IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 138 OF 2021
&
APPEAL No. 201 OF 2023 & IA No. 1630 OF 2023 & IA No. 1693 OF 2023

Dated: 21st March, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

APPEAL No. 138 OF 2021

GUJARAT URJA VIKAS NIGAM LIMITED
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara - 390007 … Appellant(s)

VERSUS

1. ESSAR POWER LIMITED
Through its Managing Director,
Essar House, Mahalaxmi Road,
Mumbai – 400034 ... Respondent No.1

2. GUJARAT ELECTRICITY REGULATORY COMMISISON
Through its Secretary,
6th Floor, GIFT ONE, Road 5C,
Zone 5, GIFT City, Gandhinagar,
Gujarat - 382355 ... Respondent No.2

Counsel on record for the Appellant(s) : Ranjitha Ramachandran
Anand K. Ganesan
Swapna Seshadri
Ashwin Ramanathan

Harsha Manav
Srishti Khindaria for App. 1

Counsel on record for the Respondent(s) : Mahesh Agarwal
Rishi Agarwala for Res. 1

Shikha Ohri
Matrugupta Mishra for Res. 2

APPEAL No. 201 OF 2023 & IA No. 1630 OF 2023 & IA No. 1693 OF 2023

ESSAR POWER LIMITED
ESSAR House,
27th KM, SURAT HAZIRA
ROAD HAZIRA SURAT GJ
394270 IN … Appellant(s)

VERSUS

1. GUJARAT URJA VIKAS NIGAM LTD.
Through its General Manager (Commerce),
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara – 390007, Gujarat. ... Respondent No.1

2. GUJARAT ELECTRICITY REGULATORY COMMISISON
Through its Secretary,
6th Floor, Gift One, Road 5C,
Zone 5, Gift City, Gandhinagar,
Gujarat - 382010 ... Respondent No.2

Counsel on record for the Appellant(s) : Mahesh Agarwal
Rishi Agarwala for App. 1

Counsel on record for the Respondent(s) : Ranjitha Ramachandran
Anand K. Ganesan
Swapna Seshadri
Ashwin Ramanathan

Srishti Khindaria for Res. 1

Shikha Ohri
Samyak Mishra for Res. 2

JUDGMENT

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER

1. The Appellant - **Gujarat Urja Vikas Nigam Limited ("GUVNL")** in Appeal No. 138 of 2021 and the Appellant - **Essar Power Limited ("Essar Power")** in Appeal No. 201 of 2023 being aggrieved by the common Order dated 27.12.2019 passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to as the **'State Commission/GERC'**) passed in Petition No. 972 of 2009 have preferred respective appeals. The State Commission, in the Impugned Order, has determined the amount along with delayed payment charges recoverable by the GUVNL in pursuance to and in terms of the Supreme Court judgement dated 09.08.2016 passed in Civil Appeal No. 3455 of 2010.

2. Since the instant appeals are cross appeals involving similar issues and are arising from the common Impugned Order, both the appeals are being disposed of with this common judgment. These Appeals have chequered history and brief facts of the Appeals are as given:

3. The GUVNL (Appellant in Appeal No. 138 of 2021/Respondent No.1 in Appeal No. 201 of 2023) is a Government of Gujarat enterprise and a Company incorporated under the Companies Act, 1956. GUVNL is one of the successor

companies of the erstwhile Gujarat Electricity Board ("GEB") and has succeeded to the business of bulk purchase and supply of electricity undertaken by the GEB and accordingly, GUVNL succeeded to all the PPAs and power procurement arrangements which the erstwhile GEB had entered into with third parties including Essar Power Limited (Appellant in appeal 201 of 2023), as well as the right to purchase the electricity generated by the generating stations of the GEB. GUVNL supplies such electricity procured to four State Distribution Licenses in Gujarat including Dakshin Gujarat Vij Company Limited **("DGVCL")**, which undertakes the distribution and retail supply of electricity to the consumers at the retail supply tariff determined from time to time.

4. The Essar Power Limited (the Appellant in Appeal No. 201 of 2023/ Respondent No. 1 in Appeal No. 138 of 2021) is a generating company, which owns, operates and maintains a Generation Station at Hazira with an installed capacity of 515 MW; Respondent No.2 is the Gujarat Electricity Regulatory Commission.

5. On 30.05.1996, Essar Power entered into a PPA with GUVNL for sale of power generated from its power plant at Hazira for a period of 20 years for a contracted capacity of 300 MW and on 29.06.1996; Essar Power entered into another PPA with Essar Steel on similar terms as that of the PPA dated 30.05.1996 entered into with GUVNL, for a contracted capacity of 215 MW. Essar Power started declaring more quantum of power to Essar Steel (more than their proportionate share of about 42%) and less than 58% to GUVNL, however GUVNL claims to have made payment for full capacity charges as well as the deemed generation incentive as per contracted capacity.

6. After the initiation of claims and counter claims by the parties against each other, and protracted discussion, Essar Power agreed to partly settle the claim of GUVNL to the extent of declaration made in favour of Essar Steel in excess of 215 MW in absolute quantum and GUVNL vide letters dated 30.10.2004 and 11.11.2004, 30.11.2004 furnished the details of the amount claimed on an *ad* hoc basis in respect of electricity supplied to Essar Steel in excess of 215 MW. Essar Power agreed to the adjustment worked out by GUVNL in the letter dated 11.11.2004 in absolute terms; and by letter dated 31.12.2004, GUVNL stated that the amount of Rs. 64 crores was on *ad* hoc basis and not as a final settlement of the issue nor of the methodology of charging of energy diverted in excess of 215 MW. Subsequently, GUVNL filed a Petition being No. 873 of 2006 before the State Commission and the State Commission by its order dated 18.02.2009 (hereinafter referred as **"GERC 2009 order"**) decided the claims of GUVNL against the Essar Power for diversion of power and certain other aspects by holding that the Essar Power is liable to compensate GUVNL for the quantum of electricity diverted by Essar Power to its sister concern, Essar Steel by not declaring the total available capacity from the 515 MW generating station in the proportion of 300 MW : 215 MW (58% : 42%); Essar Power is liable to refund the deemed generation incentive to GUVNL when the declaration of availability is based on use of Naphtha as fuel during the period from 14.9.2002 to 29.5.2006; and the claims of GUVNL for the period prior to 14.09.2002 on account of both the above issues is barred by limitation.

7. Aggrieved by the Order dated 18.02.2009 passed by the State Commission, both GUVNL and Essar Power filed appeals before this Tribunal being Appeal Nos. 77 of 2009 and 86 of 2009 respectively. This Tribunal, by its

Judgement dated 22.02.2010 upheld the decisions of the State Commission regarding issue of deemed generation incentive in favour of GUVNL, and that the claim of GUVNL prior to 14.09.2002 is barred by time. This Tribunal held that the settlement of Rs. 64 crores made by the two parties is a full and final settlement of the claims of GUVNL and further held that there was no obligation on the part of Essar Power to declare availability, based on actual generation to GUVNL proportionate to 300 MW.

8. Being aggrieved thereby, GUVNL filed Civil Appeal No 3455 of 2010 and Essar Power filed Civil Appeal No. 3454 of 2010 before the Supreme Court. The Supreme Court, by its order dated 02.09.2011 in Civil Appeal No. 3454 of 2010 disposed of the said appeal. Further, the Supreme Court by its judgement dated 09.08.2016 decided Civil Appeal No. 3455 of 2010 and upheld the decision of the State Commission dated 18.02.2009 after setting aside the order dated 22.02.2010 passed by this Tribunal in Appeal 77 of 2009 and 86 of 2009.

9. The State Commission initiated the proceedings to implement the directions contained in the judgement of the Supreme Court dated 09.08.2016. In the proceedings initiated in petition No. 972 of 2009, GUVNL contended that Essar Power never declared the aggregate available capacity of the plant but had only declared the capacity as available to GUVNL until February 2009. As per GUVNL, Essar Power was required to provide the full information about total generation and such quantum of generation made available to GUVNL and Essar Steel. The State Commission passed the Order dated 27.12.2019 (“Impugned Order”) in Petition No. 972 of 2009 and quantified the GUVNL claim as Rs. 201.91 Crore payable by Essar Power. Both, the Appellant –Essar Power and the

Appellant – GUVNL are aggrieved by the Impugned Order dated 27.12.2019 and have preferred respective Appeals before this Tribunal.

Discussion

10. Heard Mr Vaidyanathan, learned senior counsel and Mr Buddy Ranganathan, learned senior counsel representing Appellant – Essar Power and Mr Ramachandran, learned senior Counsel representing Appellant – GUVNL. The Appellant - Essar Power is aggrieved by the methodology of computation of GUVNL claim with regard to deemed generation incentive; energy computation on half hourly basis instead of hourly basis; compensation even when GUVNL has not taken full power offered to them; amount of Rs 157.88 Crore considered as deducted by GUVNL from Essar Power, while factually it is Rs 234.60 Crore and other discrepancies. On the other hand, Appellant - GUVNL is aggrieved and stated that method of computation ought to have been on HTP-1 Tariff instead of HTP -1 Energy Charge; the State Commission has considered higher amount of Rs 157.88 Crore as deducted by GUVNL instead of Rs 148.35 Crore while computing overall claim of GUVNL and Delayed Payment Surcharge should have been computed on Compound interest Basis and not on simple interest basis. Various Issues and rival contentions are deliberated here-in-below para wise:

Issue : Computation of diverted energy on hourly basis or half hourly basis

Submissions of Essar Power

11. Learned senior counsel submitted that the State Commission in the Impugned Order has directed that for working out compensation, energy

diverted to be worked out on half hourly basis, while the State Commission in its order dated 18.02.2009 (GERC 2009 Order) expressly provided that "..the diversion in the circumstances should be computed on an hourly basis...". The Supreme Court, by its judgment dated 09.08.2016, restored the entire GERC 2009 Order and therefore the state Commission is bound by the said Order and it was beyond its jurisdiction to have adopted a different methodology during computation in the Impugned Order. Learned Senior counsel further submitted that in the PPA, at Clause 1 – Availability Declaration, is on a 60-minute time block basis and this fact has been acknowledged by the State Commission, however relying on a CEA letter dated 21.02.2005 giving recommendations for metering on a 30-minute time block basis, proceeds to unilaterally modify the terms of the PPA as well as its own GERC 2009 Order by computing compensation for energy diverted on 30-minute basis. Learned senior counsel contended that the CEA Letter could not be treated as an amendment to the PPA. The State Commission in the Impugned Order, has expressly found that there was no amendment to the PPA. The mere fact that metering was conducted on a 30-minute time block does not preclude the measure of damages on the basis of a 60-minute time block. Further, the CEA Letter, dated 21.02.2005, predates the GERC 2009 Order and was issued prior to the first claim filed by GUVNL in July 2009; the failure of GUVNL to raise this issue at the relevant time precludes its invocation in the present computational proceedings. Moreover, in GUVNL's Appeal No. 77 of 2009 before this Tribunal, it was unequivocally admitted in Ground G that the applicable time block for the purpose of the PPA is one hour. Learned senior counsel further submitted that there is specific finding in GERC 2009 Order about hourly computation and the contention of GUVNL that the said finding of "hourly" could not operate as

res judicata on the ground that no specific issue was raised, no discussion ensued, and no detailed reasoning was provided is erroneous in law. Even assuming, arguendo, that *res judicata* is inapplicable, the claim is nonetheless barred by the doctrine of constructive res judicata. Even assuming that there was no issue raised or no discussion in the GERC 2009 Order, the fact remains that there is a finding on it therein. GUVNL, having preferred an appeal before this Tribunal, failed to challenge the said finding, despite having the opportunity to do so and thus it precludes GUVNL from agitating the same in the present proceedings.

Submissions by Appellant – GUVNL

12. Learned senior counsel submitted that though GERC 2009 Order observes that computation be on hourly basis and GUVNL did not raise the aspect of half hourly settlement of computation despite the change effected in pursuant to agreement reached before CEA on 21.02.2005, however no specific issue on the said aspect was raised or argued by either GUVNL or Essar Power as at that time diversion issue was related to the period till 2004, during which time the declaration of availability was on hourly basis. The declaration of availability was shifted from hourly basis to half hourly basis in the year 2005 by the intervention of CEA, that too at the instance of Essar Power in lieu of allowing Essar Power to continue the operation without segregating the generation side and the load side at the Essar Steel plant with Essar Power benefitted from the same. Since 23.02.2005, availability declaration is on half hourly basis and consequently all energy accounting at generation as well as load side were on the said basis which is not disputed.

13. The State Commission in the Impugned Order did not accept the claim of Essar Power on hourly basis and consistent with actual declaration, decided that the computation of energy diverted to be done on half hourly basis post February 2005. Learned senior counsel submitted that when the actual availability declaration, energy accounting and settlement in all respects are on half hourly basis, there is no reason for adopting simulated hourly quantum which is not realistic. Essar Power is relying only on a sentence in para 9.13 of the GERC 2009 Order to contend that there is a specific finding for hourly basis to be taken and it amounts to res-judicata is not correct as the reference in para 9.13 of the GERC 2009 Order is in relation to the alleged settlement between the parties, which is not correct in view of the specific finding of the Hon'ble Supreme Court and as such the said aspect was only a passing observation, based on the actual availability declaration till 2004. The issue of half hourly or hourly basis was not even put to issue in the GERC 2009 Order and was certainly not material or essential to the said decision. The aspect was only collaterally referred to in an earlier proceeding without the same being raised as an issue or dealt with, actual, computation was not then taken, the same should not ordinarily be considered to constitute res-judicata.

Analysis and Discussion

14. The main contention of Essar Power is that for working out the Compensation, diverted energy to be worked out on hourly basis instead of half yearly basis considered in the Impugned Order. Per Contra, GUVNL has contended that the State Commission has rightly considered the energy on half hourly basis as declaration of energy on half hourly basis has been agreed by Essar Power in line with the CEA letter dated 23.02.2005.

We take note that based on the discussion in CEA meeting held on 17.02.2005 and the recommendations conveyed by CEA vide letter dated 21.02.2005, the half hourly energy accounting has been accepted by both the parties, and though the same could have been at the behest of Essar Power to continue the operation without segregating the generation side and the load side at the Essar Steel plant, however the fact remains that in the PPA dated 30.05.1996 the declaration of availability is based on hourly basis which has not been amended. The State Commission in its order dated 18.02.2009 (GERC 2009 Order) at para 9.13 have observed that ***"the diversion in the circumstances should be computed on hourly basis."*** In the same Para the State commission also holds that "This ***appears to be a fair manner of determining the compensation that is to be paid for the period after September 2004".*** We note that GERC 2009 Order clearly holds that same methodology to be adopted for settlement for period after September 2004 meaning that same principle to be adopted for period beyond September 2004 and though when the GERC 2009 Order was passed on 18.02.2009, the computation of energy on half hourly basis have been adopted since February 2005, and this issue was never disputed by GUVNL when they approached this Tribunal and as such the methodology proposed in GERC 2009 Order has attained finality. Thus, we do not find merit in the submissions of the Appellant-GUVNL that such reference was incidental and it was only pertaining to the period in 2004 when hourly energy accounting was in vogue.

15. In the present appeal, we are only concerned whether the methodology adopted in the Impugned Order dated 27.12.2019 is as per methodology

approved in the GERC 2009 Order, as it is the “GERC 2009 order” which is upheld by the Supreme court vide its order dated 09.08.2016 ***((2016)9 SCC 103)*** and it is impermissible for the State Commission or this Tribunal to deviate from or look beyond its mandate.

16. The State Commission, in the impugned order though acknowledged that the PPA between GUVNL and Essar has energy declaration on an hourly basis and that any amendment thereto requires awritten agreement between the parties, and also records in Para 15.44 that issue of excess units whether hourly or on half hourly basis has been decided in para 9.13 in the order dated 18.02.2009 (GERC 2009 Order). However, despite this acknowledgment, the State Commission directed that energy be calculated on a half-hourly basis, which is contrary to the directive in the GERC 2009 Order requiring hourly computation of energy for the period beyond September 2004.

17. In view of the above deliberation, we are of the view that the State Commission has erred in the Impugned Order in calculation of diverted energy on half hourly basis and we hold that for the purpose of computation of energy diverted, energy to be accounted on hourly basis as per the direction in GERC 2009 Order. The State Commission, in the Impugned Order has taken note that Essar Power has submitted the data of diversion of energy on an hourly basis while GUVNL has submitted the same on half hourly basis, we therefore direct the State Commission to reconcile and verify the data submitted by both parties to work out excess energy diverted on hourly basis.

Issue : Entitlement of Compensation by GUVNL when they have taken power less than that offered by Essar Power

Submission of Appellant Essar Power

18. Learned senior counsel submitted that State Commission in the 'GERC 2009 Order' in Para 9.11 has held that whenever GUVNL does not schedule the power declared by Essar Power, Essar Power is at liberty to sell the unutilized power elsewhere and as per Para 11 of GERC 2009 Order, same provision will apply when Essar Power has declared the capacity for the entire generating station and GUVNL failed to schedule power. Reading both the paras together would mean that whenever Essar Power declared availability and GUVNL did not schedule power (whether the declaration pertained to the full 515 MW or a lesser capacity), Essar Power cannot be subjected to compensation for non-supply to GUVNL. This interpretation is further reinforced by Schedule VI of the PPA, which expressly contemplates the declaration of capacity below the full plant capacity.

19. Learned senior counsel submitted that there is no principle of law, equity or reasonableness which would support GUVNL's claim that even if they did not schedule power which was declared available for them, they would be entitled for damages for supplying the un-requisitioned quantum to Essar Steel. Learned senior counsel submitted that from the year 2002 to 2009, GUVNL has never objected to Essar Power not making known to GUVNL the power scheduled to Essar Steel, and as such GUVNL should neither be concerned nor prejudiced with how much power Essar Power declares available to Essar Steel when admittedly GUVNL does not even schedule the full quantum of power that is declared available to it.

20. Regarding the contention of GUVNL that had they known how much power was being declared available to Essar Steel, it would have helped them in planning their power procurement, learned senior counsel submitted that such an assertion is erroneous inasmuch as Essar Steel, a consumer of DGVCL, could not have declared it's requirement to DGVCL and it had a contract demand with DGVCL; and GUVNL's power procurement is on the basis of the expected requirements of its four subsidiary distribution licensees, whereas DGVCL's requirement of power is on the basis of the collective contract demand of its consumers and the expected offtake of its entire consumer base depending on various factors such as consumption trends, expected weather etc. Thus, GUVNL's claim that its scheduling of power would have changed depending upon knowing how much power was being declared available by Essar Power to Essar Steel is baseless and incorrect.

Submissions by GUVNL

21. Learned senior counsel for the GUVNL submitted that Essar Power was required to declare the availability of the entire generating station on a weekly basis, indicating the proportion of availability to both GUVNL and Essar Steel, in accordance with the agreed ratio of 58% to GUVNL and 42% to Essar Steel. The obligation to declare availability was not limited to the capacity allocated to GUVNL. The Supreme Court, in its judgement dated 09.08.2016, has upheld the decision of State Commission in GERC 2009 Order that Essar Power is required to declare the available capacity on proportionate basis and referred Schedule VI of the PPA, which clearly

stipulates the declaration of availability of entire generating station. Learned senior counsel further submitted that in Para 9.5 to 9.12 of GERC 2009 order, the need for declaration of availability of entire station has been decided and in fact at Para 9.11, right of Essar Power to deal with capacity not scheduled by GUVNL would arise only if Essar Power has duly fulfilled its obligation to declare availability qua the entire station and not otherwise.

22. Learned senior counsel further submitted that as per GERC 2009 Order, Essar Power can sell extra power to Essar Steel only if it declares availability for the entire plant and allocates supply in the 300:215 ratio and GUVNL does not schedule the power. If the said condition is not fulfilled, Essar Power cannot claim a right to supply power to Essar Steel if GUVNL does not schedule the power. During the entire period till February 2009, Essar Power failed to declare the availability of the entire generating station in accordance with these requirements and consequently, no right accrued to Essar Power to claim that the capacity not scheduled by GUVNL could be supplied to Essar Steel without constituting a diversion. The declaration of full capacity of entire generating station (not merely GUVNL share) is a precondition for application of Para 11(6) of GERC 2009 order. The claim of Essar Power, that the diversion of power not scheduled by GUVNL should not be considered in the absence of a declaration of availability for the entire generating station, is devoid of merit and liable to be rejected, being contrary to the express terms of the decision of the Supreme Court and para 11(6) of the GERC 2009 Order. Learned senior counsel further submitted that this issue was not raised in the Memorandum of Appeal No. 201 of 2023 filed by Essar Power but was subsequently introduced only in the rejoinder to the reply/submissions filed by GERC before this Tribunal.

Analysis and Discussion

23. The State Commission in the Impugned Order has arrived at the excess units of energy for compensation considering the difference between the actual units supplied to Essar Steel and its proportionate share of the allocated plant capacity citing para 9.6 of the GERC 2009 Order holding that Essar Power had an obligation under PPA to disclose entire plant capacity to GUVNL and excess units are not required to be further bifurcated based on delivery instruction of GUVNL.

24. Learned senior counsel for the Essar Power, relying on Para 9.11 and Para 11 of GERC 2009 Order, contended that compensation is payable only when Essar Power declared the full capacity of the plant and violated the supply ratio but not when Essar Power declared less than full capacity and GUVNL did not schedule the declared capacity; no prejudice will be caused to GUVNL, even if the capacity declared to GUVNL is less than the proportionate amount but GUVNL did not schedule even the capacity made available to them. Per Contra, Learned senior Counsel for GUVNL has contended, that the claim of Essar Power, that the diversion of power, not scheduled by GUVNL should not be considered even in the absence of a declaration of availability for the entire generating station, is contrary to the express terms of the decision of the Supreme Court and Para 11(6) of the GERC 2009 Order and as such had they known how much extra power is being scheduled to Essar Steel, GUVNL would have accordingly planned the power procurement strategy for their Discoms.

25. In the subject appeals, we are not required to go into the issue whether non- declaration of availability of total generation to GUVNL and consequently dispatch instruction by GUVNL even less than the proportionate capacity so declared to them and diversion of such energy not scheduled to Essar Steel, would prejudice GUVNL or not, equity or reasonableness which would support GUVNL's claim etc; we are only required to see whether the energy calculation methodology adopted in Impugned Order is as per the Supreme Court order dated 09.08.2016 and GERC 2009 Order.

26. The Supreme court in its order dated 09.08.2016, framed several issues and under the issue "True interpretation of PPA to determine whether there is any obligation to declare availability of Power in the ratio of 300: 215"; held that the findings of the State Commission in Para 9.5 to 9.12 of GERC 2009 Order is the correct interpretation of the Agreement. Thus, it was held that Essar Power is obligated to declare available capacity in the ratio of 58 % to 42 % as well as to declare available Capacity of entire generation project. Para 9.11 and para 9.12 of GERC 2009 Order is reproduced below.

> *"9.11 However, if GUVNL does not take the power declared available by EPL in terms of the aforesaid ratio, EPL will have the right to sell the power to its sister concern subject to reimbursement of the proportionate of the annual fixed charges. GUVNL cannot make a submission that although it will not purchase such power as declared available by EPL, EPL cannot sell the same to its sister concern. Such a submission would defeat the purpose of the Electricity Act, 2003 and the National Electricity Policy which promotes generation and encourages sale of surplus capacity. If GUVNL does not schedule the*

power to the extent of availability declared by EPL of the entire plant in terms of the PPA, it cannot complain if the power is sold to EPL's sister concern and the proportionate of the annual fixed cost is reimbursed.

9.12 The Commission is of the view that GUVNL is entitled to claim compensation for the energy diverted to Essar Steel from the capacity allocated to GUVNL under the PPA. EPL at all times has an obligation under the present PPA to declare availability for the entire plant and allocate the supply on the basis of 300:215 or 58:42."

27. From a bare reading of above paras of GERC 2009 Order, we are of the view that the right of Essar Power to sell the unscheduled power of GUVNL to its sister concern shall accrue only if Essar Power declares the availability of entire plant as well availability in terms of proportionate ratio. The Para 9.11 also states that no right shall accrue on GUVNL i.e. to claim compensation from Essar Power, for the power sold to Essar Steel, if entire plant capacity is declared in terms of PPA and GUVNL does not schedule power. Thus, in our view, in terms of GERC 2009 Order, for the respective rights of each party i.e. GUVNL or Essar Power, the starting point is the declaration of entire plant availability in terms of PPA signed between Essar Power and GUVNL, which reads as under:

28. The Declared available generation capacity in the PPA shall mean *"with respect to each unit or the generating station, the generating capacity expressed in MW at the delivery point as declared by the Company pursuant to Schedule VI to be made available to the Board upto the allocated capacity"*

As per Para 3.3 of the PPA, Essar Power is to declare available generation capacity in terms of Schedule VI (Despatch Procedures), as reproduced below:

> ***"3.3 AVAILABILITY DECLARATIONS***
>
> *From the date of Entry into Commercial Service of the first Unit the Company shall, submit to the Board from time to time, Declared Available Generation Capacity as per the procedures set forth in Schedule VI".*
>
> ***"SCHEDULE VI : DISPATCH PROCEDURES***
>
> ***6.1 SUBMISSION OF WEEKLY SCHEDULES***
>
> *The Company will submit to the Board's Load Dispatch Centre at Jambua, Baroda weekly schedules indicating the times and Capacity which will be available from Generating Station and if not available the reasons therefor. These weekly schedules will be submitted on or before each Friday for the next week starting from Monday. If at any time after the issue of such schedule, there is any change in circumstances, the Company will notify the Board about the revisions necessary in the weekly schedule and the reasons therefor."*

29. The Para 11(6) of GERC 2009 Order entitling Essar Power to sell power not scheduled by GUVNL is as reproduced below:

> *"11(6) For the period after 14.9.2002, if GUVNL has not scheduled energy to the extent allocated under the proportionate principle (when EPL has declared capacity for the entire generating station in terms of Schedule VI of the PPA), EPL can supply the additional power that is available only to Essar Steel / sister companies and shall only reimburse the proportionate of annual fixed cost to GUVNL."*

30. From the above deliberations, we are of the view that GUVNL is entitled for compensation for supplies made to Essar steel in excess of

proportionate principle, whenever Essar Power has failed to declare the capacity of the entire generating plant to GUVNL. The relevant Paras do not refer to the specific condition that compensation shall not be applicable if GUVNL does not schedule the power so declared to them, irrespective of non-declaration of total generation and breach of proportionate quantum by Essar Power. In our view, the State Commission in the Impugned Order has rightly worked out the units for compensation as the difference between the units actually supplied to Essar Steel and its proportionate share in the actual plant availability. Further, whenever Essar steel has declared full plant capacity to GUVNL and GUVNL has not scheduled entire power allocated to them then Essar Power can sell the excess units to Essar Steel/ sister Concerns subject to payment of only proportionate fixed charges to GUVNL. We accordingly affirm the methodology adopted by the State Commission in the Impugned Order.

Issue : Methodology of Computation to be based on HTP 1 Energy Tariff or HTP -1 Energy Charge

Submissions by GUVNL

31. Learned senior counsel for GUVNL submitted that in the Impugned Order, the State Commission has erroneously restricted the compensation to the energy component of the HTP-1 Tariff minus the variable charges payable to Essar Power. This conclusion has been arrived at solely on the basis of the GERC 2009 Order and certain correspondences from the later part of 2004, which pertain to the payment of Rs 64 crores for the diversion of power to Essar Steel beyond 215 MW in absolute terms. Learned senior counsel also submitted that the Impugned Order is patently contrary to: the

principles decided by the Supreme Court in the Judgement dated 09.08.2016; the operative part of the GERC 2009 Order that diverted capacity should be considered as deemed to have been supplied by Essar Power to GEB/GUVNL and by GEB/GUVNL/DGVCL to Essar Steel as HT consumer, in which case HTP 1 tariff as a whole (and not only Energy part of the HTP 1 tariff) is the relevant measure; and the purpose of the compensation under Section 73 of the Indian Contract Act, 1872 is to put GUVNL in the same place as GUVNL would have been if the breach had not occurred.

32. Learned senior counsel for the GUVNL further submitted that GERC 2009 Order, was specifically in the context of the alleged settlement regarding the diversion of power to Essar Steel beyond 215 MW in absolute terms, which was the subject matter of the discussion between the parties, independent of the diversion of electricity in deviation of the proportion 300:215 (58%:42%). The Subsequent correspondence from 30.10.2004 onwards, culminating in the payment of Rs. 64 crores, specifically addressed energy supplied to Essar Steel beyond 215 MW in absolute terms, without prejudice to GUVNL's claims concerning deviations from 58:42 proportion to GUVNL: Essar Steel. This is explicitly reflected in the letter dated 11.11.2004, which refers to "Energy diverted to ESTL more than 215 MW in MUs" and further clarifies that such payment is "without prejudice to GEB's rights under the provisions of the PPA". The letter dated 31.12.2004 reinforces that no final settlement had been reached regarding the issue or the methodology for charging energy diverted beyond 215 MW. The letter has been duly noted by the Supreme Court, wherein the Court rejected Essar

Power's contention that the payment of Rs. 64 Crore constituted a full and final settlement.

33. Learned senior counsel submitted that the GERC 2009 Order cannot be interpreted in a manner that undermines the efficacy of the compensation mechanism determined therein, which is premised on the deemed supply of diverted capacity by Essar Power to GUVNL and by GUVNL/DISCOM to Essar Steel.

34. Learned senior counsel for GUVNL further submitted that Essar Power reliance on an alleged settlement for the period between 1998 and September 2004, as reflected in the GERC 2009 Order, as the basis for the methodology adopted in the impugned order, is misconceived and contrary to the judgment of the Supreme Court. The Supreme Court has expressly held that, in view of the letter dated 31.12.2004, there is no settlement existed between the parties. The restoration of the GERC 2009 Order by the Supreme Court and setting aside the Tribunal's decision cannot be applied in a manner contrary with the Court's specific findings, including its rejection of the alleged settlement. Notably, in the Impugned Order, GERC has failed to address the operative part of the GERC 2009 Order.

35. Learned senior counsel further submitted that when proportionality is implemented, the entire diversion, whether within or beyond 215 MW, is appropriately accounted for. For instance, if the power supplied to Essar Steel is 250 MW, the total generation finally accounted for is 400 MW, GUVNL should have gotten 232 MW and Essar Steel only to 168 MW and therefore 82 MW (250 MW–168 MW) is the total diversion, the amount related to quantum more than 215 MW in absolute terms also gets

subsumed. The Essar Power is wrongly relying on the GERC 2009 Order on the limitation issue, which clearly states that the consideration of proportionality applies from 14.09.2002. The State Commission has also held that the Rs 64 crore amount for the period prior to 14.09.2002 cannot be adjusted by Essar Power by raising the limitation issue. The State Commission has proceeded to decide the compensation payable for the period from 14.09.2002 when the alleged settlement of Rs. 64 crores were for the period till September 2004. The measure of compensation, as mutually agreed upon, is reflected in the letter dated 17.02.2000, which stipulates that GEB shall bill Essar Steel at GEB rates for deemed supply and levy charges for any excess power drawn as deemed supply to GEB. This letter has been expressly considered in the Hon'ble Supreme Court's judgment dated 09.08.2016. Therefore, any interpretation of a settlement that contradicts the implications of this letter is legally untenable.

36. Learned senior counsel contended that rationale for considering only HTP-1 Energy Charges (variable charges) for computing compensation for diversion is legally untenable. Since the measure of compensation is based on deemed supply from GEB to Essar Steel, GEB is entitled to the full HTP-1 Tariff as applicable to a consumer. Consequently, Essar Power's claim and the Impugned Order's reliance on HTP-1 Energy Tariff, rather than the entire HTP-1 Tariff, are patently erroneous.

Submissions by Essar Power

37. Learned senior counsel submitted that Para 9.13 of GERC 2009 Order specifies the methodology of computation which is based on 'HTP-1 Energy Charge' and Supreme court order dated 09.08.2016 restores the GERC

2009 Order in its entirety. Para 9.13 of GERC 2009 order clearly holds that the principles of the settlement arrived at between the parties for the period 1998 to 2004 would also be applicable to the period after 2004 and hence the same is binding. Now GUVNL has erroneously argued that Supreme Court in Para 26 of its judgement has held that the settlement was not binding, which is incorrect, as the Supreme Court, in para 26 was dealing with the findings of APTEL (accepting the contention of Essar Power) that by virtue of the Settlement of Rs 64 Crore, the same was a full and final settlement and no further amounts were payable by Essar Power to GUVNL for any period at all. Even GUVNL has not claimed other than the amount of Rs 64 Crore for the period 1998 to 2004 when the diversion was more than 215 MW. GUVNL had already accepted the Settlement of Rs 64 Crores for diversion of power more than 215 MW before this Tribunal, therefore it is incorrect now on the part of GUVNL to contend that the Supreme Court's Judgment had undone the entire settlement. The State Commission in its GERC 2009 Order has held, not as consent between the parties, that methodology of settlement of Rs 64 for the period from 1998 to 2004, which is a fair measure of compensation, would be applicable to determine the compensation of diversion from 2004 till 2010 and same was never challenged by GUVNL in the first round before this Tribunal and as such it has attained finality.

38. In case GUVNL's contention, placing reliance on Para 26 of Supreme Court Judgement, that there is no settlement and thereby no methodology, were to be accepted, then there is no methodology at all for the computation of compensation in the entire order. Indeed, this methodology of computation was admittedly agreed between the parties, was extrapolated by the State

Commission and re-affirmed by it in the absence of any pleading, much less the proof given by GuVNL for any loss incurred; and the state Commission could not have granted or computed compensation at all. This re-affirmation of the measure of compensation was a directive of the State Commission in the GERC 2009 Order and it is this directive which was "restored" by the Supreme Court.

39. Learned senior counsel further submitted that the amount of Rs 64 Crores was arrived at on the basis of the methodology contained in the Settlement Letter dated 11-11-2004, which provides for computation on "HTP-1 Energy charge". The HTP-1 Energy charge was negotiated between the parties after rounds of discussions and correspondences (letters dated 29.7.2004, 31.7.2004, 07.8.2004, 05.10.2004 etc). However, GUVNL bases its entire argument by stating that HTP-1 Tariff must include HTP-1 Energy Charge plus HTP-1 Fixed charge. Learned senior counsel submitted that: The words "HTP-1 Tariff" even in the said sub-para of Para 11, is suffixed by the words "which *principle of compensation has been previously accepted by the parties…*" and what was accepted by the parties, is undeniably "HTP-1 Energy charge"; Therefore, when the words "HTP-1 Tariff" are read with the words "*which principle of compensation has been previously accepted by the parties* <u>*for diversions by EPL in excess of 215 MW…*</u>" it can only mean HTP-1 'Energy' Tariff.

40. Learned senior counsel also submitted that it is undisputed that the settlement of Rs 64 Crores was admittedly in respect of diversions *in excess of 215 MW* as evidenced by the Settlement letters and the said diversion for the period 2002 to 2009 was settled on the basis of "HTP-1 Energy charge"

only, which was clearly admitted by GUVNL even during the course of submissions in the matter. GUVNL argument that “in excess of 215 MW” would be compensated for at “HTP-1-Energy charge” as covered by GERC 2009 Order, whereas diversions “less than 215 MW” would be compensated for at HTP-1 Energy tariff plus fixed charges, however, there is nothing whatsoever in the GERC 2009 Order which could justify two different measures of compensation for diversions more than or less than 215 MW. Even if it is assumed for the sake of argument that there be a dichotomy between the concluding part of the order, Para 11(5) (i.e. the Decree) and the substantive part of the Order Para 9.13 read with Para 8.16, (i.e the Judgment), the Judgment must prevail over the Decree (***Bhikhi Lal v. Tribeni and Ors., 1964 SCC Online SC 245 Paras. 3 and 4)***.

41. Regarding the contention of GUVNL that the basis of compensation is to treat all diversion of power in violation of the contracted ratio as deemed supply from DGVCL to Essar Steel and thus it must also include Fixed charges, learned senior counsel for Essar Power submitted that the same is incorrect since the concept of treating the diverted power as deemed supply by DGVCL to Essar Steel is taken as a basis in a judicial Order for the determination of compensation, not in a statute, and the said Order clearly mandates the consequences and incidents of treating the said diversion as deemed supply. When such consequences are specified, GUVNL cannot in the present proceeding add to or in any way alter what was in the GERC 2009 Order; even otherwise it is submitted that GUVNL does not, in fact, suffer any loss by the methodology not factoring in the fixed charges of DGVCL. GUVNL is liable to pay the Capacity charges to Essar

Power only for that quantum of power which is declared available to GuVNL by Essar Power. When certain quantum of power is not declared available to GUVNL and was diverted to Essar Steel, GUVNL has not suffered the liability to pay Capacity Charges of such diverted power to Essar Steel. Essar Steel had a contract Demand of 44.5 MVA with DGVCL, therefore Essar Steel could be liable to pay the fixed charges only for the contracted demand of 44.5 MVA and that diverted power was not in fact supplied by DGVCL to Essar Steel. Though it is treated to be deemed for the purpose of computing compensation, that the diverted power must be treated as if it were supplied to Essar Steel by DGVCL over and above the contract demand of 44.5 MVA and there is no warrant to further assume that Essar Steel's contract demand had also increased in that process to now equal whatever was the quantum of diverted power on a month-to-month basis.

Analysis and Discussion

42. The State Commission, in the Impugned Order has considered the HTP -1 Energy Charge minus variable cost to calculate Compensation payable to the GUVNL by Essar Power for the energy diverted. Learned senior counsel for the Appellant – GUVNL has contended that instead of HTP-1 Energy charges, the compensation should be worked out considering HTP-1 Tariff which shall include fixed cost component considering the penalty amount for beaching the contracted capacity by Essar Steel, if any, as diverted energy is to be considered as deemed supply by GEB/GUVNL to Essar Steel and GEB/GUVNL is entitled to the full HTP-1 Tariff as applicable to a consumer; as also mentioned in the Para 11 (5) of GERC 2009 Order. Per Contra, learned senior counsel for Essar Power contended that diversion of energy is to be worked considering HTP-1 energy tariff as

stated in Para 9.13 of the GERC 2009 Order and not HTP-1 Tariff as contended by GUVNL as in Para 9.13, HTP-1 Energy Tariff, being a fair manner of determination of Compensation, has been specifically mentioned to be applicable for working out the compensation for the period after September 2004.

43. As already stated above, we are not required to go into the issue of determining what would be the correct methodology, whether HTP- 1 Energy tariff or HTP-1 Tariff, for working out the compensation for the energy diverted as it is to be treated as deemed energy supply from GEB/GUVNL to Essar Steel; the State Commission in the GERC 2009 Order has decided the methodology/ mechanism for various claims of GUVNL and the Supreme court in its order dated 09.08.2016 has set aside the Order of this Tribunal dated 22.02.2010 and restored the 'GERC 2009 Order' of the State Commission and therefore present issue is to be deliberated to the limited extent of methodology of compensation determined in GERC 2009 Order. In this context, Para 9.13 and Para 11(5) of GERC 2009 Order is reproduced below:

> *"9.13 As regards the quantum of compensation payable on account of diversion, the PPA is silent on the same. The parties in the settlement for dues on account of diversion for the period between 1998 and September, 2004 agreed on a particular methodology for determining such compensation. The parties had agreed that GUVNL is entitled to the HTP 1 energy tariff after excluding the variable cost. The diversion in the circumstance should be computed on an hourly basis. This appears to be a fair manner of determining the compensation that is to be paid for the period after September, 2004. The parties are required to reconcile the generation data and make final calculation on the basis of the aforesaid principle".*

"11(5). For the period after 14.9.2002, whenever EPL has failed to declare the entire capacity of the plant, all supplies made to Essar Steel / sister companies of EPL in excess of the proportionate principle referred to above is liable to be held as supply of electricity made by GUVNL to Essar Steel / sister companies of EPL. GUVNL shall be compensated for such supply at the prevailing HTP 1 tariff less variable cost, which principle of compensation has been previously accepted by the parties for diversions by EPL in excess of 215 MW".

44. The Para 9.13 specifies that parties have agreed that GUVNL is entitled to HTP 1 Energy tariff, after excluding the variable cost in the settlement of dues on account of diversion between 1998 and Sept 2004 and same methodology to be adopted in determining the compensation that is to be paid for the period after September 2004. Accordingly, from Para 9.13, it is understood that the methodology of determination of compensation shall be based on HTP-1 Energy Tariff. Para 11(5), of the GERC 2009 order states that GUVNL shall be compensated for supply so diverted at the prevailing HTP-1 Tariff minus variable cost, reliance on which has been placed by GUVNL while contending for the consideration of HTP-1 tariff and not HTP-1 Energy tariff as determined in the Impugned Order for working out compensation. We however note that in Para 11 (5) of GERC 2009 Order, while stating that the compensation to be worked out at HTP-1 Tariff, has been further specified *that* ***"which principle of compensation has been previously accepted by the parties for diversion by EPL in excess of 215 MW",*** which in our view is the HTP-1 Energy Tariff as mentioned in the Para 9.13.

45. Learned Senior counsel for GUVNL has contended that in the letter dated 17.02.2000 of Essar Power, it has been agreed by Essar Power that GEB shall bill Essar Steel at GEB rates for deemed supply and levy charges for any excess power drawn as deemed supply to GEB, cognizance of which has been taken by the Supreme court in its order dated 09.08.2016. As stated above, GUVNL had filed Civil Appeal No 3455 of 2010 before the Supreme court against the Order of this Tribunal dated 22.02.2010, which has determined that claim of Rs 64 Crores of GUVNL against Essar Power with respect to diversion of power from Essar Power to Essar Steel for the period 01.07.1996 had already been settled by this payment and this statement is final, conclusive and binding on the parties as well as Essar Power is not obligated to declare availability of generated power in the ratio of 300: 215 (58 : 42) and it is in this context that the letter dated 17.02.2000 has been referred by Supreme Court. In Para 24 of the Supreme Court order dated 09.08.2016, it has taken cognizance of the letters of Essar Power/ GUVNL including the referred letter dated 17.02.2000 to observe that Essar Power has acknowledged its liability to allocate generated power to GUVNL and Essar steel in the ratio of 58:42. The issue of applicability of HTP-1 tariff or HTP-1 Energy tariff for working out the compensation amount was not the issue under consideration before the Supreme Court and thus in our view it cannot be inferred from the Supreme court order dated 09.08.2016, that the Supreme Court has directed that compensation should be worked out on the basis of HTP-1 Tariff by referring to letter dated 17.02.2000. The Supreme Court vide its order dated 09.08.2016 has set aside the order of this Tribunal and restored the GERC 2009 Order of State Commission, which shall become the basis for working out the compensation amount on various counts.

46. Learned senior counsel for the Appellant- GUVNL has also contended that methodology of compensation of Rs 64 crore arrived for energy diverted to Essar Steel beyond their contracted capacity of 215 MW cannot be termed final, for applying the same for working out the compensation for diverted energy not in proportionate amount in the Impugned Order in view of the letter of GUVNL dated 13.12.2004, which has also been acknowledged by Supreme Court in its order dated 09.08.2016.

47. The contents of the letter dated 31.12.2004 are reproduced below for ready reference:

"GUJARAT ELECRICITY BOARD

Sardar Patel Vidyut Bhavan, Race Course, Vadodara – 390007

Ref No.COM.CoA (IPP) EPol 7311

Dated 31.12.2004

To,

Managing Director,
Essar Power Limited
Essar House, Mahalaxmi,
11 Kashavrao Khade Marg,
Mumbai.

Fax: 22-24954787

Sub: Under all allocation of Power to GEB

Dear Sir,

We refer to your letter dated 30-11-2004, conveying your acceptance of the claim of Rs.64 Crores. We would like to bring to you notice that this amount of

Rs.64 crores is not a final settlement of the issue nor is the methodology of charging for energy diverted in excess of 215 mw final. We would like to inform you that we have sought a legal opinion according to which. EPoL is bound to maintain declaration of power availability between GEB and Essar Steel. In the ratio of 300: 215. In the relevant when total generation is less than 515 MW, Essar Steel can only get, the availability from EPoL in proportionate share. Any excess quantity taken delivery by Essar Steel should be treated as supply of Power from GEB. EPoL in its letter dated 17th Feb., 2000 had accepted the EPoL's obligation to pay and also the methodology of recovery.

It is also opined that Electricity Duty is chargeable on such recovery. GEB shall work put the final recovery amount by this method and Inform EPoL accordingly. Therefore, recovery of Rs.64 Crores and Rs.7.56 Crores are provisional and adhoc. It is not correct that there was any overall package to accept the above amount in full or final settlement.

This is without prejudice to the Board's rights to the provisions of the PPA.

Thanking you,

Yours faithfully,
Sd/-
(H.K. Suthar)
General Manager (Com)"

48. It is noted from the aforementioned letter that the GUVNL has mentioned that the recovery of Rs. 64 Crore and Rs.7.56 Crore are provisional and *ad hoc* in nature and it is not an overall package to accept the above amount as full and final settlement as they have sought legal opinion on the issue of Essar Power to maintain declaration of power availability between GUVNL/GEB and Essar Steel in the ratio of 300:215. The Supreme Court in its order dated 09.08.2016 has taken cognizance of

this letter in the context that this Tribunal in its order dated 22.02.2010 has held that the GUVNL has claimed Rs.64 Crore by way of full and final settlement. It is also a fact stated by Essar Power and not disputed by GUVNL, that GUVNL has not made any supplementary claim over and above Rs.64 Crore for the period it referred to.

49. Thus, in our considered view, for working out the compensation for energy diverted in excess of 215 MW, the GUVNL has accepted the HTP -1 energy tariff and has not agitated to get HTP-1 tariff in any forum except now after passing of the Impugned Order. Accepting the contention of GUVNL that HTP – 1Tariff is to be considered for working out the compensation in the Impugned Order would mean that for diversion of energy to Essar Steel beyond 215 MW, STP-1 Energy Tariff would be the basis as already settled and for diversion of energy for not following proportionate principle, the HTP-1 Tariff would be the basis, which does not seem to be the intent of GERC 2009 Order. The State Commission in the GERC 2009 Order at Para 9.13 has clearly held that HTP-1 energy charge to be a fair manner of determining the compensation and has further held that the same is to be considered for determining compensation for the period after September 2004. As such in para 11(5) of the GERC 2009 Order, where term of HTP-1 tariff has been referred for working out the compensation, it has been qualified that the principle of compensation has been previously accepted by the parties for energy diversion by Essar Power in excess of 215 MW.

50. From the above deliberation, we are of the view that consideration of HTP-1 Energy Tariff – variable cost, was an agreed methodology for the compensation of energy diverted in excess of 215 MW and in terms of Para

9.13 and 11(5) of GERC 2009 Order, it is the HTP-1 Energy Tariff minus the variable cost, is also to be considered for working out the compensation whenever the proportionate quantum has been breached by Essar Power. We therefore find no infirmity in the Impugned Order of the State Commission insofar as consideration of HTP-1 energy Tariff minus variable cost has been considered.

Issue: Inclusion of Rs 2.2 Crores in the claim allowed for Refund of Deemed Generation Incentive

Submission by Essar Power

51. Learned senior counsel submitted that as per Article 7.4.2 of the PPA, 'deemed generation' was payable by GUVNL to Essar Power for a period of 10 years. However, an amendment dated 06.11.1995 to the government notification dated 30.03.1992 excluded the payment of a portion of the tariff (namely the deemed generation incentive) on declared availability of Naphtha. In GERC 2009 Order, GUVNL was allowed to deduct deemed generation incentive paid from 14.9.2002 onwards and in the impugned order dated 27.12.2019, State Commission computed the deemed generation incentive of Rs. 36.62 Crore paid by GUVNL to Essar Power from Sept 2002 to May 2006, however there exists a discrepancy of approximately Rs 2.2 Crore as GUVNL actually paid Rs 34.42 Crore towards the deemed generation incentive, rather than Rs 36.62 Crore. This discrepancy arose as the deemed generation incentive on Naphtha was granted only for a few days in April 2006, and in May 2006, Essar Power did not declare capacity to GUVNL on Naphtha. The. Learned Senior Counsel submitted that, details of the declaration for May 2006 are provided in the letter dated 15.03.2010, and though the said letter was not part of the record before GERC, however

GUVNL has specifically pleaded that only Rs 34.42 Crores was paid by GUVNL towards the Deemed Generation incentive before GERC

Submissions by GUVNL

52. Learned senior counsel for the GuVNL submitted that the Essar Power had only vaguely raised this issue before the State Commission, without furnishing any supporting material, despite GUVNL having made all relevant calculations available to Essar Power, along with sufficient opportunity for verification. It was incumbent upon Essar Power to provide accurate accounts with supporting documentation. The State Commission, in the impugned order has expressly recorded that GUVNL had submitted the complete computation, supported by audited accounts and SLDC data, and that Essar Power never challenged the veracity of GUVNL's data, and accordingly, the data submitted by GUVNL was relied upon. This issue was not raised in the Appeal filed by Essar Power but was belatedly introduced only through the Rejoinder filed on 17.05.2023 to GERC's reply/submissions.

Discussion and Analysis

53. The main issue pertains to refund of deemed generation incentive of Rs 2.2 Crore from the overall deemed generation incentive paid by GUVNL, which the Essar Power is not eligible to receive in case availability is declared on Naphtha in view of the amendment dated 06.11.1995 to the government notification dated 30.03.1992. The State Commission has worked out the quantum as Rs 36.62 paid by GUVNL to Essar Power which includes an amount of Rs 2.36 Crore for the period 2006 ie up to 29.05.2006, which needs to be refunded by Essar Power. Learned counsel for Essar Power has contended that during the period 2006 to 29.05.2006, the availability was not

declared on Naphtha and GUVNL in the letter dated 15.03.2010 (though not placed before the State Commission) have themselves claimed to have paid only Rs 34.42 Crore on this account.

54. Since we are remanding the matter, directing the State Commission to re-compute the amounts due under other heads, we hold that the State Commission, while reworking on the compensation amount based on the observations made in this order, may also consider this aspect as to whether an amount of Rs 34.42 Crore or Rs 36.62 Crore is eligible to be refunded by Essar Power, on account of deemed Generation Incentive based on facts and laws. Both GUVNL and Essar Power are at liberty to place their respective submissions before the Commission in this regard.

Issue: Amount deducted by GuVNL; Rs 157.88 Crore as per Impugned order; or Rs 148.35 Crore as contended by Appellant - GUVNL (Appeal 138 of 2021) or Rs 234 Crore as Contended by Appellant – Essar Power (Appeal No 201 of 2023).

Submissions by Essar Power

55. Learned senior counsel submitted that the actual amount deducted by GUVNL from its invoices is Rs 234.60 crores and not Rs 157.88 crores as considered in the Impugned Order, and considering that no further amount is payable. During the pendency of the present appeal Essar Power has discovered the bill passing letters issued by GuVNL, evidencing such deductions made from Essar Power invoices on account of alleged diversion of power to Essar Steel; permission to place such documents on record before this Tribunal has been sought through an application.

56. Learned senior counsel submitted that GUVNL, as the claimant before the GERC, owes the duty to produce all relevant documents having a direct bearing on the issue, including the bill passing letters issued by itself, which were in its possession and essential for an accurate computation of its claim. The suppression of these documents to facilitate unjust enrichment is impermissible, and GuVNL cannot oppose their production by Essar Power. The Supreme Court, in "***Chengalvaraya Naidu v. Jagannath*", (1994) 1 SCC 1**, has categorically held that it is no defense for a claimant to contend that the respondent was also in possession of the same documents and could have produced them. By suppressing the bill passing letters before the Commission, GUVNL claimed a deduction from Essar Power's bills to the extent of Rs. 148 Crores, whereas the actual deduction was Rs. 234 Crores. The State Commission vide its Order dated 5th October 2017 has expressly directed both parties to produce, *inter alia*, "… *details of invoices received from Essar Power Limited and actual payment made by GUVNL (erstwhile GEB) details of deductions made, if any, along with reasons for such deduction"*. It is evident that the "*reasons for such deductions."* could only have been provided by GUVNL it was entirely and wholly in the knowledge of GUVNL. In the subsequent hearing on 04.01.2018, GUVNL, in response to the earlier RoP, stated that "*it has already been decided by the Commission in other proceedings and the Commission passed Order on it and the same Order is challenged before the Hon'ble Appellate Tribunal for Electricity (APTEL)*....". The purported "other proceeding" referred to by GUVNL pertains to the wrongful deduction of tariff elements from Essar Power tariff. Thus GUVNL deliberately failed to disclose the "reasons for deductions" from Essar Power's bills arising from this wrongful diversion and improperly conflated it with an unrelated dispute. The "reasons for

deductions” and the amount of deductions were vital pieces of evidence that even the State Commission was pleased to call for. In the circumstances it is submitted that GUVNL’s claims cannot be decided without consideration, on merits, of the said documents.

Submissions by GuVNL

57. Learned senior counsel for the GUVNL submitted that the Impugned Order has erroneously considered the amount of Rs. 157.88 Crores already recovered by GUVNL from Essar Power; however, this amount pertains to payments made by Essar Steel to DGVCL for the supply of electricity based on contract demand and is unrelated to any diversion. Regarding the contention of Essar Power that GUVNL recovered a total amount of Rs. 390 Crores from Essar Power and Essar Steel and after deducting Essar Steel's share of Rs. 157 crores, the remaining recoverable amount to be considered for adjustment is Rs. 232 crores, learned senior counsel for GUVNL submitted that out of this total amount of Rs. 232.84 crores, a sum of Rs. 84 crores pertain to the variable cost paid to Essar Power, leaving a balance recoverable amount of Rs. 148.25 Crore, which only should be considered instead of Rs. 157 Crore. The Impugned Order, explicitly records that the said computation, duly supported by audited accounts and SLDC data, which was placed before the State Commission and furnished to Essar Power, which did not challenge the veracity of the said data nor contested by Essar Power before the State Commission.

58. Learned senior Counsel for GUVNL submitted that it was only on 15.07.2023 and 19.07.2023 that Essar Power vide application in I.A 1630 of 2023 and I.A 1693 of 2023 sought permission of this Tribunal to place

additional documents, which were not part of the GERC record and provided vague reasons for the delay, citing misplacement and unavailability of few persons. It is evident that Essar Power was in possession of the said documents and cannot claim inability to access its own records, particularly while actively pursuing this and other proceedings before various forums. No valid cause or reason was shown for admitting the documents under Order 41 Rule 27 of the CPC, 1908. The allegations made by Essar Power in the two Interim Applications mentioned above have no basis and as such detail explanation of amount deducted have been provided by GuVNL in reply to these IAs and accordingly the referred IAs have no basis and are liable to be rejected.

Analysis and Discussion

59. The impugned order records the amount deducted by GUVNL to be Rs. 157.88 Crores. The contention, urged on behalf of GUVNL, is that the actual sum deducted was only Rs. 148.35 Crores and not Rs. 157.88 Crores as erroneously recorded in the impugned order. The submission, urged on behalf of ESSAR Power (for the first time at the appellate stage), is that the amount deducted by GUVNL was actually Rs. 234 Crores as is evident from certain bill passing letters issued by GUVNL which had come to the knowledge of ESSAR Power during the pendency of the present Appeals.

60. Elaborate submissions were put forth, by Learned Senior Counsel on both sides, on whose obligation it was to produce these documents. While it was contended, on behalf of ESSAR Power, that these documents ought to have been placed on record by GUVNL, the submissions urged on behalf of

GUVNL is otherwise, and it is contended on their behalf that, since it is ESSAR Power which claims that a larger quantum of Rs. 234 Crores was deducted, it was for them to place documentary evidence, in support of their claim, on record. What is evident is that both parties are aggrieved by the amount recorded, in the impugned order, as having been deducted by GUVNL ie of Rs. 157.88 Crores. Since the claim of GUVNL, that what was deducted was a lesser sum of Rs. 148.35 Crores, is required to be re-determined by the Commission, we deem it appropriate to permit ESSAR Power to also place the documents, on which it now places reliance upon, before the Respondent-Commission which shall first consider whether such a belated claim raised on behalf of ESSAR Power should be considered at all and, if it is satisfied that it should be considered, then to examine whether ESSAR Power is justified in its claim that the sum deduced was actually Rs. 234 Crores.

61. Since we are remanding the matter to the Respondent-Commission for re-determination of the amounts due to parties, under the other heads also, we deem it appropriate to refer this issue also for the consideration of the Respondent-Commission. Both GUVNL and ESSAR Power shall be given a reasonable opportunity of being heard in this regard, and the Respondent-Commission shall thereafter pass a reasoned order, on this issue, in accordance with law.

Issue: Delayed Payment Charge (DPC)

Submissions by GuVNL

62. Learned senior Counsel submitted that the State Commission in the Impugned Order has considered the DPC on a simple interest basis for both

compensation towards energy diversion and the refund of the deemed generation incentive, in terms of Article 5.3.4 of the PPA. The same rate of simple interest has also been applied to claims made by Essar Power against GUVNL, as determined in another order dated 05.05.2023 in I.A. 15 of 2022 in Petition No. 1002 of 2010, which is presently under challenge in Appeal No. 692 of 2023.

63. It is a settled principle of law that ordinarily courts are not supposed to grant interest on interest except where it has been specifically provided under the statute or where there is specific stipulation to that effect under the terms and conditions of the contract. In the present case, the PPA stipulates DPC solely on a simple interest basis, except for the limited scenario where GUVNL raises a claim arising from the wrongful invocation of the letter of credit by Essar Power.

64. Learned senior counsel further submitted that the GUVNL had claimed DPC on the diversion of power at the rate applicable for delayed payments by retail supply consumers, as specified in the retail supply tariff orders issued from time to time. This claim is based on the principle that compensation should correspond to the difference between the HTP-1 tariff and the variable cost, thus DPC should also be of delay in payment of tariff. Thereafter, during the proceedings before GERC, leading to Impugned Order, GUVNL had given the computation of DPC, concerning the diversion of power, both in terms of what the HT consumer is liable to pay as DPC and without prejudice to the same, as per Article 5.4 on compounding basis (as has been claimed by Essar Power for recovery of its dues, under the same

PPA). Additionally, at the Instance of GERC, again on the basis of Article 5.4 of the PPA, on simple interest basis.

65. Learned senior counsel for the GUVNL submitted that in DPC ought to be computed on a compound interest basis, rather than on a simple interest basis and it should be applied at the rate applicable to other HTP-I consumers of DGVCL.

Submissions by Essar Power

66. Learned senior counsel for the Essar Power submitted that in the present proceedings, GUVNL is contending that DPC ought to have been computed on a compound interest basis, rather than on a simple interest basis and it should be applied at the rate applicable to other HTP-I Consumers of DGVCL. This contention is, contrary to GuVNL claim before the GERC, which was based solely on Clauses 5.3 and 5.4 of the PPA and on this ground alone, the findings in the Impugned Order at paras 15.53 to 15.55 needs to be set aside, since the grant of interest to GUVNL is entirely based on the terms of the PPA. As such Clauses 5.3 and 5.4 of the PPA ensure to the benefit of Essar Power in its contractual claim under the PPA (wrongful deduction) and not to the claim of GUVNL for damages *de hors* the PPA.

67. The GUVNL's claim for compound interest on the basis of the HTP-1 tariff for consumers of DGVCL is incorrect on several grounds; a claim for compound interest must be grounded either in contract or in law, and GuVNL has failed to plead either; GuVNL's claim pertains to damages, which constitute an unascertained sum and become due only upon adjudication as

payable. Consequently, there cannot be any interest at all, let alone compound interest, from the date of the cause of action till the date of the adjudication ("***Union of India v. Raman Iron Foundry", (1974) 2 SCC 23, Paras 7 & 11).*** GUVNL's further contention before this Tribunal, that if Essar Power is granted compound interest in its Appeal No. 692/2020, it ought, by parity of reasoning, to be granted compound interest in the present matter as well, and necessitates outright rejection

Discussion and Analysis

68. The State Commission, in the Impugned Order, has considered the DPC on a simple interest basis for both compensation towards energy diversion and the refund of the deemed generation incentive, in terms of Article 5.3.4 of the PPA. Learned counsel submitted that similar DPC methodology was applied to Essar Power in another appeal against GUVNL, as determined in another order, which is under challenge before this Tribunal wherein Essar Power has sought the application of Compound Interest. The learned senior counsel for GUVNL has contended that the DPC should have been on Compound interest basis and also at the rate applicable for delayed payments by retail supply consumers, as the diversion of power is to be considered as deemed supply of power by GEB to Essar Steel.

69. The issue of DPC has not been determined in the GERC 2009 Order and so this issue needs deliberation in terms of various provisions of the PPA and the applicable legal prepositions.

70. In the PPA it was the liability of GUVNL to make payment to Essar Power for the energy received and in case of delay in making such payment, the delayed payment charges have been defined under the heading "Due

Date and Payments" in Article 5.3.4 of PPA signed between Essar Power and GUVNL, which is reproduced below:

"*5.3.4 Delayed Payment charges:*

> ***If payment in full is not remitted on or before the close of business on Due Date, delayed payment charge on the unpaid amount due for each day overdue will be imposed by the Company at the rate <u>of 2% over the average interest rate charged by Board's banks on working capital loans during the preceding 12 months</u>, from the 31st day of day of the last day of the period to which the bill pertains."***

71. In the present specific case, the payments on account of diversion of power by Essar Power to Essar steel are required to be made to GUVNL by Essar Power. We note from the Impugned Order that GUVNL has sought Delayed Payment Charge as per the provisions of PPA and the State Commission has determined the same on simple interest basis as per Article 5.3.4, which was same as allowed to Essar Power for their claim on GUVNL in another order (dated 05.05.2023 in I.A. 15 of 2022 in Petition No. 1002 of 2010), which is presently under challenge in Appeal No. 692 of 2023.

72. GUVNL has fairly stated that as per settled principle of law ordinarily courts are not supposed to grant interest on interest, except where it has been specifically provided under the statute or where there is specific stipulation to that effect under the terms and conditions of the contract. Having acknowledged this legal principle and conceded that PPA stipulates DPC solely on a simple interest basis, except under certain conditions, which is not the present condition, we do not find merit in the submissions of GUVNL that DPC should be on compound interest basis because another

Appeal challenging the simple interest payable under Article 5.4.3 by Essar Power is on the file of this Tribunal and for parity, in case that appeal is decided in favour of Essar Power, GUVNL should also be given compound interest, however GUVNL has not made any submissions that as per Article 5.4.3 of PPA, the DPC is meant to be on compound interest basis rather than simple interest .

73. The Supreme court in the judgement "***D. Khosla & Co. v Union of India (2024) 9 SCC 476***, made reference to few other supreme court judgments like "*State of Haryana* v. *S.L. Arora & Co."* (2010) 3 SCC 690; "*Hyder Consulting (UK) Ltd. v. State of Orissa", (2015) 2 SCC 189; "UHL Power Co. Ltd. v. State of H.P.", (2022) 4 SCC 116 and* held that that courts cannot grant compound interest on delayed payments if it is not specifically provided for in the contract. The relevant extract of D.Khosla (supra) is as under:

> ***"24.*** *In the light of the above legal provisions and the case law on the subject, it is evident that ordinarily courts are not supposed to grant interest on interest except where it has been specifically provided under the statute or where there is specific stipulation to that effect under the terms and conditions of the contract. There is no dispute as to the power of the courts to award interest on interest or compound interest in a given case subject to the power conferred under the statutes or under the terms and conditions of the contract but where no such power is conferred ordinarily, the courts do not award interest on interest."*

In view of the above deliberation, we are unable to concede to the contention of GUVNL that DPC at compound interest should be given.

74. Learned senior counsel for GUVNL has also contended that since the diversion of power is to be considered as deemed supply of power from GEB to Essar Steel and therefore the DPC applicable to HT consumers should be payable to GUVNL. As noted in the GERC 2009 Order, PPA is silent on the quantum of compensation payable on account of diversion of power and for the purpose of compensation the diversion of power shall be considered to be deemed supply of power by GEB to Essar Steel and the formula for compensation as HTP-1 Energy Tariff minus Variable cost has been worked out. The DPC rate specified in the tariff Order is applicable when the invoice is raised on the consumer and payment is not made within the stipulated time, thereby the DPC as per prevalent Tariff order becomes applicable. In the present case, there is neither a direct contract or agreement between GUVNL and Essar Steel, nor the liability has been affixed on Essar Steel for payment of compensation, or, Essar Steel defaulted in making the payment of Invoice raised on them, but the amount has been worked out as compensation payable by Essar Power to GUVNL for diversion of power, therefore, in our view, the DPC applicable to HT consumer is inapplicable and DPC applicable as per PPA for delay in payment by GUVNL to Essar Power is a rational approach when payment liability is affixed on Essar Power. We therefore find no infirmity in the Impugned Order regarding the applicability of DPC as per the PPA on simple interest.

75. In view of the above deliberations, Impugned Order is interfered to the limited extent and remanded back to the State Commission for fresh Consideration on the issues discussed above, including the computation of energy diversion based on half hourly data, the quantification of actual amount already deducted by GUVNL, and the deemed generation incentive

to be refunded. The Respondent Commission shall, after giving both GUVNL and Essar Power a reasonable opportunity of being heard, pass orders afresh in accordance with law and in terms of the directions issued in the order now passed by us. With these directions both the captioned appeals and the IAs, if any, are accordingly, disposed of.

Pronounced in open court on this the 21st day of March, 2025.

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

Reportable / ~~Non-Reportable~~

ts/dk/ag