential tariff paid to them towards scheduled energy and the UI charges which they had paid to GUVNL for under-injection. This difference is the illegal gain which the Appellants had made by resorting to gaming. The amount paid by the Appellant as UI charges for under-injection is not being recovered from them once again. Consequently, the plea of double penalty/ double levy is without any basis.

The Appellant cannot take advantage of the failure of SLDC to report their activity of gaming to the GERC. The role of SLDC, under the Grid Code, is to bring such acts of gaming to the notice of the GERC which, in terms of the Grid Code, is required to take action on the entities which have indulged in gaming. In the present case, albeit on the Appellants challenge to the default notices issued to them by GUVNL, the GERC has concluded (in our opinion rightly so) that the Appellants have indulged in gaming. Clause 1.10 of the Grid Code provides that, notwithstanding anything contained in these Regulations, the Commission (ie GERC) may also take suo-motu action against any person, in case of non-compliance of any provisions of the GEGC (ie the Grid Code). As GERC has been conferred suo-motu powers to take action for violation of the Grid Code, it was entitled to take action against the appellants on its own.It matters little, therefore, that, instead of initiating action on a report of SLDC, it has taken action in proceedings initiated by the appellants challenging the notices issued by GUVNL.

We have, in the present appellate proceedings, re-examined the entire issue, and are of the view that GERC was justified in coming to the conclusion that the Appellants have indulged in gaming. The submissions urged, on behalf of the Appellants, under this head necessitate rejection.

III. REFERENCE BY GUVNL TO SCHEDULED VS EXPORT DATA FOR PLANTS FOR THE PERIOD 2011-2015:

A. CONTENTIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of GUVNL, would submit that, prior to FY 2018-19, the scheduling and actual generation of electricity by each Appellant was commensurate, as is clear from Para 13.92 of the Impugned Order; with the same biomass as fuel, the Appellants were in a position to match the actual generation to the scheduling in the earlier years, in a much closer manner (the Appellants were generating 97.27%, 88.03%, 94.79% and 84.27% in first four years); there is no reason why the same was not possible for the Appellant to achieve during FY 2018-19 and FY 2019-20 [**Ref: Para 13.85, 13.92-13.97,13.100 of Impugned Order];** perusal of the quantum scheduled during FY 2011-12 and FY 2017-18, as compared with the actual scheduling during FY 2018-19 and FY 2019-20, reveals the real reason; the Appellants, after being taken over by Abellon in 2017/2018, began to declare the schedule at substantially much larger quantum as compared to the previous financial years in order to make undue gains; and (vii) the claims of the Appellants on the fuel aspects, and alleged change in policy, are unsubstantiated and not admitted; and, in any case, do not justify how the Appellants could match the schedule much more closely in the beginning of plant operations and not after 7-8 years of operation.

B. CONTENTIONS URGED ON BEHALF OF THE APPELLANTS:

Sri Amit Kapur, Learned Counsel for the appellants, would submit that, referring to the scheduled vs. export data for the Plants for 2011 – 2018 period, GUVNL has misled by contending that it is only after the taking over of the Plants by the present promoters, that there was significant under-injection of power; this is wrong as: - (a) initially, the Biomass plants were operated using predominantly 2-3 types of biomass, *i.e.*, ground nutshell (organized source being an industrial agro-waste), cotton stalk or juliflora, of mono-fuel based design and operations; (b) with changes in policies to dispose of waste irrespective of input quality, projects are now dealing with a highly variable and heterogeneous waste (multi-fuel) - predominantly coming from un-organized farms and agro-not industrial sources; (c) the present operational performance in the context of continuous utilization of a blend of multiple types of wastes that are inherently variable is incomparable with the performance during intermittent and extremely low-capacity utilization with 2-3 types of biomass as fuel during the 2011 – 2018 period; (d) previous promoters were facing severe constraints in controlling the generation; this position was represented before the GERC in Petition Nos. 1113 and 1114 of 2011 by *Amreli and Junagadh*, *inter-alia*, praying that power from the Appellants' power plants be treated as infirm power, and be exempt from applicability of the Intra-State ABT mechanism; (e) a closer examination of month-wise operating data establishes that the biomass plants operated intermittently during 2011 – 2018 at extremely low-capacity utilization basis; (f) the biomass plants were acquired in 2019 by the present promoters (Abellon) to revive the plants by achieving higher capacity utilization, by utilizing all types of agro-waste/residues; this aligns with the larger objective of processing and disposal of all available waste in line

with Swachch Bharat mission and prevention of open burning of waste, while also generating renewable energy; (g) the average number of days for 2018 – 2020 on which the plants declared their schedule are Amreli - 261 days, Bhavnagar - 304 days and Junagadh - 273 days; and (h) a systemic analysis of the data provided in SLDC's Report would show that the plants had made significant deviations (both under-injection and over-injection) also during 2011-2017 although, on net basis, the deviation may seem to be low.

C.ANALYSIS:

The present promoters of the Appellants appear to have taken over the subject generating stations during the Financial Year 2018-19. The submission of GUVNL, before the GERC, was that, while the gap between declared availability and the actual generation during Financial Years 2011-12 to FY 2014-15 was far less, it is only after the present promoters took over the subject generating stations that there has been a drastic increase in the gap between declared availability/schedule and the actual generation/injection. The findings of the GERC, in the impugned order, are as under:-

"*13.85. We also note that the aforesaid plants have operated initially during FY 2011-12 to FY 2017-18 and at that time the plants were also generating the energy and supplied the same to the Respondent No.1.*

13.92. The SLDC has also submitted various details pertaining to Petitioners' plants with regard to schedule energy and actual energy injection, its impact on the Gujarat Energy Grid, details of number of time blocks when maximum DC is submitted and its impact and average system frequency and rates, revision in the schedule made by the

Petitioners after giving declaration of schedule. The same are reproduced below:

Year/ Entity	Amreli Biomass based Power Project			
	Implemented Schedule (Mwh)	Actual Energy (Mwh)	UI Energy (Mwh)	% Under Injection
2011-12	15780.72	15353.09	-427.63	2.71
2012-13	6474.75	5728.50	-746.25	11.53
2013-14	12174.58	10462.68	-1135.17	9.32
2014-15	7624.55	7187.39	-437.16	5.73
2015-16	28.75	42.51	13.76	-47.86
2016-17	61.50	48.89	-12.61	20.50
2017-18	13.00	2.97	-10.03	77.15
2018-19	36548.13	11452.83	-25095.30	68.66
2019-20	52839.58	20299.02	-32540.60	61.58

UI Energy (-) Indicate Under Injection & (+) Indicate Over Injection

Year/ Entity	Bhavnagar Biomass based Power Project			
	Implemented Schedule (Mwh)	Actual Energy (Mwh)	UI Energy (Mwh)	% Under Injection
2011-12	386.50	366.92	-19.58	5.06
2012-13	12615.00	12405.91	-209.09	1.66
2013-14	5557.18	5133.33	-423.85	7.63
2014-15	10336.50	9707.19	-391.37	3 79
2015-16	751.63	731.15	-20.47	2 72
2016-17	443.00	357.60	-85.40	19.28
2017-18	1011.23	826.43	-184.79	18.27
2018-19	51336.55	19367.16	-31969.40	62.27
2019-20	57096.12	23263.07	-33833.10	59.26

UI Energy (-) Indicate Under Injection & (+) Indicate Over Injection

Junagadh Biomass based Power Project				
Year/ Entity	Implemented Schedule (Mwh)	Actual Energy (Mwh)	UI Energy (Mwh)	% Under Injection
2011-12	24700.53	23144.84	-1555.69	6.30
2012-13	24806.98	23842.48	-989.11	3.99
2013-14	8359.00	7683.55	-653.98	7.82
2014-15	113.25	67.33	-45.92	40.54
2015-16	61.50	87.00	25.50	-41.46
2016-17	91.50	21.25	-40.25	43.99
2017-18	52.00	33.39	-18.61	35.79
2018-19	42076.35	17328.94	-24747.40	58.82
2019-20	55447.13	25840.13	-29607.00	53.40

UI Energy (-) Indicate Under Injection & (+) Indicate Over Injection

13.93. From the aforesaid table, following inferences are drawn:

13.94. The Amreli Biomass Power Plant was commissioned during FY 2011-12. During that year the schedule energy and actual energy generation is having variance with under-injection percentage of 2.71%. In FY 2012-13, the schedule generation drastically reduced by about 40% in comparison to earlier year i.e. FY 2011-12. Similarly, there is reduction in actual generation in FY 2012-13 in comparison to FY 2011-12, whereby under-injection against scheduled generation is observed about 11.53%. In FY 2013-14, the scheduled generation has increased by about 190% in comparison to scheduled generation during FY 2012-13. However, it is lower than the scheduled generation of FY 2011-12. The deviation observed between scheduled energy and actual energy as under injection during FY 2013-14 is 9.32%. In FY 2014-15, the scheduled generation and actual injection has further reduced compared to FY 2013-14 and deviation between schedule and actual generation was observed as 5.73%. From FY 2015-16 to FY 2017-18, the schedule energy generation

and actual energy generation are quite lower as negligible and deviation in schedule and actual energy generation was within the range of 20.50% to 77.15% with under-injection in FY 2016-17 and FY 2017-18 while in FY 2015-16 an over injection of 47.86% was observed. The Scheduled and Actual generation are negligible in comparison to generation of electricity with consideration of the capacity of the biomass based power plant and ignorable.

It is observed that during FY 2018-19, the schedule energy generation has increased substantially and corresponding actual energy generation was also increased, but deviation between scheduled energy and actual energy was quite higher. The deviation between scheduled energy and actual energy was substantial and percentage of under-injection is 68.66%. It is also noteworthy that the UI energy is more than double of actual energy generation/injection during said FY 2018-19. In FY 2019-20, it is observed that scheduled energy is further substantially increased in comparison to FY 2018-19. It was found that percentage of under injection was 61.58%. Thus, the deviation in schedule and actual energy generation was substantial during FY 2018-19 and FY 2019 20. It is also observed that the energy supplied through UI energy was quite higher than actual energy generation and supplied during FY 2018-19 and FY 2019-20 from this biomass based power plant at Amreli.

13.95. In so far as the Bhavnagar biomass-based power plant is concerned, the said plant was commissioned during FY 2011-12, wherein the schedule energy and actual energy generation was quite lower and having variance between the scheduled energy and actual energy as an under-injection of 5.06%. In FY 2012-13, the schedule generation has substantially increased in comparison to earlier year i.e. FY 2011-12. Similarly, actual generation has also increased in FY 2012 13 when compared to FY 2011-12, whereby under-injection against scheduled

generation is observed about 1.66%. In FY 2013-14, the scheduled generation has substantially decreased by about 44% in comparison to scheduled generation during FY 2012-13. The deviation observed between scheduled energy and actual energy as under-injection during FY 2013-14 is 7.63%. In FY 2014-15, the scheduled generation and actual injection has further increased as compared to FY 2013-14 and deviation between schedule and actual generation was observed as under-injection of 3.79%. From FY 2015-16 to FY 2017-18, the schedule energy generation and actual energy generation are quite lower as negligible and deviation in schedule and actual energy generation was within the range of 2.72% to 19.28% with under-injection in FY 2015-16 to FY 2017-18. The Scheduled and Actual generation are negligible in comparison to generation of electricity with consideration of the capacity of the biomass based power plant and ignorable.

It is observed that during FY 2018-19, the schedule energy generation has increased substantially and corresponding actual energy generation was also increased, but deviation between scheduled energy and actual energy was quite higher. The deviation between scheduled energy and actual energy was substantial and percentage of under-injection is 62.27%. It is also noteworthy that the UI energy is almost around 165% of actual energy generation/injection during said FY 2018-19. In FY 2019-20, it isobserved that scheduled energy is further substantially increased in comparison to FY 2018-19. It was found that percentage of under injection was 59.26%. The deviation in schedule and actual energy generation is also substantial during FY 2018-19 and FY 2019-20. It is also observed that the energy supplied through UI energy is quite higher than actual energy generation and supplied during FY 2018 19 and FY 2019-20 from this biomass based power plant at Bhavnagar.

13.96. Whereas in case of Junagadh Biomass based power plant, the plant was commissioned in FY 2011-12 wherein the schedule energy and actual energy generation was having variance with an under injection of 6.30%. In FY 2012-13, the schedule generation has marginally increased in comparison to earlier year i.e. FY 2011-12. Similarly, actual generation has also marginally increased in FY 2012-13 when compared to FY 2011-12, whereby under-injection against scheduled generation is observed about 3.99%. In FY 2013 14, the scheduled generation has reduced to almost 33.69% of scheduled generation during FY 2012-13. The deviation observed between scheduled energy and actual energy as under-injection during FY 2013-14 is 7.82%. During the period from FY 2014-15 to FY 2017-18 the scheduled generation and actual injection has substantially reduced as compared to previous financial years and is quite lower as negligible and deviation in schedule and actual energy generation was within the range of 35.79% to 43.99% with under-injection except FY 2015-16 when there was over-injection. The Scheduled and Actual generation are negligible in comparison to generation of electricity with consideration of the capacity of the biomass based power plant and ignorable.

It is observed that during FY 2018-19, the schedule energy generation has increased substantially, but deviation between scheduled energy and actual energy was quite higher. The deviation between scheduled energy and actual energy was substantial and percentage of under-injection is 58.82%. It is also noteworthy that the UI energy is almost around 142% of actual energy generation/injection during said FY 2018-19. In FY 2019-20, it is observed that scheduled energy is further substantially increased in comparison to FY 2018-19. It was found that percentage of under injection was 53.40%. The deviation in schedule and actual energy generation is also substantial during FY 2018-19 and FY 2019-20. It is also observed that the energy supplied through UI energy is

quite higher than actual energy generation and supplied during FY 2018 19 and FY 2019-20 from this biomass based power plant at Junagadh.

13.97. From the aforesaid, the following observations are also drawn.

(i) After commercial operationalisation of the aforesaid power plants the schedule generation by the generators was quite higher in certain years. Thereafter, it was reduced drastically except FY 2014-15. It was observed that during FY 2015-16 to FY 2017-18 declared schedule energy and actual energy was quite lower or negligible and corresponding under-injection or over-injection as observed appears quite higher and are ignorable. The error observed between scheduled generation and actual generation and reflected as under-injection was also quite lower in initial years of operationalisation of power plant up to FY 2013-14. Thereafter, in FY 2018-19 and FY 2019-20 the schedule energy was quite higher in comparison to schedule energy of earlier years whereas corresponding actual energy was quite lower. Thus, deviation of energy is quite higher and reflected as under-injection. The supply of energy through UI energy percentage was quite higher in FY 2018-19 and FY 2019 20 in comparison to the generation and supply of actual energy from the power plant during the above years.

(ii) It is observed that the generation of energy scheduled has reduced from FY 2011-12 to FY 2017-18 and thereafter in FY 2018-19 and FY 2019-20 there is substantial increase in scheduled generation. However, actual generation was quite lower."

It does appear, from the aforesaid findings of the GERC, that under-injection of energy as compared to declared availability/schedule was of a substantially lower quantum during FY 2011-12 to 2013-14 as compared to the substantial deviations during FY 2018-19 and FY 2019-20.

The explanation furnished on behalf of the appellants, for this substantial increase in deviations, is that there was a change in the kinds

of biomass used as fuel for generation of electricity. There is no valid explanation as to why there was a change in the biomass fuel used, and why the Appellants had declared a far higher availability/schedule as compared to the actual generation/injection, that too for a large number of days during this two-year period. It is the Appellants' contention that, while Amreli Power Projects had declared schedule during 2018-20 for 261 days, Bhavnagar had declared schedule for 304 days, and Junagadh for 273 days. The more the number of days for which the Appellants had declared availability/schedule and had under-injected power for a far lesser quantum than what was scheduled, enabled them to substantially increase their monetary gain.

It is pointed out on behalf of GUVNL that, during the first four years FY 2011-14, the Appellants had generated 97.27%, 88.03%, 94.79% and 84.27% of the quantum scheduled; the actual generation came down drastically during FY 2018-19 and FY 2019-20; and, during this two-year period, the first Appellant had received higher tariff for 57.67 million units, the second Appellant for 65.8 million units and the third Appellant for 54.77 million units without actual generation. Without generating power, or generating a very low quantum, the Appellants appear to have taken advantage of the higher preferential tariff, stipulated for declared availability/schedule in the PPA, of Rs. 5.66 to Rs. 5.68 per unit in FY 2018-19 and FY 2019-20 respectively, as compared to the lower UI charges which ranged between Rs. 2.66 to Rs. 2.82 per unit for a substantial part of this two-year period, and had made substantial monetary gain of Rs.53.83 crores in the process.

IV. IS BIOMASS WASTE UNCONTROLLABLE, UNPREDICTABLE AND HETEROGENEOUS?

A. CONTENTIONS URGED ON BEHALF OF THE APPELLANTS:

Mr. Amit Kapur, Learned Counsel for the appellant, would submit that bio-mass is uncontrollable, unpredictable and heterogeneous due to (a) different (i) moisture, (ii) size, (iii) density, (iv) source, (v) stone, (vi) inert content, (vii) coarseness and (viii) seasonal variations; (b) variation in generation from each crop residue while burning the same quantity of fuel; (c) no single type of biomass is available (TERI's Report dated 09.06.2017); (d) blend of different wastes; (e) the Government of Gujarat's WT[E Policy, 2016 – 2021 recognizes that fuel source for WTE plants is not homogenous and shows seasonal variations; (f) CEA's letter dated 01.04.2021 stated/recommended- (i) input to WTE Plants will remain heterogenous, and of variable composition and their GCV cannot be predicted; (ii) due to different types of input waste and variability in GCV, there is a wide range of deviation potential as waste is not homogenous; (iii) plant operators should not be penalized for deviations resulting due to variation in GCV of waste and resultant electricity output; (iv) deviation band of **+/-30%** for WTE plants; and (g) 41st Parliamentary Standing Committee on Energy's Report (December, 2023) – the Parliamentary Standing Committee on Energy acknowledged that the primary reason for variability in power generation in WTE plants is the inconsistent nature of feedstock/biomass.

Mr. Amit Kapur, Learned Counsel for the Appellant, would further submit that (a) in thermal power plants, coal is mined, crushed, washed, and supplied to the plant; the compensation payable *qua* short supply of coal is linked to quality of coal and/or energy value in coal; consistent source and quality of coal enables power plants to schedule and generate with a higher predictability and control; (b) whereas sourcing of biomass waste is a highly unorganized sector, and is linked to farming; biomass comes from various crop residues and has a high degree of variation in its characteristics which impacts combustion characteristics in

the boiler, consequently influencing steam quality entering the turbine, thereby impacting power generation; (c) GERC has put a higher test for Biomass Plants as compared to thermal power plants–(i) while GCV of coal is determined at 3970 kCal/kg, GERC determined GCV of Biomass as high as at 4423 kCal/kg; (ii) the GERC determined GCV of Biomass (4423 kCal/kg) is way higher than: -(1) GCV of Biomass as 3300 kCal/kg as held by this Tribunal in **BEDA & Ors. v. APERC & Ors. 2022 SCC OnLine APTEL 29** (relied upon CEA Report dated September 2005; (2) GCV of Biomass determined by CERC and SERCs *viz.*: -

Gross Calorific Value - Unrealistic Benchmarking

Operating Parameters Disparity: Gujarat vs. Other States - Impact on Plant Viability

Sr. NO.	State	Tariff (Rs/ KWh)	GCV (kcal/kg)	SHR (Kcal /kwh)
1	CERC	-	3100	4200
2	Gujarat	6.08	4423	3950
3	Punjab	8.92	3100	4200
4	Maharashtra	7.83	3611	4200
5	Chhattisgarh	7.56	3100	4000
6	Rajasthan	7.41	3400	4200
7	Madhya Pradesh	7.12	3100	4200
8	Uttar Pradesh	6.96	3200	4200
9	Tamil Nadu	6.11	3100	4200

GERC has determined GCV of biomass which is higher than coal (~3850 kcal/kg)
Unrealistic operational parameters determined by GERC not in sync with operating reality in Gujarat or across India.

(iii) If difference in GCV is adjusted, then under injection would have reduced by 19%; (iv) technically, Biomass plants contain “fuel follow” mode as against “turbine follow” mode i.e., the turbine follows the steam generated from the boiler instead of demanding steam to match the schedule. The travel time of the waste on the grate is typically upto 60 minutes, and therefore such boilers are low in responding; hence, normal time blocks of 15 minutes, as applicable to thermal plants, does not work for the Appellants’ Plant (biomass).

B. CONTENTIONS URGED ON BEHALF OF GERC:

With respect to the contention of the Appellants that biomass fuel is unpredictable, to achieve actual generation nearby scheduled generation,

the fuel requirement was higher than what had been considered by the Commission in its Tariff Orders, and the Appellants had rightly declared the capacity from the quantum of biomass fuel with GCV decided by the Commission which could not be considered as deviation or default on the part of the Appellants, Mrs. Suparna Srivastava, Learned Counsel for the GERC, would submit that the Commission had, in the impugned order, held as under: (i) it was the duty of the Appellants to manage its affairs relating to biomass fuel and ensure that the requisite quantum with necessary GCV and other relevant characteristics was available at their power projects to enable generation and injection of power nearby the scheduled energy; merely stating that biomass consisted of various types of agro-waste, it was heterogenous, and there was variance in its quantum, its GCV, price, moisture, sand, dust, ash content etc, did not serve any purpose, as it was the obligation of the Appellant to ensure that the capacity declarations were faithfully done, considering all relevant factors which otherwise did not come in the way of generation of electricity near to the scheduled energy; (ii) under its Order dated 22.05.2018 in Petitions No. 1113 and 1114 of 2011, and Order dated 31.07.2018 in Petition No. 1244 of 2012, the Commission had upheld applicability of the ABT mechanism to biomass projects, and had held that biomass-based generation was predictable, and that generators were required to manage prudent fuel practices and declare capacity/schedule generation as per the availability of biomass; when the Commission had held that biomass-based generation was predictable, and the same had not been challenged by the Appellants, it was not open to them to now claim that they could not accurately predict generation from biomass; and (iii) even in the Order dated 09.02.2018, the Study, on biomass availability and determination of biomass prices in the six districts of Gujarat, carried out by TERI as an Independent Consultant engaged by the Commission', had also not been

challenged by the Appellants; hence, these Orders have attained finality; and, therefore, any issues relating to parameters, decisions, tariff etc. by the Commission could not be accepted since the same had no relevance in the present matter.

C. CONTENTIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of GUVNL, would submit that the Appellants have attempted to mix up issues raising extraneous and irrelevant matters; the Appellants allege that the nature of biomass fuel available to them for generation was not predictable, and therefore the quantum to be scheduled could not be correct; this is patently erroneous for the following reasons: (i) it is contrary to the specific finding in the Order dated 17.05.2010 (applicable to the Appellants) that the Bio-mass based generation is predictable and firm in nature, and can be scheduled in accordance with ABT guidelines; the Impugned Order deals with the same at para 13.62-13.65,13.76-13.81, and 13.124; (ii) right from the beginning GERC, in its orders dated 17.05.2010, 08.08.2013, and 15.03.2018**,** had clearly and specifically held that biomass-based generation was predictable (firm in nature); issues of variability of fuel and difficulty in scheduling were raised but rejected in the Order dated 15.03.2018; (iii) the Appellants themselves had claimed that they had raised issues on scheduling before the GERC in Petition No. 1113 and 1114 of 2011 – this was rejected vide Order dated 10.05.2012; Appeal was filed on rejection of re-determination of fuel cost but not on rejection from exemption from scheduling on grounds of non-predictability which has, therefore, attained finality; (iv) in the order dated 30.03.2015 in Petition No. 1455 of 2014 filed by Abellon (the holding company of the Appellants), GERC rejected their claim for exemption from ABT Mechanism, and specifically held that *'In fact the petitioner is expected to*

follow prudent fuel management practice and schedule its operation for the following day based on the biomass available to it on the day of scheduling. Even on the day of actual operation, the petitioner has option to re-schedule its generation within certain timeframe. As such, on this account also, the petitioner's request to exempt its plant from Additional UI cannot be granted'. This Order was not challenged; and (v) none of the Appellants, or even Abellon- the holding company of the Appellants, had challenged the above findings of GERC, at any time prior to 05.08.2020, when GUVNL had issued the default notices; and, even at this stage, there has been no challenge to the specific finding of GERC on the predictability of generation.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of 'the 2nd Respondent, would further submit that the Appellants have referred to use of coal more than normative requirement; the Appellants projects, being renewable power and to be promoted, have a must run status; accordingly, the scheduling is not done on normative parameters but on actual capacity to generate electricity; the Appellants' power projects may be inefficient or the Appellants may have arranged fuel with lesser GCV or there may be any other reason why the Appellants are not able to match the normative parameters; but this does not mean that the Appellants can declare the capacity and recover tariff for units not capable of being generated and not actually generated.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would also submit that there cannot be any issue on intra-day variations when the Bio mass generation is predictable; the quality of fuel is known the day before actual generation; it is the responsibility of the Appellants to declare as per its capability for each 15 minutes time block; even otherwise, Tariff (or GCV considered for tariff) has no relation to intra-day variability; the generator has to declare

capacity as per its capability and assessment; none of the Orders of this Tribunal, relied on by the Appellants, consider such a correlation; the Appellants, as a prudent utility, ought to know the quality of the fuel and the generation capacity possible at the time when it declared availability for the ensuing day; and, further, the Appellants have the ability to alter the availability even during the course of generation.

D. ANALYSIS:

Before examining the rival submissions under this head, it is useful to take note of the earlier orders of the GERC determining the Gross Caloric Value for Bio-mass based generation plants.

i. ORDER OF GERC DATED 09.02.2018:

In its order dated 09.02.2018, relating to the study on biomass availability and determination of biomass prices in the six districts of Gujarat carried out by TERI which was appointed an independent consultant by GERC, the Commission observed that the independent consultant was appointed to carry out a study to assess the availability of biomass and determination of price of biomass in different districts of the State of Gujarat; the study was entrusted by the Commission to TERI in compliance with the direction of APTEL in Appeal Nos. 132 & 133 of 2012 which was upheld by the Supreme Court in its Judgment in Civil Appeal No. 1973 & 1974 of 2014 dated 05.07.2016.

After taking note of the objections raised by each stake-holders, the GERC arrived at a final number to protect consumer interest as well as to promote renewable energy in the State. Table 25 details the weighted Average GCV for different biomass categories and reads as under:

"Table-25

NET SURPLUS AVAILABILITY OF DIFFERENT BIOMASS AND ITS COST AND GCV

Based on availability of net surplus in six districts and Weighted Average

Net Surplus	***Biomass***	***Wt. Average Cost***	***Wt. Average GCV***
KMT		***Rs./Tonne***	***Kcal/Kg***
2662.63	*Cotton Stalk*	*3738*	*4472*
217.53	*Groundnut Shell*	*4132*	*4315*
189.20	*Castor Stalk*	*3738*	*3876*
90.85	*Pigeon Pea Stalk*	*3738*	*4473*
12.64	*Paddy Husk*	*3368*	*3737*
3172.85	***Weighted Average for Gujarat***	***3764***	***4423***
129.60	***Sugarcane Bagasse***	***2025***	***2250***

Weighted Average Cost for Gujarat in (Rs./Ton)	***3764***	***Weighted Average GCV for Gujarat in (Kcal/Kg.)***	***4423***

E. ”

The GERC further observed that, considering the above, the derived weighted average GCV of different biomass (except Bagasse) available in the six districts of the State was 4423 kcal/ kg, and the weighted average cost works out to Rs.3764 per MT; since the study was conducted in FY 2017-18, GERC had decided to consider the aforesaid cost and GCV as the base for FY 2017-18, while deciding the energy charge for the project utilising the above fuel; and the aforesaid parameters were the base parameters for determination of tariff i.e. energy charge of the biomass project.

ii. ORDER OF GERC IN PETITION NO.1113 OF 2011 DATED 22.O5.2O18:

Petition No. 1113 of 2011 was filed by Amreli Power Projects Limited, and Petition No. 1114 of 2011 was filed by Junagadh Power Projects Ltd, seeking re-determination of fuel cost, fixation of tariff and non-applicability of intra-state availability based tariff to the biomass based 10 MW power plant at Amreli and Junagadh under Section 62 read with Section 86(1)(a) of the Electricity Act, 2003.

In the orders passed in the said Petitions on 22.05.2018, the first issue framed by GERC was what would be the price of the biomass fuel and energy charge payable to the Petitioners by the Respondent?

The GERC observed that, in considering the aforesaid parameters, it had passed Generic Tariff Order No.1 of 2018 dated 15.03.2018, determining the energy charge for the Biomass based energy projects utilizing (i) water cooled condenser, (ii) Air cooled condenser, and (iii) Bagasse based generation, which would be commissioned during the control period specified in the said order i.e. for FY 2017-18 to 2019-20. The Commission then detailed the energy charge decided by it in the said order in the form of a table, which records the Commission having arrived at the Gross Calorific Value of biomass in kcal/ kg as 4423 and the cost of fuel as Rs.3764 per MT. Thereafter the Commission observed that it was clear that the Petitioners' plants were eligible to receive the energy charge as determined in Order No. 1 of 2018 for the years 2017-18 to 2019-20.

iii. ORDER OF GERC IN PETITION NO. 1244 OF 2012 DATED 31.07.2018:

Petition No. 1244 of 2012 was filed by Bhavnagar Biomass Power Projects Private Limited under Section 86(1)(f) of the Electricity Act, seeking directions to the Respondents, among others, for determination of

fuel cost, fixation of tariff of their biomass-based plant under Section 62 read with Section 86(1)(a) of the Electricity Act, 2003.

In its order dated 31.07.2018, the GERC took note of its earlier orders in Petition Nos. 1113 and 1114 of 2021, and framed certain issues, the first of which was whether their plant was eligible for re-determination of tariff, based on the operational and cost parameters?

The GERC held that, during the proceedings, the Petitioner had agreed that the decision of the Commission, in the Orders in Petition Nos. 1113 of 2011 and 1114 of 2011 dated 22.05.2018, was applicable to their project with respect to the energy/ variable charge with consideration of biomass price, GCV etc; the Respondent, while agreeing with the Petitioner, had stated that the levelized fixed component of tariff determined by the Commission in the said Order may not be allowed to the Petitioner in view of the Article 5.2 of the PPA. The Commission observed that, since both the Parties had agreed that the Petitioner's plant was eligible for re-determination of energy/ variable charge with consideration of biomass price as well as GCV based on the Commission's Orders in Petition Nos. 1113 of 2011 and 1114 of 2011, the issue be decided in favour of the Petitioner.

iv. ORDER OF APTEL IN APPEAL NO.277 OF 2021 DATED 15.11.2021:

In the 3rd biomass tariff order No. 1 of 2018 dated 15.03.2018, the GERC determined the Gross Calorific Value (GCV) at 4423 kcal/ kg, and the tariff for procurement of power by Distribution Licensees and others from Biomass based power projects and bagasse based co-generation projects for Control Period up to FY 2019-20. Thereafter the GERC issued notice dated 26.03.2020 extending operation of the 3rd biomass tariff order dated 15.03.2018 for the period beyond 31.03.2018 making it clear that it

would continue to apply till a fresh biomass tariff order was issued. This notice was the subject matter of challenge by all the Appellants herein before this Tribunal in Appeal No. 277 of 2021.

This Tribunal, in its Order in Appeal No. 277 of 2021 dated 15.11.2021, observed that the prayer in the Appeal, assailing the said extension by notice dated 26.03.2020, was concerning the said tariff order dated 15.03.2018, though it had been clarified during the hearing that the Appellants did not seek any relief vis-a-vis the control period originally envisaged in the said order i.e. the period ending up to 31.03.2020.

In its Order, in Appeal No. 277 of 2021 dated 15.11.2021, this Tribunal observed that the Commission was yet to take a final call on the biomass tariff order for the control period 2020-2021 onwards; it was inappropriate for the Tribunal to take a decision on the objections to the TERI Report or the inaccuracy of the GCV determined by the previous order as that would amount to usurping the jurisdiction which vested in the State Commission.

This Tribunal then noted the submission urged by the Counsel on both sides that the matter be left for decision by the State Commission and, with the consent of Learned Counsel on all sides, disposed of the Appeal directing the State Commission to take a final decision, after hearing all interested parties on all issues in accordance with law on the draft published on 11.03.2020 expeditiously. This Tribunal concluded adding that the Commission should pass a clear express order for the control period beginning from 01.04.2020; and the parties would have the liberty to submit detailed written submissions before the Commission.

It is evident from the Order of this Tribunal, in Appeal No. 277 of 2021 dated 15.11.2021, that the GCV, determined in the tariff order dated

15.03.2018, was not in issue, and it was only extension of operation of the 3rd biomass tariff order dated 15.03.2018, beyond 31.03.2020, which was subjected to challenge. Consequently, for the period upto 31.03.2020, it is the tariff order dated 15.03.2018, wherein the GVC was determined as 4423 kcal/ kg, which would continue to govern. As we are concerned in this appeal only with FY 2018-19 and 2019-20, (both of which are for the period prior and upto 31.03.2020), it is the GVC of 4423 kcal/ kg, as determined in the tariff order dated 15.03.2018, which would apply. As the said tariff order dated 15.03.2018, (which has attained finality at least in so far as FY 2018-19 and 2019-20 are concerned), is binding on them, the appellants cannot be heard to contend that a far lower GVC should have been adopted.

In the aforesaid orders passed by the GERC, the Gross Calorific Value of biomass has been determined as 4423 kcal/ kg. Petitions No. 1113 and 1114 of 2011 were filed before the GERC by Amreli Power Projects Limited and Junagadh Power Projects Private Limited respectively. In the orders passed in Petitions Nos.1113 and 1114 of 2011, both dated 22.05.2018, the GERC observed that, for the control period FY 2017-18 to 2019-20, the GCV of biomass was 4423 kcal/ kg and the cost of fuel was Rs.3764/ MT. Following this order, the GERC had, in Petition No. 1244 of 2012 filed by the other Appellant M/s. Bhavnagar Biomass Power Projects Private Limited, passed an order similar to that passed in Petition Nos. 1113 and 1114 of 2011. It is relevant to note that all these orders passed by the GERC, in Petitions filed by the Appellants herein, have not been subjected to challenge by way of an appeal, and have attained finality.

What was under challenge in Appeal No. 277 of 2021 was not the 3rd biomass tariff Order No.1 of 2018 dated 15.03.2018, but the notice

issued by GERC on 26.03.2020 extending operation of the said biomass order dated 15.03.2018 beyond FY 2019-20. In its order in Appeal No. 277 of 2021 dated 15.11.2021, this Tribunal noted the submission urged on behalf of the Appellants that they did not seek any relief with respect to the tariff order dated 15.03.2018 during the original control period envisaged in the said order i.e. the period up to 31.03.2020, and their grievance was confined only to extension of the said tariff order on and after 01.04.2020. The said remand order passed by this Tribunal in Appeal No. 277 of 2021 dated 15.11.2021 has also attained finality.

It is settled law that matters finally disposed of by the order of remand cannot be reopened when the matter comes back after the final order upon remand on appeal or otherwise to the Court remanding the matter. If no appeal is preferred against the order of remand, the matters finally decided in the order of remand can neither be subsequently re-agitated before the Court to which it was remanded nor before the Court where the order passed upon remand is challenged in appeal or otherwise from such order. The Court, to which the matter is remanded, has to act within the order of remand. It is not open to such Court or authority to do anything but to carry out the terms of the remand even if it considers it to be not in accordance with law. Once a finality is reached, it cannot be reopened. **(Bidya Devi v. Commissioner of Income-tax, Allahabad: AIR 2004 Cal 63 (Calcutta HC DB); Uttar Haryana Bijli Vitran Nigam Limited & others vs CERC & others (Judgement of APTEL in Appeal No. 383 of 2022 dated 02.02.2024).**

The order of remand passed by this Tribunal, in Appeal No. 277 of 2021 dated 15.11.2021, records the submission, urged on behalf of the Appellants herein, that they did not seek any relief with respect to the tariff order dated 15.03.2018 during the original control period envisaged in the

said order i.e. the period up to 31.03.2020, and their grievance was confined only to extension of the said tariff order beyond 01.04.2020. Having chosen not to question the 3rd biomass tariff order No. 1 of 2018 dated 15.03.2018, whereby the GERC had determined the Gross Calorific Value (GCV) for biomass as 4423 kcal/ kg for the control period 2017 to 2020, even in Appeal No.277 of 2021 before this Tribunal, the appellants cannot now be heard to contend that the said GVC cannot be form the basis for holding that the appellants had deliberately over-declared availability and under-injected power.

It is settled law that the judgment of a competent Court is binding inter-parties and cannot be re-agitated in collateral proceedings. An order or judgment of a Court/Tribunal, even if erroneous, is binding inter-parties. The binding character of judgments, of Courts of competent jurisdiction, is in essence a part of the rule of law on which administration of justice is founded. (***The Direct Recruit Class-II Engineering Officers' Association* v. *State of Maharashtra* : (1990) 2 SCC 715; *U.P. State Road Transport Corporation* v. *State of U.P.* : (2005) 1 SCC 444; Vidya Sagar Singh v. G.B. Pant University of Agriculture and Technology, 2019 SCC OnLine Utt 473)**. Matters in controversy, in judicial/quasi-judicial proceedings, decided after full contest, after affording fair opportunity to the parties to prove their case, by a Court/Tribunal competent to decide it and which proceedings have attained finality, is binding inter-parties. (***Gulabchand Chhotalal Parikh* v. *State of Bombay (Now Gujarat)* : AIR 1965 SC 1153; *State of Punjab* v. *Bua Das Kaushal* : (1970) 3 SCC 656 : AIR 1971 SC 1676; Vidya Sagar Singh v. G.B. Pant University of Agriculture and Technology, 2019 SCC OnLine Utt 473)**. Once a matter, which was the subject-matter of a lis, stood determined by a competent Court/Tribunal, no party can thereafter be permitted to reopen it in a subsequent litigation. (***Swamy***

Atmananda* v. *Sri. Ramakrishna Tapovanam* : (2005) 10 SCC 51 : AIR 2005 SC 2392; *Ishwar Dutt* v. *Land Acquisition Collector* : (2005) 7 SCC 190; Vidya Sagar Singh v. G.B. Pant University of Agriculture and Technology, 2019 SCC OnLine Utt 473**). Issues which have been concluded inter-parties cannot be raised again in proceedings inter-parties. (State of Haryana* v. *State of Punjab* : (2004) 12 SCC 673; Vidya Sagar Singh v. G.B. Pant University of Agriculture and Technology, 2019 SCC OnLine Utt 473**). In view of the earlier orders passed by the GERC, which are judgments inter-parties binding on the appellants, it would be wholly inappropriate for us to entertain a fresh challenge to the very same issues.

The orders of the GERC, to which the Appellants were parties to, are binding on them. It is not open to the Appellants, having chosen not to challenge the validity of any of the afore-said orders of the GERC in appellate proceedings, to now put-forth submissions contrary to what has been determined in the afore-said orders. As shall be elaborated later in this Order, reliance placed by the Appellants on the CEA's letter dated 01.04.2021 is also of no avail, since the contents of the said letter discloses that the CEA has recommended deviation limits of plus/minus 30% for all types of waste to energy plants considering the wide range of possible deviation in calorific value of waste. As noted hereinabove, the GERC has fixed the GCV of biomass as 4423 kcal/ kg and, since such determination is binding on the Appellants, it is not open to them to now turn around and contend that this GCV as determined by the GERC is erroneous, that too in collateral proceedings where the issue which arises for consideration is whether or not the Appellants have indulged in gaming by mis-declaration of their available capacity/ scheduled energy, and

making monetary gain by generating/ injecting power for a far lesser quantum than what had been scheduled a day earlier.

In this context, it is useful to note what the GERC has observed in the impugned order:

13.78. The Commission in its Generic Tariff Orders dated 17.05.2010, 08.08.2013 and 15.03.2018 has decided that biomass power projects are 'Must Run' status and they are subjected to scheduling and dispatch provisions. They are governed by ABT Orders. These Orders have attained finality as there is no challenge to this Orders by any parties. The relevant portion of the said Orders are reproduced below:

"e. Scheduling of Power Commission's Decision Generation from biomass based power projects and bagasse based co-generation projects is predictable and hence, those projects should come under the ambit of GERC Terms and Conditions of Intra-State Open Access) Regulations, 2011 as well as GERC ABT orders. The exemption from scheduling requirements for the smaller capacity biomass based power projects having installed capacities up to 4 MW has been kept considering their smaller size and difficulties of monitoring by the SLDC. As regards the suggestion to extend the benefit of exemption from scheduling to the existing projects, the matter can be dealt with separately and not as a part of this order."

13.79. The Commission has also in its Order dated 30.03.2015 in Petition No. 1455/2014 filed by M/s Abellon Limited decided that the prayer of the Petitioners to exempt the biomass projects from the ABT mechanism is not accepted and the same is rejected. From the aforesaid orders, it is clear that the generation from biomass based projects have

been recognised that they are predictable and governed by ABT mechanism

13.80. The Amreli biomass Power Projects and Junagadh Biomass Power Projects have challenged the orders of the Commission dated 17.05.2010 before the Hon'ble Tribunal and raised the issues of the energy charge determined by the Commission for the project life. Subsequently, the said matters also went to the Hon'ble Supreme Court. However, there was no challenge on the issue of the scheduling of generation before the Hon'be Tribunal awell as the Hon'ble Supreme Court. Hence, the decision dated 17.05.2010 has attained its finality which includes the issue of scheduling of biomass based generations.

13.81. The Petitioners have fairly admitted that they have not made any revisions in the schedule during the day though the revision in schedule provided as per the provision of ABT Orders. The contention of the Petitioners that the schedule generation is not achievable is not acceptable.

13.82. The plant of the Petitioners operated during FY 2018-19 and FY 2019-20 and the data submitted on record state that the deviation was continue during the operation of the plant from the schedule given by the generators. It is also observed that the deviations were substantial and there is no effort of the reducing the said deviations by way of the revision of schedule given in the orders available to generator as well as the improvement in the schedule methodology. The Petitioners have failed to prove the same based on the data submitted by them as well as the data submitted by the SLDC. Thus, mis-declaration between scheduled energy and actual energy on continuous basis for long time during FY 2018-19 and FY 2019-20 when UI charges were quite lower in the range of Rs.

2.66 to Rs. 2.82 while preferential tariff receivable by the Petitioners was Rs. 5.66/unit for FY 2018-19 and Rs. 5.86/unit for FY 2019-20 prove beyond the doubt that an additional amount is about Rs. 3/unit receivable by the Petitioners/Biomass generators by supplying energy through UI by way of continuous mis-declaration and under injection of energy with intent to obtain commercial gains qualifies as 'gaming'.

13.125. The Petitioners contended that there is no intentional misdeclaration on their part and it is beyond the control of the Petitioners while the Respondent GUVNL had contended that the declaration of schedule is intentional with intent to obtain commercial gain. It is observed that the plants of the Petitioners were commissioned during FY 2011-12. The Petitioners' plants have initially for one or two years after COD generated the electricity by giving schedules to the SLDC about 25% to 35% of the capacity of the plants during that years. The deviations observed between schedule energy and actual energy are quite lower in the initial years i.e. FY 2011-12 to FY 2014-15. Thereafter, there is substantial lower declaration of schedule energy by the Petitioners in comparison to schedule energy. The actual energy generated was having deviation from the scheduled energy in the aforesaid years. However, the deviation is quite lower in comparison to FY 2018-19 and FY 2019-20 observed in their plants of Amreli, Junagadh and Bhavnagar biomass power projects. Thereafter, the Petitioners' Power Plants have given schedules for generation in FY 2018-19 and FY 2019-20 and for some months of FY 2020-21. During the aforesaid periods the schedule energy is given substantially higher in comparison to earlier years.

13.126. The tariff payable for energy supplied from biomass power projects of the Petitioners for FY 2018-19 was Rs. 5.66 per unit and Rs. 5.86 per unit for FY 2019-20. We note that although, the Respondent

GUVNL in its submissions has mentioned the average UI rate to be in the range of Rs. 2.66 – Rs. 2.79 per unit for Petitioner No. 1. But the average UI charges payable as per data submitted by Respondent SLDC for deviation between scheduled energy and actual energy injected with consideration of matched UI charges paid and corresponding UI energy for Amreli Biomass Power Project is Rs. 2.67 per unit for FY 2018-19 and Rs. 2.74 per unit for FY 2019-20. Similarly, in case of Bhavnagar Biomass Power Project it is observed to be Rs. 2.66 per unit for FY 2018-19 and Rs. 2.82 per unit for FY 2019-20, while in case of Junagadh Biomass Power Project it is Rs. 2.75 per unit for FY 2018-19 and Rs. 2.78 per unit for FY 2019-20. Thus, the difference between the tariff receivable for the scheduled energy (actual energy supplied) from the plant is quite higher than the UI rate payable for deviation between schedule and actual energy generation by the ! lower rate than the tariff payable by it, for such UI energy."

On the issue of predictability of Biomass as fuel, it is relevant to note that Order No. 5 of 2010 was passed by the GERC for determination of tariff for procurement of power of distribution licensees from biomass based power generators, and other commercial entities. Among those who had submitted their objections was M/s. Abellon Clean Energy Ltd., (the holding company of the Appellants herein). In Para 6.7 of the said order, the GERC held that generation from biomass based power projects was predictable and could hence be scheduled in accordance with the ABT guidelines; biomass based generating plants were governed by the provisions of the Inter-State ABT Orders of the Commission. The GERC rejected the submission, urged on behalf of M/s. Abellon Clean Energy Ltd, that biomass based projects, generating below 10 MW power, should be exempted from scheduling as per CERC guidelines.

In its subsequent Order No. 4 of 2013, the GERC observed that generation from biomass based power projects was predictable, and hence these projects come under the ambit of the GERC terms and conditions of Intra-State Open Access Regulations, 2011 as well as ABT Orders. Again in Order No. 1 of 2018 dated 15.03.2018, the Commission observed that generation from biomass based power and bagasse based co-generation projects were predictable, and hence can be scheduled in accordance with Intra-State ABT guidelines; generation from biomass power projects had been included under the ambit of Intra-State ABT Orders from the Tariff Order dated 08.08.2013; generation from biomass based power projects was predictable and can be scheduled on a day ahead basis; and the provisions of the 2011 Regulations as well as GERC ABT Orders shall be applicable to such projects.

The afore-said Regulatory Orders, wherein the GERC recorded its findings regarding predictability of biomass fuel, and has determined the Gross Calorific Value of bio-mass as 4423 kcal/ kg, are binding on the Appellants at least in so far as FY 2018-19 and FY 2019-20 are concerned. Further, in Petition Nos. 1113 and 1114 of 2011, the Appellants herein had sought exemption from Intra-State availability based tariff for their biomass power projects, which contention did not find favour with the GERC in its order dated 22.05.2018.

Reliance placed by the Appellants, on the judgment of this Tribunal in **Biomass Energy Developers Association vs. APERC: (2022) SCC OnLine APTEL 29,** is also of no avail. In the said case, the Appeals before this Tribunal were filed against the Tariff Order passed by the APERC on 16.05.2014 and 19.07.2014 whereby the variable cost for biomass projects was determined for the period 01.04.2014 to 31.03.2019. Reliance placed in the said judgment, on the CEA Report, is of no

assistance to the Appellant, since GCV was determined as 4423 kcal/ kg by GERC in the petitions filed before it by the Appellants themselves for the control period 2017-18 to 2019-20.

Since the said Orders of the GERC dated 22.05.2018 and 31.07,2018, in the Petitions filed by the Appellants herein, have attained finality at least in so far as the control period 2017-2020 is concerned, this issue cannot be re-agitated in the present appellate proceedings where the issue relates to whether or not the Appellants had indulged in gaming during the two-year period FY 2018-19 and 2019-20. Since the GCV, as determined by the GERC, is binding on the Appellants, it would be wholly inappropriate for us to examine this issue, and the issue of predictability of biomass, in these appellate proceedings. Suffice it to make it clear that, while we may not be understood as having expressed any opinion on the correctness or otherwise of the findings recorded by the GERC in the various orders passed by it, we must necessarily refrain from examining the question whether or not a different GCV could be applied, and whether biomass is predictable, since the orders of the GERC, which have attained finality, are binding on the appellants herein.

In any event, as has been pointed out earlier in this order, there were several occasions when the Appellants had scheduled a particular quantum of energy but had generated/ injected zero energy on the following day. No amount of variation in the GCV of Biomass can be said to result in the Appellants' not being able to inject even a single unit of power, despite having scheduled a quantum between 8 to 9 MW (as against the installed capacity of 10 MW) just a day earlier. This brazen act of under-injection by the Appellants is clear from SLDC's letter dated 26.10.2018 informing Amreli Power Projects that they had generated 0 (zero) MW against the scheduled 8 MW resulting in under-injection of 8

MW. The contents of the said letter discloses that against their installed capacity of 10 MW, Amreli Power Projects had scheduled 8 MW the day before, but had chosen not to inject even a single unit of energy the very next day. That their bonafides are suspect is also evident from their failure to revise their schedule the night before. Even if leeway were to be given for some variation, the appellant had scheduled energy equivalent to 80% of their installed capacity ie they had informed SLDC that they would be generating/injecting 8 MW the next day, but did not generate/inject even a single unit of energy on the said day.

We conclude our analysis under this head holding that we find no merit in the submission of the Appellants regarding the unpredictable nature of biomass and determination of GCV by the GERC, since some of the orders of the GERC, in this regard, were passed in Petitions filed by the appellants themselves, these orders were not challenged by way of appeals, and were permitted by the Appellants herein to attain finality.

V. NON-CONSIDERATION OF PERMISSIBLE DEVIATION BAND FOR WTE PLANTS:

A. CONTENTIONS URGED ON BEHALF OF THE APPELLANTS:

Sri Amit Kapur, Learned Counsel for the Appellants, would submit that CEA, by letter dated 01.04.2021, *inter alia* recommended a deviation band of +/-30% for WTE plants; however, the GERC brushed aside CEA's recommendation dated 01.04.2021; the Supreme Court, in ***MSEDCL vs. Adani Power Maharashtra Ltd. 2023 SCC OnLine SC 233***, recognized CEA as a statutory expert body whose views deserve due consideration; it was not open for the GERC to brush aside CEA's observations *qua* variable nature of Biomass based power generation; the CERC, in Deviation Settlement Mechanism and Related Matters Regulations 2022,

has allowed 20% deviation for WTE based plants; Power plants using MSW are analogous to power plants using Biomass; the nature of waste is heterogenous in both cases; Reg. 11.8 of the GERC Grid Code 2013 allows deviation from schedule as per limits specified in the '*CERC UI Regulation*'; and, by allowing GUVNL's claim based on refund of money for all the units deviated, the GERC has put the Biomass plants, using heterogenous fuel with an uncontrolled quality, at an untenable position of zero deviation contrary to the applicable statutory and policy framework, when even coal plants are permitted some deviation.

B. CONTENTIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the Appellants have referred to use of coal more than normative requirement; the Appellants project have a must run status being renewable power and to be promoted; accordingly, the scheduling is not done on normative parameters but on actual capacity to generate electricity; the Appellants' power projects may be inefficient or the Appellants may have arranged fuel with lesser GCV or any other reasons why the Appellants are not able to match the normative parameters; but this does not mean that the Appellants can declare the capacity and recover tariff for units not capable of being generated and not actually generated.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would further submit that the Appellants are also wrongly referring to aspects relating to Municipal Solid Waste ('**MSW**') when the Appellants projects are admittedly biomass based, and these are not same; the Appellants have sought to rely on the CEA letter, and the deviations approved by the CERC which is incorrect for the following

reasons: (i) CERC treats MSW and Biomass differently under the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 [Regulation 2(c) and 4(c) refer to Biomass and 2(q) and 4(i) refer to MSW; and Chapter 5 for parameters for biomass and Chapter 10 for parameters for MSW]; these are, under the Regulations, treated as two different projects with different incentives; (ii) the MSW projects involving treatment of Municipal Waste, has different characteristics; in case of biomass, the fuel from agricultural inputs is processed and the energy value of the agricultural inputs are known on the previous day for generation in the subsequent day, as also recognized by GERC; this is clearly visible from the statement of generation for FY 2011-12 to FY 2017-18 [**Ref: Para 13.121 of Impugned Order]**; the recommendations in the CEA Letter were considered only in case of MSW project; CERC has only accepted 20% deviations for MSW projects, and there is no such provision for biomass generators; similarly reference to Government of Gujarat Policy for MSW is also not applicable to the Appellants; (iii) even for MSW, the deviation considered is 20% whereas the Appellants, as biomass, have under-injected by more than 50% which itself shows that the Appellants are intentionally over-declaring and under injecting; (iv) CEA letter is dated 01.04.2021 and CERC DSM was in 2022 which is for the period after the disputed period in the present Appeal, and the same anyway cannot be relied upon, and (v) further as on date, the binding GERC Orders state that the biomass generation is firm and predictable and the same was not challenged by the Appellants; and, if at all the issue has to be considered, the same has to be considered for ABT Orders by GERC and not in the present case.

C. ANALYSIS:

Under Section 70(1) of the Electricity Act, the Central Electricity Authority ("CEA" for short) has been constituted to exercise such functions and perform such duties as are assigned to it under the said Act. The functions and duties of the CEA are detailed in Section 73 of the Electricity Act. Section 73(1)(a) requires the CEA to advise the Central Government on certain matters. Section 75(1) stipulates that, in the discharge of its functions, the CEA shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing.

In its letter dated 01.04.2021, the CERC noted that the Ministry of Power, GOI had, by its letter dated 17.03.2021, sought suggestions for a band to be proposed for exemption from deviation settlement mechanism; waste to energy projects were being set up with the primary objective of saving the planet from environmental hazards by processing and disposal of waste (Municipal solid Waste, agro-residue waste etc) in urban and rural areas as well as to prevent open burning of waste, and avoid landfilling of the waste; generation of electricity in the process was a byproduct and was incidental; the very nature of waste to energy plants was heterogeneous; and the average calorific value of waste and the deviations with respect to waste was given in the form of a table. While the average calorific value of mixed municipal waste was recorded in the said table as 1600 kcal/kg, it was recorded as 2500 kcal/kg for reused derived fuel and 3100 kcal/kg for agro-waste/biomass; and, on this calorific value, the CEA had proposed a deviation band, for WtE plants up to 2500 MW capacity, as +/- 30%.

The aforesaid letter of the CEA dated 01.04.2021 is for waste to energy plants. As the proposal itself emanated from the CEA only on 01.04.2021, it may not have retrospective application to the earlier financial years 2018-19 and 2019-20, under consideration in the present

appeal. In any event the GERC had itself determined the gross calorific value for biomass as 4423 kcal/kg in Petitions filed by the Appellants themselves, which order of the Commission, as noted hereinabove, has attained finality. It must also be borne in mind that the deviations in the present case is not confined even to the 30% bandwidth recommended by the CEA, and has been found by the GERC to be far in excess thereof.

As noted hereinabove, the letter of the CEA dated 01.04.2021 is with reference to the Ministry of Power's letter dated 17.03.2021 seeking suggestions for a band to be proposed for exemption from deviations and settlement mechanism. Based on this letter, the CEA had submitted its recommendations vide its letter dated 01.04.2021. Guidelines/norms specified by the CEA are not mandatory, save where it is adopted or incorporated in the legislation. **(Rattan India Power Ltd vs MERC and another (Judgement of Aptel in Appeal No, 41 of 2019 dated 06.02.2024).** Our attention has not been drawn to any provision either in the Electricity Act, or in the applicable Regulations, incorporating such norms.

The Appellant has not placed any material on record to show what action, if any, was taken thereafter by the Ministry of Power. Recommendations of the CEA to the Ministry of Power would not, by itself, justify a different view being taken from the earlier tariff orders passed by the GERC, that too in Petitions filed by the Appellants themselves, wherein the Commission had determined the GCV for Biomass as 4423 kcal/kg. It is relevant to note that, for the subject financial years 2018-19 and 2019-20, the appellants bio-mass projects have not been exempted from the deviation and settlement mechanism, and have in fact paid UI charges.

The Appropriate Government has been conferred the power, in matters of policy involving public interest, to issue directives under Section 107/108 which the Appropriate Commission is required to be guided by.

Such directives can be issued by the appropriate Government including on the advise/recommendation of the CEA. While the Central/State Commissions shall be guided by the directives issued by the Central Government or the State Government, under Sections 107/108 of the Electricity Act, such directives are not binding on them. It is unnecessary for us to dwell any further on this aspect, since it is not even the appellants' case that any such directives were issued by the Govt pursuant to the recommendations of the CEA.

As noted hereinabove, the GCV stipulated by the GERC, in the various tariff orders passed by it, is binding on the Appellants herein, more so as they have acknowledged, (as has been recorded in the order of this Tribunal in Appeal No.277 of 2021 dated 15.11.2021), that they were not challenging the tariff order dated 15.03.2018, for the control period upto 31.03.2020, wherein the GCV was determined for Biomass as 4423 kcal/kg. As we are concerned, in the present appeal, only with FY 2018-19 and FY 2019-20, both of which relate to the period upto 31.03.2020 and not beyond, it is impermissible for the appellants to now turn around and contend that GCV, as proposed by the CEA in its letter dated 01.04.2021, should prevail.

It is evident, therefore, that the Appellants' reliance on the letter of the CEA dated 01.04.2021 is wholly misplaced and is of no avail.

VI. HAS GUVNL MISLED BY CONTENDING THAT THE GVC IN THE 3RD BIOMASS TARIFF ORDER HAS NOT BEEN SUBJECTED TO CHALLENGE?

A. SUBMISSIONS URGED ON BEHALF OF APPELLANTS:

Sri Amit Kapur, Learned Counsel for the Appellants, would submit that GUVNL has made a wrong averment that the GCV in the 3rd Biomass

Tariff Order [15.03.2018] has not been challenged; the following is noteworthy: - (a) in December 2020, the Appellants filed Appeal No. 277 of 2021 challenging the 3rd Biomass Tariff Order [15.03.2018] *qua* GCV and SHR; (b) by Judgment dated 15.11.2021 in Appeal No. 277 of 2021, this Tribunal remanded the matter to GERC for fresh consideration; (c) pursuant to the remand, on 27.06.2022, GERC passed the next Biomass Tariff Order *inter alia* holding TERI Report as a valid report without any deficiencies and determined the same GCV of Biomass; and (d) aggrieved by the Biomass Tariff Order dated 27.06.2022, the Appellants challenged the same in *DFR No. 70 of 2023* which is now pending in the 'List of Finals'.

B. SUBMISSIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 2nd Respondent, would submit that the Appellants, instead of dealing with the specific findings in the Impugned Order (which are based on indisputable facts), are seeking to divert the matter by raising issues which are beyond the scope of the present proceedings, which already stand settled by earlier Orders of the GERC, and there was no challenge by the Appellants to such orders; the GCV value of biomass for the period 2018-19 and 2019-20 (i.e., till 31.03.2020) and SHR of the plant are settled as per the earlier orders implemented by the GERC: (i) in line with the Orders of this Tribunal, GERC had appointed TERI, a reputed agency in the field, to undertake a study and, after hearing all parties, GERC had passed Order dated 09.02.2018 deciding on GCV and price of biomass fuel in Gujarat; the Order dated 09.02.2018 was neither challenged by the Appellants/holding company or any other party; (ii) the Tariff Order dated 15.03.2018 had considered the parameters fixed in the Order dated 09.02.2018; the Order dated 15.03.2018 was not challenged until

belatedly on 21.12.2021, after issuance of the Default Notices by GUVNL and even in Appeal, the same was not set aside; it was the Appellants' own submission before this Tribunal that no relief was sought until 31.03.2020, and the consideration was for the period from 01.04.2020; the Appellants have wrongly referred to the Appeal without disclosing the above; accordingly, the Appellant cannot raise any issue for the period prior to 31.03.2020; and (iii) GERC has passed an Order on remand for period from 01.04.2020 which has not been stayed; even otherwise, whatever issue the Appellants may have with Tariff Orders of the GERC, the same has to be challenged separately; this would not entitle the Appellants to declare capacity which it is not capable of generating in order to claim tariff without generation; in terms of the Tariff order dated 15.03.2018, GERC re-determined the tariff of the Appellants, vide orders dated 22.05.2018 and 31.07.2018; subsequent to the order, the Appellants had executed Supplementary PPAs on 06.07.2018 (Appellant Nos. 1 & 3) and 28.08.2018 (Appellant No. 2), accepting the position; and these Agreements were signed without any issue being raised on the GCV or SHR or on predictability of generation.

C. ANALYSIS:

The submission of GUVNL is that the GERC had, pursuant to the orders passed by this Tribunal, appointed TERA to undertake a study and had, thereafter, passed order dated 09.02.2018 deciding the biomass fuel price in Gujarat. It had passed another tariff order on 15.03.2018 following the parameters fixed in its earlier order dated 09.02.2018. It was only after the default notices were issued to them on 05.08.2021 that the Appellants had filed Appeal No. 277 of 2021 before this Tribunal challenging the tariff order dated 15.03.2018; and the said orders are binding on the Appellants.

It is evident from a bare reading of the order passed by this Tribunal in Appeal No. 277 of 2021 dated 15.11.2021 that the tariff order dated 15.03.2018 related to the control period 01.04.2017 to 31.03.2020. The Appellants had conceded before this Tribunal (as has been recorded in the afore-said order of this Tribunal) that they were not challenging the tariff order dated 15.03.2018 for the control period ending 31.03.2020, and their grievance was only regarding extension of the said tariff order for the period from 01.04.2020 onwards. On this Tribunal remanding the matter, the GERC passed a fresh tariff order dated 27.06.2022 stipulating the very same GCV for biomass ie 4423 kcal/kg, and the appeal there-against in DFR No. 70 of 2023 is pending before this Tribunal.

In the present appeal. the default notices issued by GUVNL relate to the period FY 2018-19 and FY 2019-20 ie from 01.04.2018 to 31.03.2020. The appellants have conceded before this Tribunal that, for this period, the biomass tariff order dated 15.03.2018 would apply and, consequently, the fact that the GCV for biomass stipulated therein, ie 4423 kcal/kg, is applicable to them is not in dispute. The question which arises for consideration in the appeal filed before this Tribunal, in DFR No. 70 of 2023, relates to the period on and after 01.04.2020 with which were not concerned in the present appeal. In any event the order passed by the GERC on 27.06.2022 has not been stayed by this Tribunal in DFR No. 70 of 2023, and continues to remain in force as on date.

VII. REPLY AND REPORT OF SLDC:

A. CONTENTIONS URGED ON BEHALF OF THE APPELLANTS:

Sri Amit Kapur, Learned Counsel for the appellant, would submit that at no point has SLDC alleged Gaming; there is neither any factual averment nor any documentary evidence to indicate that the Appellants

are liable for Gaming; at all stages, SLDC possessed relevant data *qua* energy scheduled and generated by the appellants; SLDC never reported Gaming to the GERC in terms of Reg. 11.18 of the GERC Grid Code, 2013 prior to GUVNL's Default Notices; evidently, SLDC did not detect any Gaming, on the part of the Appellants, to report; on 10.09.2020, SLDC intimated GERC regarding under-injection by Appellants to seek guidance of the GERC without any allegation of Gaming (***@pgs. 377-378, CC***); in Analysis D and F of SLDC Report, it is mentioned that the Appellants have not made any downward or upward revision irrespective of the UI rates being on the higher or lower side; this establishes that there was no intention of the Appellants to make any commercial gains; without prejudice, SLDC cannot supplement and expand the scope of the Default Notices with the help of additional data/documents alien to the contents of the Default Notices issued by GUVNL; it is settled position of law that the effect of any document ought to be ascertained on the basis of the document itself, and no external aid can be used to give a different meaning to a document (Refer: ***Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405)***; and, as such, the SLDC Report dated 05.12.2020 [*i.e., an event subsequent to the date of issuance of GUVNL's Default Notices*], may not be relied upon since it cannot retrospectively explain the Default Notices.

B. CONTENTIONS URGED ON BEHALF OF GERC:

Mrs. Suparna Srivastava, Learned Counsel for the GERC, would submit that, considering the lapses on part of the SLDC in fulfilling its statutory mandate to continuously monitor any instances of 'gaming' and promptly report the same to the Commission for further investigation, the Commission directed SLDC to hence forth strictly adhere to the provisions of the Grid Code, ABT Orders and immediately take appropriate actions,

whenever, any gaming /mis-declaration was found (Ref. Para 14(v) of impugned Order).

C. CONTENTIONS URGED ON BEHALF OF SLDC:

Ms. Abiha Zaidi, learned Counsel for the 3rd Respondent-SLDC, would submit that the SLDC is functioning as per Section 32 of the Electricity Act, 2003 and as per Clause 3.16 of the GERC, Gujarat Electricity Grid Code, 2013 ("Grid Code"**);** SLDC has continuously monitored the under injection of the Appellants and issued specific notices to the Appellants for maintaining injection as per the schedule during 2018-19, 2019-20 and 2020-21; SLDC, vide these notices, specifically directed the Appellants to maintain injection as per the schedule; and a summary of the notices given by SLDC to the Appellants were being furnished in the form of a table.

Ms. Abiha Zaidi, learned Counsel for the 3rd Respondent-SLDC, would submit that, pursuant to the notices issued, no change was observed, and the schedule was not revised nearer to actual injection by the Appellants; SLDC, vide letter dated 10.06.2019, pointed out the injection by the Appellants giving the week-wise and day wise statement and instructing the Appellants to maintain the injection as per schedule; SLDC again issued a set of letters dated 26.08.2020, pointing out the consistent under injection by the Appellants and called for an explanation failing which action would be taken as per Regulation 11.18 of the Grid Code; pursuant to the same, SLDC reported to the State Commission on 10.09.2020 in regard to the constant under injection and deviation from scheduled capacity in respect of the Appellants' power projects as per the provision of the Grid Code; and SLDC again issued notice, vide letter dated 07.09.2020, to the Appellants for their consistent large-scale

deviation from the schedule for which explanation was sought within a weeks' time.

Ms. Abiha Zaidi, learned Counsel for the 3rd Respondent-SLDC, would state that the SLDC had submitted a comprehensive report pursuant to the interim order passed by the GERC in IA. No. 7 of 2020 and IA. No. 8 of 2020 in Petition No. 1888 of 2020 dated 09.10.2020; as per the comprehensive report – (a) the Appellants had failed to inject energy as per the injection schedule; (b) the Appellants had not followed the directions of the regulatory agency, and had failed to furnish details of monthly usage of fuel along with cumulative energy generated; (c) the Appellants had consistently violated certain provisions of the Grid Code and the Intra-State ABT Order, which had polluted the grid by injecting less energy compared to scheduled energy; (d) SLDC continuously monitors 16000 MW and after sign change mechanism, real time market has delayed ISGS schedule to 8th time block, it is a challenge for SLDC to monitor and maintain grid parameters in 15 minutes time block; in addition, SLDC has to maintain deviation at Gujarat boundary between + or – 250 MW in a 15 min time block, and needs to change sign in 6/12 block; a vast variation in grid is due to variation in wind and solar generation; technology is not yet matured to forecast wind and solar generation accurately; 1500 MW variation in a day is very common; and SLDC also conducted internal inquires and issued show cause notices to the concerned personnel regarding deviation in scheduled energy and actual dispatched energy in respect of the Appellants' power projects.

D.ANALYSIS:

In the various letters addressed by them to the Appellants herein, SLDC has only referred to the appellants having under-injected power for a quantum far less than the quantum it had scheduled a day earlier, and

has made no reference to their having indulged in gaming. For instance, in both the letters addressed to Amreli Power Projects on 26.10.2018, SLDC had pointed out that, as against the scheduled 8 MW, they had injected zero and one MW respectively. In the letter addressed to Junagarh Power Projects on 28.10.2018, SLDC informed them that, as against the scheduled 8 MW they had injected zero MW of power. It is only later before the GERC that SLDC acknowledged that the Appellants had indulged in gaming. Failure on the part of SLDC, to take prompt action to ensure that entities do not resort to gaming, would not confer any right on the Appellants to retain the illegal benefits of gaming. As noted hereinabove, the Appellants had over-declared capacity/schedule the day before and had under-injected power the next day. They had, thereby, made monetary gain ie the difference between the preferential tariff which they received under the PPAs for Rs. 5.66 and Rs. 5.68 per unit for FY 2018-19, FY 2019-20 for the availability declared by them as against the lower UI rates ranging between Rs.2.66 and Rs.2.82 per unit for a substantial part of this period which they were required to pay GUVNL for the quantum of energy under-injected below the quantum they had scheduled the day before.

Among the responsibilities which the SLDC is required to discharge, in terms of Regulation 11.2 of the Grid Code, is to check that there is no gaming, which is defined as an intentional mis- declaration of a parameter related to commercial mechanism in vogue, in order to make an undue commercial gain. The obligation of the SLDC is to check that there is no gaming by a generator in its availability declaration. Clause 11.14 requires SLDC, if it suspects that a generating station has deliberately over declared the plant's capability, contemplating to deviate in the schedule given on the basis of their capability declaration and thereby has made money as charge towards deviation from the schedule, SLDC is required

to ask the generating station to explain the situation with necessary back-up data. This obligation, fastened on them by clause 11.14 of the Grid Code, has not been discharged by SLDC and, while they had on a few rare occasions during the two year period FY 2018-19 and 2019-20 pointed out certain deviations, they did not convey to the Appellants their suspicion that the generating stations were indulging in gaming. Clause 11.18 of the Grid Code required SLDC to periodically review the actual deviations to check whether any of the constituent was indulging in unfair gaming. In case any such practice was detected, SLDC was required to report the matter to the Commission for further investigation/action. In the case on hand, SLDC has failed to check whether the Appellants were indulging in unfair gaming, and, consequently, the question of their detecting gaming and reporting the matter to the Commission did not arise.

Failure of SLDC to report that the appellants had indulged in gaming to GERC, before default notices were issued by GUVNL, does not require the Commission to refrain from investigating the matter and taking action pursuant thereto. Not only does the GERC exercise regulatory functions, it is also fastened with the statutory obligation of making regulations in consumer interest. Further Clause 1.10 of the Grid Code provides that, notwithstanding anything contained in the said Code, the GERC may also take suo-motu action against any person, in case of non-compliance of any provisions of the Grid Code. As resort by the Appellants to “Gaming” amounts to non-compliance of the provisions of the Grid Code, the GERC has suo-motu powers to take appropriate action against them.

Resort to gaming by any generator would eventually require consumers of electricity to bear the financial burden of the illegal benefit which the appellants-generators had retained thereby. The Regulatory Commission has not only the power, but is also duty bound, to exercise its regulatory powers to ensure that gaming is not resorted to, and to take

remedial action for recovery of the illegal gains which the generating station had made as a result of gaming, with a view to protect consumers interests.

In **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405,** the Supreme Court observed that, when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise; otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

The Supreme Court quoted with approval the observations in its earlier judgement, in **Commr. of Police, Bombay v. Gordhandas Bhanji: AIR 1952 SC 16**, that Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do; Public orders made by public authorities are meant to have public effect, and are intended to affect the actings and conduct of those to whom they are addressed, and must be construed objectively with reference to the language used in the order itself; and concluded holding that Orders are not like old wine becoming better as they grow older.

It is debatable whether the law declared by the Supreme Court, in **Mohinder Singh Gill Vs Chief Election Commissioner: AIR 1978 SC 851** and **Gordhan Das Bhanji Vs State: AIR 1952 SC 16,** would apply to orders passed by the Appropriate Commission under the Electricity Act as, besides exercising adjudicatory functions, it also exercises regulatory powers; and an appeal lies to this Tribunal against both a regulatory order as well as an adjudicatory order passed by the Appropriate Commission.

In the present case, reliance is placed by the appellants, on **Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405,** to contend that SLDC cannot supplement and expand the scope of the Default Notices issued by GUVNL with the help of additional data/documents unconnected to the contents of the Default Notices issued by GUVNL as the effect of any document ought to be ascertained on the basis of the document itself, and no external aid can be used to give a different meaning to a document; and the SLDC report, an event subsequent to the date of issuance of GUVNL's Default Notices, cannot be relied upon since it cannot retrospectively explain the Default Notices.

The law declared by the Supreme Court, in **Mohinder Singh Gill Vs Chief Election Commissioner: AIR 1978 SC 851** and **Gordhan Das Bhanji Vs State: AIR 1952 SC 16,** would apply only to statutory orders, and not to construction/interpretation of contractual provisions or to reports submitted to the GERC by the SLDC. Reliance placed by the appellants on the said judgements is, therefore, misplaced. Suffice it to make it clear that, in the present appellate proceedings, we have not expressed any opinion on the applicability of the law declared in the afore-said judgements of the Supreme Court, even to orders passed by the appropriate Commission, as these aspects require detailed examination in an appropriate case.

We find it difficult to accept the submission, urged by Ms. Abhiha Zaidi, Learned Counsel, that, in view of the various functions which it was required to discharge, SLDC was not in a position to check and call for an explanation from the appellants regarding their having indulged in gaming. The over-declaration of capacity/schedule, and under-injection of energy which followed, is spread not over a day or two, but over a two-year period. In the second half of 2018-19, SLDC had noticed deviations and had

accordingly informed both Amreli Power Projects and Junagarh Power Projects of their having under injected power for a quantum far less than the availability declared by them just a day before. All that the SLDC was required to further ascertain was whether the Appellants had, by resorting to such under-injection, made monetary gain. An inquiry into this aspect merely required SLDC to take note of the preferential tariff stipulated in the PPA, the prevailing UI charges for under-injection, and compute the difference. Periodic monitoring by SLDC would have disclosed that the Appellants had retained this difference, which was the monetary gain made by them, over the two year period FY 2018-19 and 2019-20. It does appear that the concerned officials of SLDC, who were holding office during the afore-said period, were negligent in the discharge of their statutory duties under the Grid Code.

While GUVNL claims to have taken action against certain of its officials, on coming to know that the Appellants had resorted to gaming, we are informed that the monthly invoices, raised by the Appellants on GUVNL, contains details of the preferential tariff payable, the UI charges which the Appellant had paid to them etc; and it did not require much effort for the concerned officials of GUVNL to unearth the gaming activity indulged in by the appellants. That this activity of gaming was permitted to go on for more than two years, also goes to show that the officials of GUVNL, involved in the process of verification of the appellants' invoices, were negligent in the discharge of their duties.

We deem it appropriate, therefore, to direct GERC to identify those responsible, both in the SLDC and in GUVNL, for turning a blind eye to the gaming activities resorted to by the Appellants herein, and hold such persons accountable for the lapses on their part. Merely directing SLDC to strictly adhere to the Grid Code would not suffice, and we expect GERC

to forthwith take action against the erring officials, and to take steps to put in place an effective mechanism to ensure prompt reporting by SLDC of such gaming activities, so that the entities involved are not emboldened, to take advantage of the prevailing gaps in the existing system, and to make illegal gain by resort to gaming. The GERC shall also consider prescribing a mechanism whereby periodical reports are sought from SLDC, as effective monitoring by GERC in this regard would alone ensure that SLDC discharges its statutory obligations under the Grid Code.

VIII. ARE THE APPELLANTS ENTITLED TO FIXED COSTS IRRESPECTIVE OF WHETHER OR NOT THEY HAVE GENERATED ELECTRICITY?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANTS:

Sri Amit Kapur, Learned Counsel for the Appellants, would submit that, without prejudice, out of INR 53.83 Crores claimed by GUVNL (and approved in the Impugned Order), INR 30 Crores is the fixed cost which the appellants incurred regardless of generation; the extra fuel cost incurred over and above the normative requirement, caused a net loss to the developers; and the appellants' tariff is a two-part tariff (Art. 5.1 and 5.2 of the PPA), and not a single part tariff as misled by GUVN**L.**

B. SUBMISSIONS URGED ON BEHALF OF GUVNL:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of GUVNL, would submit that Biomass tariff is a single part tariff, and therefore there can be no separate claim of fixed cost; and, even otherwise, the Appellants are not entitled to fixed cost when it was not capable of generating units and did not generate units despite the schedule.

C. ANALYSIS:

Before examining the rival submissions under this head, it is useful to take note of certain earlier orders passed by the GERC, as well as the relevant paragraphs of the impugned order relating to Fixed Cost.

i. ORDER OF GERC IN PETITION NO.1113 OF 2011 DATED 22.O5.2O18:

Petition No. 1113 of 2011 was filed before the GERC by Amreli Power Projects Limited seeking re-determination of fuel cost, fixation of tariff and non-applicability of intrastate availability based tariff to the biomass based 10 MW power plant at Amreli under Section 62 read with Section 86(1)(a) of the Electricity Act, 2003.

In the order passed in the said Petition on 22.05.2018, the second issue framed by GERC was whether the Petitioner was eligible for the fixed cost as per Order dated 07.02.2011 in Petition No. 985 of 2009?. The third issue was, if the answer of the 2nd question was affirmative, whether the fixed charge was receivable by the Petitioner on year to year basis or levelized basis?, and whether the same was subject to the discretion of the Respondent?; and the fourth issue was whether the tariff determined in this Order by the Commission is applicable prospectively or retrospectively?

On the question whether the Petitioner was eligible for fixed cost, the GERC observed that its earlier decision in Petition No. 985 of 2009 dated 07.02.2011 filed by M/s. Abellon Clearn Energy Limited (the holding company of the Appellant) recognised that the Petitioner whose plants were commissioned during the control period of Order No. 5 of 2010 dated 17.05.2010 were entitled for the tariff determined by the Commission in Petition No. 985 of 2009 dated 07.02.2011; as per the said Order, the question whether tariff is to be paid on year to year basis or levellised tariff,

was at the discretion of the Respondents; while the said order was not interfered with by APTEL, in para 33 of Order in Appeal Nos. 132 and 133 of 2014 dated 02.12.2023, APTEL had granted permission to the Petitioner to raise the issue of receiving tariff with air-cooled condenser on year to year basis or levellised basis before the Commission at the time of reconsideration of biomass fuel price, and had directed the Commission to consider and decide the issue in accordance with law; and the Petitioner was entitled to receive fixed tariff on levellised basis. The GERC worked out the fixed tariff based on levellised fixed cost of Rs.1.59 per kwH and different energy charges for year-1 to year-20.

The Commission further observed that, subsequent to this Generic Tariff Order, the Commission had, in its Order dated 07.02.2011 in the matter of M/s. Abellon Clean Energy Limited, decided a consolidated fixed tariff based on a levellised fixed cost of Rs.1.69/kWh and different energy charges for 1-20 years to be applicable for biomass plants using air-cooled condenser; however, the distribution licensee was given a choice to either pay a consolidated fixed tariff or year to year tariff; and it was evident therefore, that the fixed cost of plants using air cooled condenser was levellised and fixed at Rs.1.69/kWh. The Commission allowed the Petitioner a consolidated fixed tariff comprising of a levelised fixed cost of Rs.1.69/kWh for the entire PPA duration, and energy charges as determined in its Order dated 15.03.2018.

The Commission observed that the Petitioner plant was eligible to receive the energy charge/ variable charge as determined by the Commission based on the biomass price as per its Order dated 09.02.2018. The Energy charges for FY 2017-2018 was determined as Rs.3.78/kWh, for FY 2018-19 as Rs.3.97/kWh, and for FY 2019-20 as Rs.4.17/kWh. The Commission further held that the Petitioner was entitled

to receive fixed tariff for biomass project, which was a sum of fixed cost and variable cost as follows: (i) Levellised fixed cost of Rs.1.69 per unit for the life of the plant, and (ii) Energy Charge/ Variable cost of Rs.3.97/kWh and Rs.4.17/kWh for FY 2018-19 and FY 2019-20 respectively; accordingly, the Petitioner was entitled for fixed tariff of Rs.5.66/kWh for FY 2018-19 and Rs.5.86/kWh for FY 2019-20 for the energy generated from plant and supplied to the Respondent; all terms and conditions of PPA, except tariff, shall remain unchanged; the variable cost for the subsequent period shall be decided by the Commission from time to time; and the tariff determined in this Order would be received by the Appellant prospectively..

ii. ORDER OF GERC IN PETITION NO. 1244 OF 2012 DATED 31.07.2018: Petition No. 1244 of 2012 was filed by Bhavnagar Biomass Power projects Private Limited under Section 86(1)(f) of the Electricity Act, seeking directions to the Respondents, among others, for determination of fuel cost, fixation of tariff of their biomass based plant under Section 62 read with Section 6(1)(a) of the Electricity Act, 2003.

In its order dated 31.07.2018, the GERC took note of its earlier orders in Petition Nos. 1113 and 1114 of 2021, and framed certain issues, including whether they were eligible for levelised fixed component of tariff of Rs.1.69 per unit or year to year fixed component of tariff as per Order in Petition No. 985 of 2009 dated 07.02.2011?; If re-determination of tariff was permissible, what was the energy/variable charge receivable by the Petitioner?; and whether the Order of the Commission in the present Petition was prospective or retrospective?

The Commission held that the Petitioner was eligible for fixed component of tariff at the rate of Rs.1.69/kWh (levellised as per the Order in Petition No. 985 of 2009 dated 07.02.2011. The Commission adopted

the uniform approach for all biomass projects in the State and held that the Petitioner's plant was eligible to receive the energy charge/ variable charge as determined by the Commission in Order No. 1 of 2018 dated 15.03.2018 for FY 2018-19 & 2019-20 as follows: - For FY 2018-19, energy charge/ variable cost of Rs.3.97/kWh and for FY 2019-20 at Rs.4.17/kWh. The Commissioner observed that the Petitioner was entitled to receive the tariff prospectively. The Commission concluded that the Petitioner was entitled to receive a consolidated tariff for its biomass project, which was a sum of fixed component of tariff and energy/ variable cost as follows:- (i) Levellised fixed component of tariff of Rs.1.69 per unit for the life of the plant plus; (ii) energy charge/ variable cost of Rs.3.97/ kWh and Rs.4.17/ kWh for FY 2018-19 and FY 2019-20 respectively; and the Petitioner was entitled for a consolidated tariff of Rs.5.66/ kWh for FY 2018-19 and Rs.5.86/ kWh for FY 2019-20 for the energy generated from plant and supplied to the Respondent. The Commission further made it clear that all the terms and conditions to the PPA, except tariff, shall remain the same.

iii. IMPUGNED ORDER:

In Para 13.15 of the Impugned order, the GERC records the Appellant's submission that, out of Rs. 53.83 Crores claimed by the Respondents, Rs. 17.78 Crores have already been claimed as RPO cost by GUVNL, Rs. 30 Crores is the fixed cost of developers which has been incurred regardless of generation and extra fuel of Rs. 74 Crores have been used causing net loss of Rs. 102.35 Crores to the Petitioners.

In Para 13.34 of the Impugned order, the GERC, after extracting the relevant portion of the Order in Petitions No. 1113 of 2011 & 1114 of 2011 dated 22.05.2018, notes that the PPAs were amended by the parties in the year 2018, inter-alia, amending Article 5. The GERC thereafter

extracts Article 5 of the PPAs, of Amreli Biomass and Junagadh Biomass, as amended on 06.07.2018. Clause 2.1 of the amendment stipulates that GUVNL shall pay the following tariff for a period of 20 years for all the Scheduled Energy as certified in the monthly SEA by SLDC; and the total Tariff i.e. fixed + variable Tariff shall be: (a) Rs. 4.45/Kwh from Commercial Operation Date to 21.05.2018, (b) Rs. 5.66/ KWh for the period from 22.05.2018 to 31.03.2019, (c) Rs. 5.86/KWh for FY 2019-20; the variable cost for the subsequent period shall be decided by the Commission from time to time, while the Levelised fixed cost of Rs. 1.69 per unit shall be applicable for rest of the period of agreement as per GERC order dated 22.05.2018. Clause 2.1 of the amendment dated 28.08.2018, with respect to Bhavnagar Biomass Power Project, is identical to Clause 2.1 of the earlier amendment dated 06.07.2018 with respect to Amreli Biomass and Junagadh Biomass.

iv. CONTENTIONS URGED IN THE APPEAL:

In Para 9.44 of the Appeal, it is stated that the Appellants, as a without prejudice submission, had argued during Rejoinder stage before the GERC that assuming that Appellants had to refund any amount as alleged by GUVNL, such amount ought to exclude the fixed cost element of tariff; this contention has been overlooked by the GERC; GUVNL's claim of Rs. 53.64 Crores, as has been directed by the GERC to be refunded by the Appellants, includes fixed cost element of tariff of Rs. 29.95 Crores; the Appellants were initially governed by the Commission's generic tariff Order dated 17.05.2010 wherein Appellants adopted a levelized tariff under the PPA; this generic tariff order was modified by the Commission vide Order dated 07.02.2011 by determining (1) additional capital cost for air cooled condenser plants and (b) fixed cost of tariff amounting to Rs. 1.69/unit and increasing variable cost; further, the Commission vide its

Order dated 22.05.2018 recognized that the Appellants were entitled to fixed cost as per Order dated 07.02.2011 and variable cost as decided in subsequent tariff orders (paragraphs 21.13 and 31.14); the Appellants' tariff is a cumulation of fixed and variable cost, even as per the amended Article 5.2 of the PPA; even the CERC has recognised two-part tariff for Biomass plants; the GERC's ABT Order 2006 has also mandated adoption of two-part tariff for all generating stations including Biomass Plants; the PPA provides that GERC's ABT Order 2006 is applicable to Biomass plants which mandates applicability of two-part tariff. Additionally, the PPA was amended in 2018 after Ld. GERC's Order dated 22.05.2018; Clause 11.56 of the Grid Code provides that the beneficiaries shall pay to the respective generating stations, capacity charges corresponding to plant availability and energy charges for the scheduled dispatch; this means that capacity charges i.e. fixed cost is to be paid as per declared capacity; Biomass Plants, being covered under the two-part tariff regime, cannot be deprived of its fixed cost which has been incurred irrespective of power generation; and the GERC, by directing refund of full amount as claimed by GUVNL, which includes fixed cost, grossly erred in law, rendering the Appellant Projects' viability at threat.

The Appellant's case, in short, is that, even if this Tribunal were to hold that GERC was justified in its conclusion that the Appellant had indulged in gaming, they would still not be liable to pay Rs. 30 Crores (from out of Rs. 53.83 Crores which they have been directed to pay to GUVNL in terms of the impugned order), since this sum of Rs. 30 Crores represents the fixed cost which the Appellants are entitled to regardless of generation. GUVNL contends to the contrary, and submits that the Appellant is not entitled for its claim of fixed cost both on the ground that biomass tariff is a single part tariff and fixed cost is not required to be paid

to plants which are neither capable of generation nor has it generated electricity despite scheduling it.

As the appellants had raised this contention in the proceedings before the Commission, albeit in their rejoinder, the GERC was obligated in law to consider and adjudicate the rival submissions in this regard. Except to hold that the total tariff payable to them, includes both fixed and variable tariff, the afore-said submissions have not been dealt with in the impugned order.

We, therefore, direct the GERC to consider this issue and determine whether the Appellant is entitled to claim fixed costs, whether such a claim can be made even in instances where the Appellants had declared availability/schedule, but had failed to generate/inject even a single unit of energy the following day, and, if they are so entitled, determine the total amount representing fixed cost which they are entitled to etc.

It is made clear that we have not expressed any opinion on the Appellant's entitlement for payment of fixed cost or regarding the quantum of fixed charges, if any, to which they are entitled to, for these are all matters which are required to be examined by the GERC. As noted hereinabove, even on the Appellants' own showing their entitlement for fixed cost is for Rs. 30 Crores from out of the amount they were directed to pay to GUVNL of Rs. 53.83 Crores. The impugned order passed by the GERC, to the extent it directed the Appellant to pay Rs. 23.83 Crores (Rs. 53.83 Crores - Rs. 30 Crores) along with interest is upheld. The direction issued by GERC to the appellants to pay Rs.30.00 crores to GUVNL, with interest, must, however, await a fresh adjudication of this issue by the GERC.

IX. CONCLUSION:

For the reasons above-mentioned, the impugned order of the GERC, holding that the Appellants had indulged in gaming, is upheld. It is only to the extent of the Appellants' claim, for fixed cost of Rs. 30 Crores, that the matter is remanded to the GERC for its consideration in accordance with law, in terms of what has been referred to hereinabove. The GERC shall also cause an enquiry and try to identify those responsible, both in the SLDC and in GUVNL, for failing to check the gaming activities resorted to by the Appellants herein, and thereafter direct both SLDC and GUVNL to take suitable action against them for their lapses. The GERC shall also take necessary steps to put in place an effective mechanism to ensure prompt reporting henceforth by SLDC, of gaming activities being indulged in by the entities concerned; and to prevent entities from resorting to such illegal practices in future. The entire exercise, including action being taken against the erring officials, shall be completed with utmost expedition, and in any event within four months from the date of receipt of a copy of this order. The Appeal is, accordingly, disposed of. All other pending IAs also stand disposed of accordingly.

Pronounced in the open court on this ***17th day of December, 2024.***

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

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REPORTABLE/NON-REPORTABLE