IN THE APPELLA TE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 358 OF 2018 & IA No. 1273 OF 2018 &
IA No. 1118 OF 2019 & IA No. 575 OF 2019 &
IA No. 1219 OF 2021

Dated: 22nd November, 2021

Present: Hon’ble Mr. Ravindra Kumar Verma, Officiating Chairperson
Hon’ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

GRIDCO Limited
Through Chairman and Managing Director,
(Wholly owned Undertaking of
Government of Odisha and having its
Registered Office at Janpath,
Bhubaneswar — 751022), Odisha. …. Appellant(s)

Versus

1. **M/s. Vedanta Limited**
Through the Managing Director,
1st Floor, Module C-2, Fortune Tower,
Bhubaneswar -751013, Odisha, …. Respondent No.1

2. **The Commissioner-cum-Secretary (Energy)**
Department of Energy, Government of
Odisha Bhubaneswar - 751001, Odisha. …. Respondent No.2

3. **The Chief Load Dispatcher**
SLDC, Mancheswar Railway Colony,
Bhubaneswar-751010, Odisha. …. Respondent No.3

4. **The Chairman-cum-Managing Director**
Odisha Power Transmission Corporation
Ltd. (OPTCL),
Bhubaneswar-751 022, Odisha. …. Respondent No.4

5. The Authorised Officer
WESCO Utility
At/PO: Burla, Dist-Sambalpur-768017,
Odisha. …. Respondent No.5

6. Odisha Electricity Regulatory Commission
Through its Secretary
BidyutNiyamak Bhawan
Plot NO. 4, Chunokoili
SalashreeVvihar
Bhubaneswar – 751 024, Odisha …. Respondent No.6

Counsel on record for the Appellant(s): **Mr. Raj Kumar Mehta**
Ms.HinashiAndley

Counsel on record for the Respondent(s): **Mr. Hemant Singh**
Mr. Nishant Kumar
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Mr. Jyotshna Khatri
Mr. Lakshyajit Singh Bagdwal
Mr. Soumya Singh for R-1

Mr. Soumyajit Pani for R-2

Mr. Sakesh Kumar for R-3 & R-4

Mr. Ganesan Umapathy
Mr. Rutwik Panda
Mr. Anshu Malik for R-6

JUDGMENT

PER MR.RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. The present appeal has been filed by GRIDCO Limited (hereinafter referred as **"the Appellant"**) against the impugned order dated 17.04.2017 passed by the Odisha Nadu Electricity Regulatory

Commission (hereinafter referred as **"the Commission/State Commission/OERC/Respondent No.6"**), in Case No. 08 of 2017.

2. The Appellant, GRIDCO Limited is a wholly owned company of the Government of Odisha and is carrying on the functions of bulk supply of electricity to four Distribution companies in the State of Odisha w.e.f. 01.04.2005.

3. M/s. Vedanta Limited is the Respondent No.1 (hereinafter referred as "the Respondent No.1")

4. Department of Energy, Government of Odisha is the Respondent No.2 (hereinafter referred as "the Respondent No.2")

5. State Load Despatch Centre, Bhubaneswar, is the Respondent No.3 (hereinafter referred as "the Respondent No.3/SLDC").

6. Odisha Power Transmission Corporation Ltd., is the Respondent No.4 (hereinafter referred as "the Respondent No.4/OPTCL").

7. Odisha Power Transmission Corporation Ltd., is the Respondent No.4 (hereinafter referred as "the Respondent No.4/OPTCL").

8. WESCO Utility is the Respondent No.5 (hereinafter referred as "the Respondent No.5/WESCO").

9. The Appellant GRIDCO Limited is a wholly owned Company of the Government of Odisha and is carrying on the functions of Bulk Supply

of Electricity to four Distribution Companies in the State of Odisha w.e.f. 01.04.2005.

10. MoU dated 26.09.2006 was executed between Government of Odisha and M/s. Sterlite Energy Limited ('Sterlite Energy") for setting up of a Thermal Power Plant of 2400 MW capacity at an estimated expenditure of Rs. 7482 crore within a period of 45 months through MoU Route.

11. Pursuant to MoU dated 26.09.2006, Principal Power Purchase Agreement dated 28.09.2006 ("PPA") was executed between Sterlite Energy and GRIDCO. GRIDCO filed a petition before OERC for approval of the PPA being Case No. 44/2006.

12. First Unit of the Generating Station achieved the COD on 10.11.2010, Second Unit achieved the COD on 30.03.2011, the Third Unit achieved COD on 19.08.2011 and fourth Unit achieved COD on 26.04.2012.

13. Consolidated PPA dated 19.12.2012 was executed between GRIDCO and erstwhile Sterlite Energy (predecessor of Respondent No. 1, Vedanta Limited).

Interim Order dated 12.06.2013 passed by OERC

14. **By order dated 12.06.2013,** OERC approved the consolidated PPA as well as the Tariff of the Generating Station. OERC also directed erstwhile Sterlite Energy to submit the Revised Bill of Monthly Fixed Charges based on the approved Annual Fixed Charges and the

Month Wise Energy Charges as per the Formula given in the Order. By the said order dated 12.06.2013, State Commission directed as under:

"57. In conclusion, the Commission direct as follows:

(a) M/s. SEL will submit the revised bill of fixed charges monthwise based on the approved Annual Fixed Charges and the month-wise Energy Charge as per formula given in this Order.
(b) M/s. SEL and GRIDCO will regularize the payment of infirm power received by GRIDCO prior to CoD of the generating unit at the variable charge rate of that particular month.
(c) SLDC should schedule the total power of the project considering the full requirement of GRIDCO as per its own entitlement, full requirement of VAL-II and other Short Term Open Access (STOA) customer of M/s. SEL.
(d) The day-ahead generating availability for the project as a whole shall be declared by the Generator to SLDC and SLDC shall schedule GRIDCO's drawl from Generator's bus bar for the project as a whole. SLDC shall also certify Plant Availability Factor Achieved during the Month (PAFM) in percentage for the relevant month.
(e) The tariff of M/s. SEL – IPP, so determined in this Order is valid upto 31.03.2014. M/s SEL – IPP shall file its tariff application for the F.Y. 2014-15 onwards at least three months prior to validity period i.e. on or before 01.01.2014."

15. Erstwhile Sterlite Energy filed a Review Petition registered as Case No. 54 of 2013 in the matter of review of Final Order dated 12.06.2013

in Case Nos. 117/2009, 31/2010 and 56/2012. Sterlite Energy also filed an application seeking Interim relief and grant of status quo prior to the Tariff Order dated 12.06.2013.

16. By order dated 25.09.2013 OERC disposed of the Review Petition filed by Sterlite Energy.

Appeal No. 25 of 2014 by SEL

17. The order dated 12.06.2013 was challenged by Sterlite Energy Limited being Appeal No. 25 of 2014 before this Tribunal mainly on the following grounds:

(i) Disallowance on account of denial of treatment of free reserves of Parent Company as equity (30:70).
(ii) Disallowance due to incorrect computation of normative loan and weighted average rate on interest on loan.
(iii) Disallowance of actual coal cost while computing variable charges.
(iv) Disallowance of higher Auxiliary consumption;
(v) Disallowance of Higher Station Heat Rate

Interim Order dated 28.03.2014 passed by this Tribunal

18. This Tribunal passed Interim Order dated 28.03.2014 directing payment of the balance dues for the period August 2010 to February 2014 on the basis of Capacity Charges to be worked out based on Plant Availability Factor computed considering the capacity of 400 MW instead of installed capacity of 600 MW in view of the

Transmission Constraint of the 220 KV VAL-Budhipadar Double Circuit Line. This Tribunal also directed payment of current dues.

Appeal No. 179 of 2014 by GRIDCO

19. The Appellant filed an appeal on 09.05.2014 before this Tribunal against the direction contained in Para 16 of the order dated 12.06.2013 of the Commission with regard to the Transmission Constraint of the 220 KV VAL-Budhipadar Double Circuit Line being Appeal No. 179 of 2014. The appeal filed by GRIDCO was mainly to challenge the following observations of OERC in Para 16 of the order dated12.06.2013:

> *" XXXXXXXXXXX*
> *We agree with the contention of the petitioner that due to Transmission Constraint they have not been able to generate at full capacity and inject the state quota of power to the State Commission System.*
>
> *XXXXXXXXXXX*
> *The 220 KV double circuit transmission line running between M/s.SEL and Budhipadar Grid sub-station of OPTCL is capable of carrying power around 400 Mw in sustainable mode for which M/s. SEL has limited the generation from Unit-II accordingly.*
> *XXXXXXXXXXX*

In the said appeal filed by GRIDCO it was also urged that under the PPA installation of transmission system upto OPTCL Bus Bar was the responsibility of Sterlite."

20. The Appellant made payment of Rs.164 Crores in instalments to Sesa Sterlite in compliance with the interim orders dated 28.03.2014 and 29.11.2014 respectively subject to final order in the Appeal.

21. The IB-Meramundali 400 KV Double-Circuit Line was restored and synchronised with the OPTCL Grid at 400/220/132 KV Meramundali Sub-Station on 06.01.2016.

Judgment dated 10.05.16 in Appeal No. 25 of 2014

22. By separate judgments dated 10.05.2016, This Tribunal dismissed appeals filed by Sterlite and GRIDCO. However in the judgement in Appeal No. 25 of 2014, This Tribunal observed as under:

Para 8(a):

a) As per the relevant provisions contained in the consolidated PPA between the Appellant and the Respondent No. 2 dated 19.12.2012, the capacity allocated to the Respondent No. 2 was 25% of the installed capacity of the subject thermal power station. The Respondent No. 2's share of power ought to be made available to Respondent No. 2 by the Appellant at the bus bar of OPTCL nearest EHV sub-station at required voltage level.

Para 8(c):

From the above it's observed that for installation of transmission system up to the STU bus bar was the Appellant's responsibility

and the role of the STU and the Government of Odisha was limited only to providing assistance in obtaining the state statutory clearances to the Appellant.

Para 8(g):

There is no doubt in our mind regarding the bus bar of Budhipadar sub-station of the STU is the point of delivery of power, as per relevant provisions of the consolidated PPA."

Judgment dated 10.05.16 in Appeal No. 179 of 2014

23. In the judgement dated 10th May, 2016 in Appeal No. 179 of 2014, the Tribunal observed as under:

"Para 7(viii):

We do take note of the PPA condition that the state share of power shall be made available to the Appellant by the Respondent No. 1 at the bus bar of OPTCL nearest EHV sub-station *at required voltage level and the Respondent No. 2 would bear the cost of dedicated transmission line from their generating plant to the designated grid sub-station of STU at available voltage level including augmentation of existing equipment/transmission system if any of the STU.*

Para 7(ix):

After accepting the State Commission's considered view of 400 MW of power transmission in the sustainable mode for the

transmission line in question for that specific period, the ***auxiliary power consumption as well as Station Heat Rate on account of partial loading as considered by the State Commission in its Impugned Order would stand justified****. It is an established fact that if the unit operates at a partial load, it does affect adversely the normative parameters such as auxiliary power consumption, Station Heat Rate etc.* ***Hence, we would not like to interfere with the State Commission's finding in this regard in its Impugned Order".***

24. Respondent No. 1 filed applications for Clarification/Rectification (I.A No. 319-320 of 2016) for rectification/clarification of the above observations in the judgment dated 10.05.2016. Sterlite also filed Review Petition No. 12 of 2016 for the same relief. The applications for the clarification/rectification as well as the Review Petition were dismissed by this Tribunal by order dated 22.07.2016.

25. Respondent No. 1 filed True-up application for the period 2010-11 to 2013-14 based on This Tribunal's direction in the judgement dated 10th May, 2016 in Appeal No. 25 of 2016.

26. Subsequently, Sesa Sterlite filed yet another application (I. A. No. 535 of 2016) in Appeal No. 25 of 2016 for a clarification that the Tribunal has not directed refund/return of the amount of Rs. 164 Crore. The said application was also dismissed by this Tribunal by order dated 18.10.2016.

27. Respondent No. 1 filed appeals before the Supreme Court against the judgments dated 10.05.2016 and order dated 18.10.2016 of This

Tribunal. All the appeals filed by Respondent No. 1 were listed for admission before Supreme Court on 10.02.2017, 03.03.2017 and 10.03.2017. After arguments at length, **since the Supreme Court was not inclined to admit the appeals, on 10.03.2017 Counsel for Sterlite sought permission to withdraw the appeals and the appeals were accordingly dismissed as withdrawn.**

28. Case No. 8 of 2017 was filed by Respondent No. 2 before OERC in January, 2017 (While Civil Appeals before Hon'ble Supreme Court were sub-judice) raising the following issues along with objections relating to ARR application of GRIDCO for F.Y. 2017-18:

(i) Direct GRIDCO to make payment of Rs. 164 crore on immediate basis to Vedanta Ltd. along with Carrying Cost upto the date of actual Payment;

(ii) Direct GRIDCO to pay amount of Rs. 36.90 crore on immediate basis along with the carrying cost of Rs. 6.642 crore for the differential coal cost of Rs. 36.90 crore on immediate basis;

(iii) Issue direction to GRIDCO for signing of the PPA and comply with the OERC's order dated 27.01.2015;

(iv) Direct SLDC to follow the procedure as mentioned in CERC/OERC for calculating the PAFM.

29. The Appellant, GRIDCO Limited filed a Written Submission dated 20.02.2017 in which it was, inter-alia, submitted as under:-

(a) The said amount of Rs. 164 crore was paid to M/s. Vedanta Ltd as per interim orders of APTEL dated 28.03.2014 and 29.11.2014 in Appeal No. 25 of 2014 (against the period 2010-11 to 2013-14).

(b) However, as per the final order dated 10th May, 2016 in Appeal No. 25 of 2014, APTEL upheld the OERC Order 12.06.2013 in its entirety. It is pertinent to mention here that, as per the OERC order 12.06.2013, no such amount is payable by GRIDCO to the Petitioner M/s. Vedanta Ltd.

(c) The Petitioner M/s. Vedanta Ltd has challenged the APTEL Orders based on which GRIDCO has issued notice for recovery/adjustment of Rs. 164 crore, before the highest Court of Law i.e. Hon'ble Supreme Court of India. Therefore, it is legally untenable to raise the same issue once again before the Commission when the matters are pending before the Supreme Court on question of admission and issue of notice thereof.

30. OERC passed the final order in Case No. 8 of 2017 on 17.04.2017 in which it was, inter-alia, held as under:

"…………..In normal case the PAFM of a generating station should be computed basing on the Regulations made by the appropriate Commission. However, the Commission in its order dated 12-06- 2013 in Case No. 117/2009, 31/2010 and 56/2012 has observed that the 220 KV DC line running between M/s. Vedanta Ltd and Budhipadar Grid sub-station of OPTCL is capable of carrying power around 400MW in sustainable mode for which M/s. Vedanta has restricted generation from Unit-II. The Hon'ble APTEL in their judgement in appeal No. 25 of 2014 dated 10-05-2016 has also preferred not to interfere in the above said

views of the Commission. Therefore, for calculating PAFM of the IPP, the carrying capacity of the line at 400MW in sustainable mode should be taken into consideration. Accordingly, while calculating PAFM the installed capacity of the IPP (Unit-II) should be taken as 400MW or actual injection whichever is higher. The aforesaid mechanism should be adopted for the period from November 2010 till the Transmission Constraint was resolved."

Submissions of the Appellant

31. The present Appeal arises out of order 17.04.2017 passed by Odisha Electricity Regulatory Commission (Commission, for Short) in Case No. 08 of 2017.

32. By the impugned order, the Commission has directed that while calculating PAFM (Plant Availability Factor for the Month) for computation of Capacity Charge, Installed Capacity of IPP (Unit-II) should be taken as 400 MW or actual injection whichever is higher (as against the actual Installed Capacity of 600 MW) and the said mechanism should be adopted for the period from November, 2010 till the Transmission Constraint was resolved (i.e. 06.01.2016).

33. The above direction is based on the erroneous premise that in the order dated 12.06.2013 the Commission had taken the view that due to Transmission Constraint the Transmission Line of Vedanta between the Generating Station and OPTCL Grid Sub-Station is capable of carrying 400 MW as against Installed Capacity of 600 MW

and the finding with regard to Transmission Constraint was upheld by this Tribunal in judgments dated 10.05.2016 in Appeal No. 25 of 2014.

34. It is the case of Appellant that following issues arise for consideration in the present case:

(i) Whether the direction of the Commission in the impugned order that while calculating PAFM (Plant Availability Factor for the Month) for computation of Capacity Charge, Installed Capacity of IPP (Unit-II) should be taken as 400 MW or actual injection whichever is higher, is justified in view of the categorical finding of the Tribunal (in the judgments dated 10.05.2016 in Appeal No. 25 of 2014 and Appeal No. 179 of 2014) to the effect that under Clause 4.0 of the Consolidated PPA dated 19.12.2012, it was the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL (which was held to be the 'Delivery Point') and to construct the Transmission line for that purpose at its own cost?

(ii) Whether the aforesaid direction of the Commission for computation of PAFM on the basis of the transmission constraint can be upheld on the basis that in the judgments dated 10.05.2016 in Appeal No. 25 of 2014 and Appeal No. 179 of 2014 while holding that under Clause 4.0 of the Consolidated PPA dated 19.12.2012, it was the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL and to construct the Transmission line for that purpose at its own cost, This Tribunal has upheld the direction of the Commission in the order dated 12.06.2013 computing the Auxiliary

Consumption and State Heat Rate only taking into account the Constraint in the Transmission Line?

Issue No. 1:

35. The following findings were recorded by the Tribunal in the judgment dated 10.05.2016 in Appeal No. 25 of 2014:

"a)…………The Respondent No. 2's share of power ought to be made available to Respondent No. 2 by the Appellant at the bus bar of OPTCL nearest EHV sub-station at required voltage level, and the OPTCL as State Transmission Utility ("STU") with the help of Government of Odisha, will assist the Appellant in getting clearances/approvals within the state jurisdiction with clear stipulation that all the responsibility for obtaining such clearances/approvals shall remain with the Appellant and the Appellant would need to bear cost of:

i. dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU at available voltage level.
ii. interfacing at both the ends including works at the Grid Sub-station, cost of Bays etc.
iii. Replacement/ up-gradation/ augmentation of existing equipments / transmission system(s) if any of STU."

……………………………………………………………………………….

"b) From the above it is observed that for installation of transmission system up to the STU bus bar was the Appellant's responsibility and

the role of the STU and the Government of Odisha was limited only to providing assistance in obtaining the state statutory clearances to the Appellant."

"c) The generating station of the Appellant is connected to STU network at Budhipadar grid sub-station through 220 KV double circuit line."

……………………………………………………………………………….

d) There is no doubt in our mind regarding the bus bar of Budhipadar sub-station of the STU is the point of delivery of power, as per relevant provisions of the consolidated PPA."

36. The following finding was recorded by the Tribunal in the judgment dated 10.05.2016 in Appeal No. 179 of 2014:

……………………………………………………………………………….

"viii) We do take note of the PPA condition that the state share of power shall be made available to the Appellant by the Respondent No. 1 at the bus bar of OPTCL nearest EHV sub-station at required voltage level and the Respondent No. 2 would bear the cost of dedicated transmission line from their generating plant to the designated grid sub-station of STU at available voltage level including augmentation of existing equipment/transmission system if any of the STU."

37. In both judgments it was categorically held that State share of power had to be made available to GRIDCO by Sterlite at the Bus bar of OPTCL nearest EHV Sub-station at required Voltage level.

38. There was no direction in either of the judgments of the Tribunal that the Transmission constraint of the 220 KV Line will be taken into consideration for calculation of PAFM (Plant Availability Factor for the Month) % by SLDC.

39. The Review Petition and the appeals filed by Vedanta before the Hon'ble Supreme Court challenging the findings of the Tribunal with regard to the Delivery Point having been dismissed, the above findings of the Tribunal in the judgments dated 10.05.2016 in Appeal No. 25 of 2014 and Appeal No. 179 of 2014 to the effect that under Clause 4.0 of the Consolidated PPA dated 19.12.2012, it was the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL (which was held to be the 'Delivery Point') and to construct the Transmission line for that purpose at its own cost have attained finality.

40. In view of the findings of the Tribunal, it was the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL (which was held to be the 'Delivery Point') and to construct the Transmission line for that purpose at its own cost having attained finality, the Commission grossly erred in directing that Transmission Constraint should be taken into consideration for calculation of the PAFM for computation of Capacity Charges.

41. The direction in the impugned order that Transmission Constraint should be taken into consideration for calculation of the PAFM for computation of Capacity Charges is, therefore, in the teeth of judgments dated 10.05.2016 of the Tribunal.

42. It is submitted that Vedanta cannot be allowed to take advantage of its own default in not constructing the Transmission Line by directing payment of Capacity Charges on the basis of PAFM Computed taking the Constraint of the Transmission Line into consideration. This will be against the well settled principle of law that a person cannot be allowed to take advantage of its own wrong.

43. As a matter of fact, during the course of hearing on 01.11.2021, it was conceded on behalf of Vedanta that the findings of the Tribunal in the judgments dated 10.05.2016 in Appeal No. 25 of 2014 and Appeal No. 179 of 2014 with regard to the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL and to construct the Transmission line for that purpose at its own cost have attained finality.

44. The direction of the Commission for computation of the PAFM taking the Transmission constraint in 220kV Double Circuit VAL-Budhipadar Line into consideration is, therefore, liable to be set aside as being contrary to the judgments dated 10.05.2016 of the Tribunal in Appeal No.25 of 2014 and Appeal No.179 of 2014 which have attained finality.

Issue No. 2:

45. The submission on behalf of Vedanta that in the judgments dated 10.05.2016 in Appeal No. 25 of 2014 and Appeal No. 179 of 2014 while holding that it was the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL and to

construct the Transmission line for that purpose at its own cost the Tribunal had upheld the direction of the Commission in the order dated 12.06.2013 determining the Auxiliary Consumption and Gross Station Heat Rate taking the Transmission Constraint into consideration, and therefore the Commission was justified in directing computation of PAFM % on the basis of Transmission Constraint by the impugned order is misconceived and untenable.

46. During the pendency of Appeal No. 25 of 2014, on the application filed by Vedanta for stay of the order dated 12.06.2013 of the Commission interim order dated 28.03.2014 was passed by This Tribunal directing that Transmission Constraint should be taken into consideration for computation of PAFM for payment of Capacity Charges. The relevant extract from the said order is quoted below:

> *"10. In view of the above accepted position in the impugned order by the State Commission regarding transmission constraints, we feel that for computation of the Plant Availability Factor and Fixed Charges for the power project, the transmission constraints limiting the evacuation capacity to 400 MW should be taken into account. According to the PPA, the Applicant/Appellant has to make available the capacity at the bus bars of the generating station and it is the obligation of the GRIDCO to make the arrangement for evacuation of power from such delivery points.*
>
> *11.*
>
> *…………………………………………………………………...*

12. In view of above we pass the following interim order, subject to adjustment on the disposal of the main Appeal.

i) There is no dispute regarding the Annual Fixed Charges for unit no. 2 for the period 2010-11 to 2013- 14. The Capacity Charges payable to the Applicant/Appellant for the FYs 2010-11 to 2013-14 shall be worked out based on Plant Availability Factor computed considering the transmission constraints with capacity of 400 MW of the 220 KV Double Circuit line from the SESA Sterlite Plant to Budhipadar sub-station of OPTCL instead of installed capacity of 600 MW…….”

47. From the above observations it is evident that the interim order dated 28.03.2014 was passed subject to adjustment on the final disposal of the main appeal <u>on the basis that</u>:

(i) Vedanta had to make the power available at the Bus Bar of the Generating Station;

(ii) There was Transmission Constraint in the Transmission Line from the Generating Station to the Budhipadar Grid Sub Station of OPTCL;

(iii) It was GRIDCO’s obligation to make arrangement for evacuation of Power from the Bus Bar of Generating Station;

48. The basis of the interim order dated 28.03.2014 was wiped off by the categorical findings in the final judgments dated 10.05.2016 in Appeal No. 25 of 2014 and Appeal No. 179 of 2014 that under Clause 4.0 of

the Consolidated PPA dated 19.12.2012, it was the obligation of Vedanta to deliver the power at the Bus-bar of Budhipadar Grid Sub-Station of OPTCL (which was held to be the 'Delivery Point') and to construct the Transmission line for that purpose at its own cost.

49. After the judgment dated 10.05.2016 of the Tribunal dismissing Appeal No. 25 of 2014 was delivered, notice was issued by GRIDCO to Vedanta seeking refund / adjustment of Rs. 164 Crore paid by GRIDCO on account of the difference in PAFM due to Transmission Constraint pursuant to the interim order dated 28.03.2014 of the Tribunal in the said appeal.

50. Sterlite filed an Application for Clarification/Directions regarding judgment dated 10.05.2016 (being I.A. No. 535 of 2016 in Appeal No. 25 of 2014) with regard to Notice dated 19.09.2016 of GRIDCO seeking refund of Rs. 164 Crore (paid by GRIDCO on account of the difference in PAFM on account of Transmission Constraint) on the basis of interim order dated 28.03.2014, with the following prayer:

"7. "In view of the above submission's it is respectfully prayed that, This Tribunal in the interest of justice may be pleased to clarify that:

a) It has not directed for refund/return of the admitted amount of Rs.164 Crores paid by GRIDCO to Vedanta Ltd and ….".

51. I.A. No. 535 of 2016 for clarification filed by Vedanta was dismissed by the Tribunal by order dated 18.10.2016.

52. Vedanta filed appeal before Hon'ble Supreme Court against order dated 18.10.2016 in I.A. No. 535 of 2016 of the Tribunal being Civil Appeal No. 12362 of 2016.

53. By order dated 10.03.2017, Civil Appeal No. 12362 of 2016 was dismissed as withdrawn by the Hon'ble Supreme Court on the submission of the Counsel for Vedanta on instructions.

54. The claim of Vedanta which was rejected by the Tribunal by dismissal of I. A. No. 535 of 2016 by order dated 18.10.2016 which has attained finality in view of the order dated 10.03.2017 dismissing the appeal filed by Vedanta against the said order as withdrawn, has been allowed by the impugned order.

55. It is submitted that Vedanta having raised the issue of payment of Capacity Charges on the basis of PAFM computed on the basis of transmission constraint of 400 MW in the Transmission Line by way of application for stay in Appeal No. 25 of 2014 (as is evident from the extract of the interim order dated 28.03.2014 quoted above) and the said issue having been finally decided against Vedanta by order dated 18.10.2016 of This Tribunal dismissing IA No. 535 of 2016 (which has attained finality in view of the appeal filed by Vedanta against the said order dated 18.10.2016 having been dismissed as withdrawn by order dated 10.03.2017 of Hon'ble Supreme Court), the order dated 18.10.2016 rejecting the claim of Vedanta for payment of Capacity Charges on the basis of PAFM computed on the basis of transmission constraint of 400 MW, would operate as res-judicata.

56. It is most respectfully submitted that the claim of Vedanta for payment of Capacity Charges on the basis of PAFM computed on the basis of transmission constraint of 400 MW having been finally rejected by the Tribunal by order dated 18.10.2016 and the said order dated 18.10.2016 having attained finality (in view of the appeal filed by Vedanta against the said order having been dismissed as withdrawn by order dated 10.03.2017 of Hon'ble Supreme Court), it was not open to Vedanta to once again raise the same issue through the back door. It was also not permissible for the Commission to revisit the said issue once again. For the same reason, this Tribunal also cannot revisit the said issue which has been finally settled, once again in the present appeal.

57. It is thus submitted that even though This Tribunal upheld the order dated 12.06.2013 of the Commission determining the Auxiliary Consumption and Gross Station Heat Rate on the basis of the transmission constraint of the Transmission Line, it consciously and specifically rejected the claim for computation of PAFM% on the basis of such Transmission Constraint.

58. The submission on behalf of Vedanta that the Commission was justified in directing computation of PAFM on the basis of Transmission Constraint since the Tribunal had upheld computation of Auxiliary Consumption and Gross Station Heat Rate on the basis of the transmission constraint is, therefore, wholly misconceived and devoid of any merit.

59. Without prejudice to the above, it is further submitted that while Auxiliary Consumption and Station Heat Rate are Operational

Parameters whereas PAFM% is only a component to be taken into consideration in computation of Tariff i.e. monthly Fixed/Capacity Charges. This is evident from a perusal of Regulation 13 and 21 of CERC Tariff Regulations, 2009 which are applicable to the present case. Transmission Constraint only affects Operational Parameters related to part load operation of a Thermal Unit. In fact, the Formula for computation of PAFM % takes the Auxiliary Energy Consumption into consideration and the Formula for computation of Energy Charges takes into account both Auxiliary Energy Consumption as well as Gross Station Heat Rate.

60. From the above, it is evident that the benefit of the higher Auxiliary Energy Consumption and Gross Station Heat Rate on the basis of Transmission Constraint is indirectly passed on to Vedanta in computation of PAFM% for payment of Capacity Charges as well as in computation of Energy Charges.

61. It is for this reason that in the earlier proceeding while granting benefit of transmission Constraint in determination of Auxiliary Consumption and Station Heat Rate the Commission as well as This Tribunal declined to extend the benefit of transmission constraint in computation of PAFM.

62. Lastly, it is submitted that issues with regard to determination of higher Auxiliary Consumption and Station Heat Rate as well as PAFM % were raised in the earlier proceedings culminating in the judgments dated 10.05.2016 in Appeal No. 25 and 179 of 2014 and finally the order dated 18.10.2016 in I.A. No. 535 of 2016. Whatever relief this Tribunal deemed appropriate in the facts and circumstances of the

case was granted in the said judgments which have attained finality. It is, therefore, not open to the Tribunal to reopen the issue of calculation of PAFM % once again in the present appeal.

63. In the above premises, the impugned order is erroneous in law as well as on the facts of the record and is liable to be set aside.

Submissions on behalf of Respondent No.1/Vedanta

64. Appellant has submitted that these submissions have been filed based on the following broad contentions:

i. That, the entire issue is squarely covered by the earlier judgments of this Tribunal and also by the Hon'ble Supreme Court and cannot be re-agitated;

ii. That, on account of the present litigation, GRIDCO is wilfully not making the legitimate payments to Vedanta; and

iii. That, the averments made by GRIDCO and OPTCL that the responsibility to construct transmission line was on Vedanta, cannot at all be considered as this issue also stands covered by the previous judgments of this Tribunal.

RE: The entire issue is squarely covered by the earlier judgments of this Tribunal and also by the Hon'ble Supreme Court, and cannot be re-agitated

65. It is submitted that Vedanta owns and operates a 2400 MW (4x600 MW) coal fired power plant at Jharsuguda, Orissa, out of which power from Unit-II (600 MW) is supplied to GRIDCO, in terms of a Power Purchase Agreement dated 19.12.2012.

66. Accordingly, Vedanta was supplying power to GRIDCO from its Unit-II for the period starting from 10.11.2010 to 05.01.2016, by utilising the SEL-Budhipadar 220 KV D/C transmission line constructed by OPTCL/ Respondent No. 4, which was connected to the sub-station of OPTCL at Budhipadar.

However, GRIDCO could not draw the full State share to the extent of the total capacity from Unit-II (600 MW) due to constraint in the transmission system, as the above Budhipadar 220 kV D/C line could not cater more than 400 MW power. Such constraint was clearly beyond the control of Vedanta. In fact, Vedanta was also constrained to operate its Unit-II in part load condition so that 400 MW of power could be supplied to GRIDCO in a sustainable mode.

67. It is submitted that the issue of transmission constraint was recognized by the OERC while passing an order dated 12.06.2013 in Case No. 117 of 2009, wherein under paras 10 and 16, it was held as under:

"10. Regarding Transmission / Wheeling of Power generated by this power plant it is indicated in the PPA that "Power to GRIDCO shall be made available by SEL at the Bus bars of the Station connected to the transmission lines of OPTCL / PGCIL and it shall be the obligation and responsibility of

GRIDCO to make the required arrangement for evacuation of power from such delivery points. SEL shall make independent arrangements for evacuation of the remaining power from the station at SEL costs and responsibility." On this issue M/s SEL has submitted that under the PPA the obligation to prepare infrastructure for evacuation is with GRIDCO and it is also quite clear that the delivery point for supply of power to GRIDCO is the bus-bar of the generating station and it is the obligation of GRIDCO to make necessary arrangements for evacuation of power from the bus-bar in order to avail state share of power. SEL further submitted that they are reviving the abandoned 400 KV Ib-Meramundali line of OPTCL on deposit work basis and hopeful that upon completion of the same, which is expected by July, 2013, the unit connected to OPTCL Network will be able to run at full 600 MW capacity and normative parameters of operations as per regulations shall be achieved. On this issue the Commission is of the view that since the transmission planning programme of OPTCL for evacuation of power from the upcoming IPPs is under process, GRIDCO/OPTCL may approach the Commission for suitable amendment of the clause in the consolidated PPA, if necessary after finalisation of the same. Till then the present practice of evacuation of power from the power plant of M/s SEL will continue, which is expected to improve after revival of the IbMeramundali line of OPTCL.

Determination of Auxiliary Consumption:

16. M/s. SEL submitted that during construction of the power plant, Unit-II was synchronised to the State Grid first for supplying power to GRIDCO. But GRIDCO could not draw the full State share (600 MW) of the plant due to transmission line constraint which was there due to availability of only two circuits of 220 KV line between SEL and Budhipadar Grid sub-station through which SEL power is injected in to the State transmission system. Therefore, SEL has no alternative but to operate the Unit -II which has installed capacity of 600 MW in part load condition. The under generation of Unit- II has resulted in increase in percentage of auxiliary consumption with respect to the total generation. According to Regulation 26 (iv) (a) (ii) of CERC Tariff Regulations M/s. SEL is eligible for a normative auxiliary consumption of 6% of the total generation. We agree with the contention of the Petitioner that due to transmission constraint they have not been able to generate at full capacity and inject the State quota of power to the State transmission system. As per CERC norm M/s. SEL is to consume 36 MW as auxiliary consumption irrespective of the loading of the Generator in absolute term. The 220 KV double circuit transmission line running between M/s. SEL and Budhipadar Grid sub-station of OPTCL is capable of carrying power around 400 MW in sustainable mode for which M/s. SEL has limited the generation from Unit –II accordingly. The normative auxiliary consumption of 36 MW for a generation of 400 MW is calculated to be 9% which we accept for the period till the next unit i.e. Unit – I is declared commercially operated and synchronised to the Power Grid system

through which its power is evacuated. Therefore, the Commission accept the auxiliary consumption of 9% upto29.03.2011. It is to be mentioned here that except Unit – II of the power station all other units are connected to 400 KV system of M/s. PGCIL. As per the above principle, subsequent units such as Unit – I, III and IV which were commercially operated in different dates as stated above, their auxiliary consumption is also calculated to be 36 MW each same as that of Unit –II of the power station. Accordingly the Commission calculates the percentage of auxiliary consumption of the power station taking into consideration the units which are actually connected to the Grid either through Power Grid system or OPTCL system on a particular date. The percentage of auxiliary consumption at different point of time till all the four units is commercially operated is given in the table below

………"

From a perusal of the aforesaid paragraphs of the order dated 12.06.2013, the following is evident:

i. The OERC categorically acknowledged Clause 4 of the Consolidated PPA which provides that Power to GRIDCO shall be made available by SEL at the Bus bars of the Station connected to the transmission lines of OPTCL / PGCIL and it shall be the obligation and responsibility of GRIDCO to make the required arrangement for evacuation of power from such delivery points;

ii. Accordingly, based on the existing arrangement at the point of time, the OERC held that since the transmission planning programme of OPTCL for evacuation of power from the upcoming IPPs is under process, GRIDCO may approach the Commission for suitable amendment of the clause in the consolidated PPA, if necessary after finalisation of the same.

    However, till then, the Commission categorically held the present practice of evacuation of power from the power plant of M/s SEL will continue, which is expected to improve after revival of the Ib Meramundali line of OPTCL.

iii. Further, the OERC observed and agreed that due to the said transmission constraint, Vedanta has not been able to generate at full capacity and inject the State quota of power to the State transmission system.

68. Hence, from the above order, it is evidently clear that the transmission constraint was never attributable to Vedanta, which was acknowledged by the OERC while holding that the tariff parameter of Auxiliary Energy Consumption would be considered by taking/ deeming the installed capacity of the Unit as 400 MW, instead of 600 MW.

69. The above order was challenged by Vedanta before this Tribunal, in an appeal, being Appeal No. 25 of 2014. GRIDCO also filed a cross appeal, being Appeal No. 179 of 2014 before this Tribunal. In Appeal No. 25 of 2014, Vedanta, inter-alia, contended that the installed

capacity due to transmission constraint ought to be considered as 350 MW instead of 400 MW, for the purpose of computing tariff.

In Appeal No. 179 of 2014, GRIDCO contended that the OERC wrongfully determined tariff parameters by considering installed capacity as 400 MW, and that it was the obligation of Vedanta to make power available at the bus bar of the grid sub-station of OPTCL at Budhipadar.

70. It is relevant to mention herein that in Appeal No. 25 of 2014, Vedanta filed an application before this Tribunal, being I.A. No. 35 of 2014, seeking for interim relief. In the said application, this Tribunal vide an order dated 28.03.2014 held that the tariff/ Capacity Charges payable to Vedanta for the FYs 2010-11 to 2013-14 shall be worked out based on PAFM computed by considering/ deeming the Unit capacity (installed capacity) as 400 MW, instead of installed capacity of 600 MW. The relevant extract of the aforesaid interim order, is set out herein below:

"12. In view of above we pass the following interim order, subject to adjustment on the disposal of the main Appeal.

i) There is no dispute regarding the Annual Fixed Charges for unit no. 2 for the period 2010-11 to 2013- 14. The Capacity Charges payable to the Applicant/Appellant for the FYs 2010-11 to 2013-14 shall be worked out based on Plant Availability Factor computed considering the transmission constraints with capacity of 400 MW of the 220 KV Double Circuit line from the SESA Sterlite Plant

to Budhipadar sub-station of OPTCL instead of installed capacity of 600 MW. Orissa SLDC is directed to compute the Plant Availability Factor for the FYs 2010-11 (from November 2010) to 2013-14 as per the above directions and inform the Appellant and GRIDCO within 30 days of passing of this order. The Applicant/Appellant will revise the bills for the FYs 2010-11 to 2013-14, reworking the Capacity Charges based on the Plant Availability Factor determined by the SLDC and Energy Charges for respective financial years determined in the impugned order. Regarding Water Charges and Electricity Duty, the same will be paid by GRIDCO as per the bills submitted by the Applicant/Appellant. If the net amount due to the Applicant after adjusting the payment already made by GRIDCO is positive then the GRIDCO will pay the balance amount to the Applicant/Appellant within 30 days of raising of the bill by the Appellant. If the net amount is negative then GRIDCO will adjust the same in the current bills of the Applicant/Appellant.

……..”

71. Against the aforesaid order, GRIDCO filed applications being, I.A. No., 278 and 279 of 2014, seeking modification of the said order. Further, Vedanta also filed an application, being I.A. No. 233 of 2014, seeking implementation of the said order. While deciding the above applications, this Tribunal passed an order dated 29.11.2014 thereby holding that the installed capacity of 400 MW, instead of 600 MW, shall be considered for computing PAFM**.** Further, this Tribunal

proceeded to direct GRIDCO to implement the aforesaid interim order dated 28.03.2014 at the earliest.

72. It is pertinent to mention herein that GRIDCO challenged the aforesaid order dated 29.11.2014 of this Tribunal, before the Hon'ble Supreme Court in Civil Appeal No. 1376-1378 of 2015. However, the Hon'ble Supreme Court did not find any reason to interfere with the aforesaid order and accordingly, vide an order dated 16.03.2015, dismissed the aforementioned civil appeals of GRIDCO. The aforesaid order of the Hon'ble Supreme Court is set out herein below:

> "We have heard learned counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgment impugned does not warrant any interference.
>
> The civil appeals are dismissed."

73. Subsequently, this Tribunal passed the judgement in Appeal No. 25 of 2015, on 10.05.2016 upholding the view of the Commission, thereby holding as under:

> *"5. In the light of the above, the following issues emerge for our consideration;*
>
> *…….*
>
> *(ii) Whether the State Commission has erred in considering only linkage coal cost for computation of variable cost and disallowing the Actual Auxiliary*

Consumption and Station Heat Rate for the period till the alleged transmission constraint is resolved?

……..

8. Now we take up the other issue as contested by the Appellant regarding the transmission capacity limitation which restricted evacuation of power from the Appellant's generating station and resulting into partially loading of the units, which has caused higher auxiliary power consumption and higher Station Heat Rate ("SHR") as compared to Operating Norms as specified in the prevailing Regulations and as a consequence of which the financial losses are suffered by the Appellant. We have perused the relevant documents submitted by the Respondents vis-à-vis the Appellants claims on account of restricted power evacuation and are making the following observations.

………

i) Now the issue before us as alleged by the Appellant pertains to restricted power evacuation capacity resulting into partial loading affecting adversely the performance parameters such as Auxiliary Power Consumption and SHR.

The State Commission in its Impugned Order dated 12.06.2013 accepted the transmission constraint as alleged by the Appellant and stated that since the transmission planning programme of OPTCL for

evacuation of power from upcoming IPPs which is under process, the Respondent No. 2/OPTCL may approach the Commission for suitable amendment of the Clause in the consolidated PPA, if necessary after finalization of the same. Till then, the present practice of evacuation from the power station of Appellant will continue.

j) The State Commission in its Impugned Order accepted that due to transmission constraint, the Appellant has not been able to generate at full capacity and to inject the state full quota of power to the State Transmission system and determined the auxiliary power consumption based on the existing transmission capability.

k) In light of the above, the transmission constraint from the bus bar of the generating station upto the Budhipadar sub-station of the OPTCL has been accepted by the State Commission in its Impugned Order after going through the relevant data furnished by the parties and the same has been reaffirmed by the Tribunal's order dated 28.03.2014.

l) We do not have any doubt that at the time of passing of Impugned Order, the State Commission would have gone into all the requisite details on the transmission capacity and the prevailing constraints in evacuation of power form Unit-II of the generating station.

………

o) After accepting the State Commission's considered view of 400 MW of power transmission in sustainable mode for the transmission line in question for that specific period, the auxiliary power consumption as well as Station Heat Rate (on technical consideration) as considered by the State Commission in its Impugned Order would stand justified. Hence, we would not like to interfere with the State Commission's finding in this regard in its Impugned Order.

p) Therefore, the second issue on the operating parameters seeking upward revision by the Appellant as discussed above arisen due to the alleged transmission constraints is also decided against the Appellant."

74. Further, in cross appeal filed by GRIDCO, Appeal No. 179 of 2014, this Tribunal did not find any infirmities in the order dated 12.06.2013 of the OERC, and passed a similar judgment as was passed in Appeal No. 25 of 2014 on the same date, i.e., 10.05.2016. The relevant extracts of the aforesaid judgment are set out herein below:

"vii) Aggrieved by the Impugned Order dated 12.06.2013, the present Appeal has been filed. Looking into the above facts of the Appeal, the main issues before us for deciding this Appeal are:

(a) Whether the State Commission erred in accepting the allegation of Respondent No.1 in respect of the

transmission constraint holding that the 220 KV double circuit line running between Respondent No.1 and Budhipadar grid sub-station of OPTCL is capable of carrying power around 400 MW in sustainable mode without going into the requisite technical details on account of actual load transmitted through the same network and thereof determination of the tariff based on the restricted parameters?

(b) Whether the State Commission was justified in taking the alleged transmission constraint into consideration even though under the consolidated PPA it is the obligation of the Respondent No. 1 to make power available at the bus bars of the grid sub-station of OPTCL at Budhipadar?

…….

7.0 After having gone through all the above issues in detail, our observations are as under;

…….

iii) The State Commission in its Impugned Order accepted that due to transmission constraint, the Respondent No. 1 has not been able to generate at full capacity and inject the state quota of power to the State Transmission system and determines the auxiliary power consumption on the existing transmission capability.

iv) Now, we analyze this Tribunal's Interim Order dated 28.03.2014. The relevant extract is reproduced below;

……..

After perusing this Tribunal's order as above, we observed that the Tribunal considered the findings of the State Commission in its Impugned Order accepting therein the transmission constraint.

v) Since the Appellant failed to comply with this Tribunal's order dated 28.03.2014, the Respondent No. 1 filed IA before the Tribunal seeking implementation of its order of 28.03.2014 which was disposed of by the Tribunal's order dated 29.11.2014 directing the Appellant once again to comply with its order dated 28.03.2014 at the earliest.

vi) In light of the above, the transmission constraint from the bus bar of the generating station upto the Budhipadar sub-station of the OPTCL has been accepted by the State Commission in its Impugned Order after going through the relevant data furnished by the parties and the same has been reaffirmed by the Tribunal's order dated 28.03.2014.
……

x) … …. ….

In our opinion, the State Commission is in a better position to ascertain the grid constraints keeping in view the requisite data of the State Load Despatch Centre on this issue in question.

xi) *After accepting the State Commission's considered view of 400 MW of power transmission in the sustainable mode for the transmission line in question for that specific period, the auxiliary power consumption as well as Station Heat Rate on account of partial loading as considered by the State Commission in its Impugned Order would stand justified. It is an established fact that if the unit operates at a partial load, it does affect adversely the normative parameters such as auxiliary power consumption, Station Heat Rate etc. Hence, we would not like to interfere with the State Commission's finding in this regard in its Impugned Order.*

75. Hence, vide the aforesaid two judgments dated 10.05.2016 passed in Appeal Nos. 25 of 2014 and 179 of 2014 respectively, the Tribunal settled the principle that during the period affected by transmission constraint, the tariff parameters have to be reconciled to 400 MW, instead of 600 MW qua the installed capacity.

Thus, the entire issue, which GRIDCO is again agitating today qua determination of tariff parameters by considering installed capacity as 400 MW, stands covered.

76. In fact, it is pertinent to mention herein that GRIDCO never challenged the aforesaid judgments of this Tribunal before the Hon'ble Supreme Court.

It is also pertinent to mention herein that Vedanta filed a civil appeal before the Hon'ble Supreme Court, being Civil Appeal Nos. 30263 and 30264 of 2016, which withdrawn was by Vedanta.

Hence, the aforementioned judgments dated 10.05.2016 of this Tribunal attained finality.

77. Therefore, for the relevant period (i.e., from 10.11.2010 to 05.01.2016), as held in the above judgments dated 10.05.2016, the tariff parameters (SHR and AUX consumption) have to be determined by reconciling the same to 400 MW as the installed capacity, instead of 600 MW. Similar to SHR and Auxiliary Consumption (AUX), PAFM is also a tariff parameter.

78. In fact, PAFM can also be computed by considering installed capacity as 400 MW, as evident by the principle contained in the interim order dated 28.03.2014 passed by this Tribunal in Appeal No. 25 of 2014. As such, the OERC did not create any new principle, but followed what was principally considered by this Tribunal.

In other words, the OERC in the impugned order qua PAFM, did not commit any illegality as the issue of PAFM being computed by considering installed capacity as 400 MW, was principally blessed by this Tribunal in the above interim order.

79. In any event, under no circumstances, the commercial principles to be invoked as per Section 61(b) of the Electricity Act, 2003 while determining tariff, can mean that for computation of certain tariff parameters (AUX and SHR) the installed capacity be considered/ deemed as 400 MW, while computation of PAFM, the same would be considered as 600 MW. The commercial principles under Section 61

would entail similar treatment to be given to all tariff parameters with respect to the same Unit.

80. In view of the above, since the entire issue is covered by the earlier judgments of this Tribunal, the same is no more res-integra, and accordingly, the present appeal ought to be dismissed by this Tribunal.

RE: On account of the present litigation, GRIDCO is wilfully not making the legitimate payments to Vedanta

81. It is submitted that on account of long pendency of the instant appeal, Vedanta is not able recover its legitimate payments from GRIDCO, to the tune of Rs. 448 Crores, as it continues to deliberately withhold the legitimate payments to be made by it towards capacity charges for supply of power from November, 2010 to 05.01.2016.

82. In furtherance to the above, Vedanta craves to submit before this Tribunal, the following aggravating factors which have wreaked financial havoc and seriously jeopardized the operations & existence of it business:

   a) during the last 5 years, the power plant of Vedanta has faced severe financial loss(es) which has run around Rs. 7300 Crores. However, keeping in view the overall welfare interests of the State, as well as of its employees, Vedanta continues to run its power plant. It is pertinent to note that Vedanta itself generates employment, directly and indirectly for around 15,000 people whose livelihood and sustenance depend mainly on Vedanta.

Thus, it is imperative that the financial health of Vedanta is maintained;

b) In addition to the deliberate act on the part of GRIDCO, wherein it has withheld a more than substantial sum of money, to the tune of around Rs. 448 Crores (*which is the lis in the present case*), it is categorically submitted that GRIDCO is also deliberately withholding a substantial amount of money, to the tune of approximately Rs. 900 Crores, being charges payable to Vedanta on account of Legitimate dues on one pretext or the other.

The aforesaid monies which are yet to be paid to Vedanta has severely hampered its financial position.

c) Further, the financial situation of Vedanta has become so grim that it is unable to pay the recurring Statutory dues (*towards Electricity Duty and the charges payable to WESCO*) which is also adding to the interest and penalty liability of Vedanta and as of now the said liability is to the tune of Rs. 60 Crores.

Critically, due to such severe cash flow crunch and financial handicap, the power plant of Vedanta faces the threat of power disconnection on a monthly basis. In the event, such disconnection is given effect to then it shall severely put the lives of thousands of employees and other persons who are directly or indirectly associated with Vedanta under extreme duress; and

d) Even though GRIDCO has time and again deliberately failed to clear the dues of Vedanta on one pretext or the other and such dues as of today have cumulatively piled up around Rs. 1400 Crores and rises further with the passage of each day, Vedanta has dutifully continued to supply power from Unit-II of its power plant, as it caters to the needs of the State of Odisha, which fact has also been acknowledged by GRIDCO, through its recent communication.

83. It is further submitted that, on account of the ongoing COVID- 19 pandemic, Vedanta has been badly affected, and is not in a position to sustain its operations, more so because the aforesaid amount is long overdue, coupled with the fact that Vedanta produces Aluminium and is not able to sustain as a result of drop in demand, including in the International Market. In fact, in the last 5 financial years, the power plant of Vedanta has faced a negative cash flow to the tune of approximately Rs. 7300 Crores.

84. Further, as already demonstrated in the preceding paragraphs, the entire issue being agitated before this Tribunal in the present proceedings, has already attached finality by way of various judgments/ orders of this Tribunal, which also stand affirmed by the Hon'ble Supreme Court.

85. Hence, in view of the above, GRIDCO ought to be directed to make the payments to Vedanta, in terms of the impugned order, within a stipulated period of time.

RE: The averments made by GRIDCO and OPTCL that the responsibility to construct transmission line was on Vedanta, cannot at all be considered as this issue also stands covered by the previous judgments of this Tribunal

86. It is submitted that OPTCL vide its written submissions dated 30.10.2021, alleged that the transmission constraint was on account of Vedanta and not GRIDCO, since it was the responsibility of Vedanta to construct a transmission line upto to the pooling station of OPTCL.

87. At the outset, it is submitted that OPTCL never participated in the proceedings before the OERC under which the impugned order has been passed. In fact, in the present appeal, OPTCL never filed any pleadings, and straight away filed the aforesaid written submissions. This shows that GRIDCO and OPTCL are working in collusion.

88. Be that as it may, on merits, the above issue was raised by GRIDCO in the previous round of appeals (Appeal Nos. 25 and 179 of 2014). This is evident from the following extracts of the final judgment dated 10.05.2016 of Appeal No. 179 of 2014, which are set out hereinbelow:

"(A). The Appellant is challenging the Impugned Order dated 12.06.2013 on the following grounds;

i) The State Commission was not justified in accepting the contention of the Respondent No. 1 that due to the transmission constraint they had not been able to generate at full capacity resulting into lesser injection

than the state quota of power to the state transmission system. The State Commission erred in holding that 220 KV double circuit transmission line running between the Respondent and No.1 and the Budhipadar grid sub-station of OPTCL is capable of carrying power around 400 MW only in sustainable mode resulting into restricted generation from Unit 2 of the generating station of the Respondent No. 1.

The State Commission was not justified in taking the alleged transmission constraint into consideration since under the consolidated PPA it is the obligation of the Respondent No. 1 to make power available at the bus bar of the grid sub-station of OPTCL at Budhipadar. For facilitating supply of power at the bus bars of OPTCL grid sub-station, the Respondent No.1 has installed two numbers of 315 MVA interconnecting transformers along with 5.5 kilometers of 220 KV double circuit line and included the cost of the same in the capital cost of the generating stations.

……….

iii) The State Commission was not justified in coming to the conclusion that the double circuit line running between Respondent No. 1 and the Budhipadar grid sub-station of OPTCL is capable of carrying power around 400 MW in sustainable mode, since there was no material on record to support the said conclusion.

The State Commission was not justified in coming to the above conclusion in light of the fact that the double circuit line running between Respondent No. 1 and Budhipadar grid sub-station of OPTCL is capable of carrying more than 500 MW power without endangering the safety of the line in any matter whatsoever and this fact had been brought to the notice of the State Commission vide submissions made on 23.07.2012 by the Appellant.

vii) The State Commission was not justified in determining the tariff on the basis of the finding that 220 KV double circuit transmission line running between the Respondent No. 1 and the Budhipadar grid sub-station of OPTCL is capable of carrying power more than 400 MW in sustainable mode. As such, the State Commission was not justified in computing the auxiliary consumption and Station Heat Rate on the basis that 220 KV double circuit transmission line running between Respondent No.1 and Budhipadar Grid substation of OPTCL is operating at a restricted load.

………

xii) Under Clause 4.0 of the consolidated PPA dated 19.12.2012, it is the obligation of the Respondent No.1 to make power available at the bus bar of the grid sub-station of OPTCL at Budhipadar. The Clause 4.0 of the consolidated PPA dated 19.12.2012 is reproduced below;

………"

89. After recording the submissions of GRIDCO on the above issue, this Tribunal held as under:

> "7.0 After having gone through all the above issues in detail, our observations are as under;
>
> … … …
>
> viii) We do take note of the PPA condition that the state share of power shall be made available to the Appellant by the Respondent No. 1 at the bus bar of OPTCL nearest EHV sub-station at required voltage level and the Respondent No. 2 would bear the cost of dedicated transmission line from their generating plant to the designated grid sub-station of STU at available voltage level including augmentation of existing equipment/transmission system if any of the STU.
>
> … .. …
>
> xi) After accepting the State Commission's considered view of 400 MW of power transmission in the sustainable mode for the transmission line in question for that specific period, the auxiliary power consumption as well as Station Heat Rate on account of partial loading as considered by the State Commission in its Impugned Order would stand justified. It is an established fact that if the unit operates at a partial load, it does affect adversely the normative parameters such as auxiliary power consumption, Station Heat Rate etc. Hence, we

would not like to interfere with the State Commission's finding in this regard in its Impugned Order."

90. Hence, it is evident as follows:

a) This Tribunal acknowledged the submissions of GRIDCO qua the alleged responsibility of Vedanta to make power available at the bus bar of the grid sub-station of OPTCL at Budhipadar;

b) Thereafter, this Tribunal in both the detailed judgments dated 10.05.2016, proceeded to grant relief to Vedanta qua the principle that during the period of transmission constraint, tariff parameters are to be computed by considering installed capacity as 400 MW, instead of 600 MW.

GRIDCO never challenged the aforesaid judgments before the Hon'ble Supreme Court, and accepted the principle espoused by this Tribunal that tariff parameters are to be computed by considering installed capacity as 400 MW, instead of 600 MW, during the period of transmission constraint.

91. In view of the aforesaid, the averment of GRIDCO regarding the above issue, has to be rejected. This also attracts the doctrine of Issue Estoppel and Cause of Issue Estoppel which prevents a party to assert an action against the other party, when the issue is already decided in previous litigation between the same parties. In this regard, reference is made to the judgment of the Hon'ble Supreme Court in *Bhanu Kumar Jain vs. Archana Kumar &Anr.*, reported (*2005) 1 SCC*

787. The relevant extract of the aforesaid judgment is set out hereinbelow:

30. Res-judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

31. In a case of this nature, however, the doctrine of "issue estoppel" as also "cause of action estoppel" may arise. In Thoday [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] Lord Diplock held: (All ER p. 352 B-D)

' …"cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment.… If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

32. The said dicta was followed in Barber v. Staffordshire County Council [(1996) 2 All ER 748 (CA)] .A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C. (A Minor) v. Hackney London Borough Council [(1996) 1 All ER 973 : (1996) 1 WLR 789 (CA)] .]"

92. It is also a settled principle of law that a judgment is a binding precedent for a point that is decided irrespective of whether a particular argument on such point was canvassed before the court or not. This has been held by the Hon'ble Supreme Court in *Govindaraj Mudaliar Vs State of Tamil Nadu* reported in *1973 (1) SCC 336*, the relevant extract of which is setout hereinbelow:

"10. The argument of the appellants is that prior to the decision in *Rustom Cavasjee Cooper case*, it was not possible to challenge Chapter IV-A of the Act as violation of Article 19(1)(*f*) owing to the decision of this Court that Article 19(1)(*f*) could not be invoked when a case fell within Article 31 and that was the reason why this Court in all the previous decisions relating to the validity of Chapter IV-A proceeded on an examination of the argument whether there was infringement of Article 19(1)(*g*), and clause (*f*) of that

article could not possibly be invoked. We are unable to hold that there is much substance in this argument. *BhanjiMunji case*, and other decisions which followed it were based mainly on an examination of the inter-relationship between Article 19(1)(*f*) and Article 31(2). There is no question of any acquisition or requisition in Chapter IV-A of the Act. The relevant decision for the purpose of these cases was only the one given in *Kochuni case*, after which no doubt was left that the authority of law seeking to deprive a person of his property otherwise than by way of acquisition or requisition was open to challenge on the ground that it constituted infringement of the fundamental rights guaranteed by Article 19(1)(*f*). It was, therefore, open to those effected by the provisions of Chapter IV-A to have agitated before this Court the question which is being raised now based on the guarantee embodied in Article 19(1)(*f*) which was never done. It is apparently too late in the day now to pursue this line of argument. In this connection we may refer to the observations of this Court in *Mohd. Ayub Khan* v. *Commissioner of Police, Madras* [AIR 1965 SC 1623 : (1965) 2 SCR 884 : (1965) 2 SCJ 706] according to which even if certain aspects of a question were not brought to the notice of the court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In *Smt Somavanti* v. *The State of Punjab* [AIR 1963 SC 151

> : (1963) 2 SCR 774 : (1963) 2 SCJ 35] a contention was raised that in none of the decisions the argument advanced in that case that a law may be protected from an attack under Article 31(2) but it would be still open to challenge under Article 19(1)(*f*), had been examined or considered. Therefore, the decision of the Court was invited in the light of that argument This contention, however, was repelled by the following observations at p. 794.
>
> "The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided."

In the above judgment, the principle laid down by the Hon'ble Supreme Court was that a judgment would have a binding effect irrespective of whether a particular point/ argument was advanced or not. The present case is however on higher footing, since GRIDCO specifically contended that the alleged responsibility of Vedanta to make power available at the bus bar of the grid sub-station of OPTCL at Budhipadar, and even then, this Tribunal laid down the principle that the tariff parameters are to be computed by considering installed capacity as 400 MW, instead of 600 MW, during the period of transmission constraint.

93. Hence, having accepted the judgments dated 10.05.2016 passed by this Tribunal in Appeal No. 25 of 2014, and Appeal No. 179 of 2014, GRIDCO cannot at all raise the above issue in the present appeal.

In view of the submissions made hereinabove, Vedanta prays that the present appeal be dismissed and GRIDCO be directed to make payments in terms of the impugned order.

Submissions of the Respondent No.4/OPTCL

94. The Electricity Act, 2003 mandates the Duties of Generating Companies under Section 10, which is enumerated below for kind appreciation of the Tribunal;

> *"Section-10: Duties of generating companies – (1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made there under."*

95. Prior to the synchronisation of the 1st Unit of the Vedanta-IPP (i.e. Unit#2), the GRIDCO and State Transmission Utility (OPTCL) had filed case no 15 of 2010 and 127 of 2010 to bring to the notice of the Learned State Commission the fact that, it is the statutory duty of the IPP to construct required dedicated transmission line for evacuation of State share of power and thereby prayed for necessary direction to the IPP.

The contention of OPTCL (Respondent No-2) was in line with the relevant provision under Section 10 of the Electricity Act, 2003.

Order dt 30.03.2010 in OERC case no 15 of 2010 is quoted below for kind appreciation of this Tribunal;

“The petitioner, OPTCL filed an application before the Commission seeking inter alia direction to the Respondent No.1 M/s. Sterlite Energy Limited to provide adequate transmission facility for evacuation of Orissa share of power from Sterlite Thermal Power Station, Jharsuguda through the transmission network of OPTCL.xxxxxx”

96. The responsibility of constructing the required power evacuation infrastructure of SEL was on the developer of the generator. This has been agreed upon by SEL (Vedanta)in the MOU dated 26.09.2006.

The relevant clause of MOU dated 26.09.2006 is quoted below for kind appreciation of this Tribunal;

> *“Clause 1(vi):SEL may set up its own transmission facility for evacuation of power to the point of off-take by the buyer(s) or may request the State Transmission Utility (STU) and Central Transmission Utility (CTU) or any other Transmission Utility or Licensee for evacuation of power from the Thermal Power Plant and may enter into agreements for such purpose. The Government and its concerned agency shall assist SEL in the matters of transmission facility for evacuation of power from the*

Thermal Power Plant. In case SEL evacuates power through State Transmission Utility or Central Transmission Utility, transmission of the entire capital cost for strengthening such lines for evacuation of entire power of the Thermal Power Plant will be borne by SEL."

97. As per the observation of this Tribunal at para 6.0 (A) of the judgment dated 10.05.2016 in Appeal No.179 of 2014 the Appellant (GRIDCO) submitted that;

"6.0-(A)-i).xxxxxxxx For facilitating supply of power at the bus bars of OPTCL grid sub-station, the Respondent No-1 has installed two numbers of 315 MVA interconnecting Transformers along with 5.5 kilometers of 220kV double circuit line and included the cost of the same in the capital cost of the generating station.

6.0-(A)-ii).Xxxxxxxx the State Commission in its earlier order dated 04.04.2012 had stated as under:

"Commission is not satisfied with the logic of transmission constraints posed by M/s SEL. The IPP must ensure supply of state quota to the SDE (State Designated Entity) & accordingly prepare the infrastructure to fulfil its obligations."

In the above context it can be construed that the transmission constraints if any arises in the 220 kV Double Circuit between SEL and Budhipadar Grid S/S of OPTCL is attributed to Respondent No-1, SEL (Vedanta) but not to the Respondent No-2, OPTCL and this

has been affirmed by learned State Commission in its order dated 04.04.2012.

98. The matter of transmission constraint has already been addressed by The APTEL in judgement Dt 10.05.2016 in Appeal No 25 of 2014 and judgement Dt 10.05.2016 in Appeal No.179 of 2014.

However there was no issue in evacuation of power by existing 220 kV Vedanta-Budhipadar double circuit line as it was capable of carrying entire generation 564 MW.

99. Judgement dated 10.05.2016 in Appeal No. 25 of 2014 passed by this Tribunal as under;

"Para 8:
Now we take up the other issue as contested by the Appellant regarding the transmission capacity limitation which restricted evacuation of power from the Appellant's generating station and resulting into partially loading of the units, which has caused higher auxiliary power consumption and higher Station Heat Rate ("SHR") as compared to Operating Norms as specified in the prevailing Regulations and as a consequence of which the financial losses are suffered by the Appellant. We have perused the relevant documents submitted by the Respondents vis-à-vis the Appellants claims on account of restricted power evacuation and are making the following observations.

a) As per the relevant provisions contained in the consolidated PPA between the Appellant and the Respondent No. 2

dated 19.12.2012, the capacity allocated to the Respondent No. 2 was 25% of the installed capacity of the subject thermal power station. The Respondent No. 2's share of power ought to be made available to Respondent No. 2 by the Appellant at the bus bar of OPTCL nearest EHV sub-station at required voltage level, and the OPTCL as State Transmission Utility ("STU") with the help of Government of Odisha, will assist the Appellant in getting clearances/approvals within the state jurisdiction with clear stipulation that all the responsibility for obtaining such clearances/approvals shall remain with the Appellant and the Appellant would need to bear cost of;

i. Dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU at available voltage level.

ii. Interfacing at both the ends including works at the Grid Sub-station, cost of Bays etc.

iii. Replacement/up-gradation/augmentation of existing equipment/ transmission system(s) if any of STU.

b) The above works were required to be carried out by the Appellant as per the specifications and requirement of licensees/utilities and after commissioning of the project, the Appellant was required to transfer these lines and infrastructure at STU sub-station end to the STU as transfer of assets for the maintenance by the STU, at the charges to be decided by licensee/utility and paid by the Appellant. This was with a clear understanding that if the Appellant desires to evacuate further power beyond state share, they may

strengthen the transmission system and also to bear the state transmission charges as applicable.

c) *From the above it is observed that for installation of transmission system up to the STU bus bar was the Appellant's responsibility and the role of the STU and the Government of Odisha was limited only to providing assistance in obtaining the state statutory clearances to the Appellant.*

d) *The generating station of the Appellant is connected to STU network at Budhipadar grid sub-station through 220 KV double circuit line.*

e) *It is also observed there have been frequent change in stand by the Appellant with regard to its proposal for type of the conductor planned to be used in the 220 KV lines, initially from moose conductor then to ACSR Zebra conductor and thereafter ACSR Moose conductor etc. which impacted the readiness of the said 220 KV line.*

f) *Based on the system study report, considering the 220 KV double circuit line on the ACSR Moose conductor, the STU confirmed that 550 MW of power can be safely evacuated with the certification that in the past on various occasions, the Appellant has exported 450-500 MW power through these lines with no adverse impact on the system. Though the Appellant was continuing to provide schedule for 564 MW of power after excluding the auxiliary power*

consumption, the net power export has been much less than the schedule of 564 MW on various occasions.

There has been reference made to various reports relating to selection of conductor specifications by the rival parties but we would not like to go into such details as the above works were to be carried out by the Appellant as per the specifications and requirements of the licensees/utilities.

g) There is no doubt in our mind regarding the bus bar of Budhipadar sub-station of the STU is the point of delivery of power, as per relevant provisions of the consolidated PPA."

100. Judgement dated 10.05.2016 in Appeal No.179 of 2014 passed by this Tribunal as under;

"Para 7:

After having gone through all the above issues in detail, our observations are as under;

i) On perusal of State Commission's order dated 04.04.2012, there has been clear admission on the part of infrastructure to the State Commission stating therein that it is not satisfied with the logic of transmission constraint posed by the Respondent No.1 and directed them to ensure supply of state quota and accordingly prepare the infrastructure to ensure its obligation.

ii) The State Commission in its Impugned Order dated 12.06.2013 accepted the transmission constraint as alleged by the Respondent No.1 and stated that since the transmission planning programme of OPTCL for evacuation of power from upcoming IPPs which is under process, the Appellant/OPTCL may approach the Commission for suitable amendment of the Clause in the consolidated PPA, if necessary after finalization of the same. Till then, the practice of evacuation from the power station of Respondent No. 1 will continue.

iii) The State Commission in its Impugned Order accepted that due to transmission constraint, the Respondent No. 1 has not been able to generate at full capacity and inject the state quota of power to the State Transmission system and determines the auxiliary power consumption on the existing transmission capability.

viii) We do take note of the PPA condition that the state share of power shall be made available to the Appellant by the Respondent No. 1 at the bus bar of OPTCL nearest EHV sub-station at required voltage level and the Respondent No. 2 would bear the cost of dedicated transmission line from their generating plant to the designated grid sub-station of STU at available voltage level including augmentation of existing equipment/transmission system if any of the STU."

101. However M/S VAL (erstwhile SEL) had filed an IA No 14 of 2016 in Appeal No 179 of 2014 wherein they have submitted that the

dedicated transmission line is owned and operated by them. Thus any transmission constraint arisen in the said line is attributed to M/S VAL but not to OPTCL.

102. Moreover the decision regarding evacuation of GRIDCO's share of power has reached its finality by Hon'ble Supreme Court. The same has been reaffirmed by Ld. Commission by order dated 09.04.2019 in Case No. 59 of 2016. The relevant para of the order dt 09.04.2019 is quoted below for kind appreciation of this Tribunal;

> *"16. Hon'ble APTEL in its judgement dated 10.05.2016 in Appeal No. 25/2014 has made interpretations and observations on power evacuation arrangement. M/s. Vedanta Ltd. had gone on appeal on this observation of Hon'ble APTEL to Hon'ble Apex Court and the Appeal has been dismissed by the Hon'ble Apex court as withdrawn on 10.03.2017. Therefore, the decision of Hon'ble APTEL regarding evacuation of GRIDCO's share of power has reached its finality. Accordingly, both the parties are at liberty to rephrase the concerned clause on evacuation arrangement in the PPA in line with the observations dated 10.05.2016 of Hon'ble APTEL in Appeal No.25/2014 in this regard and submit the same before commission for approval."*

In the above context, considering the MOU dt 26.09.2006, PPA dt 19.12.2012, APTEL order dt 10.05.2016 in Appeal no 179 of 2014, APTEL order Dt 10.05.2016 in Appeal No 25 of 2014, IA No14 of 2016 filed by M/S SEL in Appeal No 179 of 2014,OERC order Dt 09.04.2019 in case no 59 of 2016 it is well understood that any transmission constraint for evacuation of power from SEL at OPTCL

S/s is not attributable to OPTCL. It is also in conformity with the provisions of Electricity Act-2003 10(1) which is obligatory on the part of generating station to construct dedicated line up to the point of evacuation. The transmission constraint if any is attributable to SEL.

Submissions of the State Commission/Respondent No.6

103. The appellant filed present appeal against the common order dated 17.04.2017 passed by the State Commission in Case no. 08 of 2017, wherein it held that:

> *"In normal case the PAFM of a generating station should be computed basing on the Regulations made by the appropriate Commission. However, the Commission in its order dated 12.06.2013 in Case No. 117/2009, 31/2010 and 56/2012 has observed that the 220 KV DC line running between M/s. Vedanta Ltd. and Budhipadar Grid substation of OPTCL is capable of carrying power around 400 MW in sustainable mode for which M/s. Vedanta has restricted generation from Unit-II. The APTEL in their judgement in Appeal No. 25/2014 dated 10.05.2016 has also preferred not to interfere in the above said views of the Commission. Therefore, for calculating PAFM of the IPP, the carrying capacity of the line at 400 MW in sustainable mode should be taken into consideration. Accordingly, while calculating PAFM the installed capacity of the IPP (Unit-II) should be taken as 400 MW or actual injection whichever is higher. The aforesaid mechanism should be adopted for the period from November, 2010 till the transmission constraint was resolved."*

104. The appellant filed a review petition being Case No. 49 of 2017 against the impugned order. The said review petition of the appellant has been dismissed after a detailed hearing vide order dated 15.05.2018 by holding inter-alia as under:

> *"15. It is to be mentioned that the APTEL so also the Hon'ble Apex Court of India have upheld the said tariff order dated 12.06.2013 of the Commission. In this tariff order it was observed by the Commission that the 220 KV DC line running between M/s. Vedanta Ltd. and Budhipadar Grid Sub-station of OPTCL is capable of carrying power around 400 MW in sustainable mode for which M/s. Vedanta Ltd. has restricted generation from Unit-II, which has been deliberated in the order of the APTEL and the APTEL has upheld the aforementioned observations of the Commission. Therefore, keeping in view the transmission constraint, the Commission, at Para-17 of the impugned order, has considered the carrying capacity of the said 220 KV DC line as 400 MW in sustainable mode for calculating the PAFM of the IPP of M/s. Vedanta Ltd. till transmission constraint was resolved. However, in the same paragraph of the impugned order, the Commission has indicated that in normal case the PAFM of the generating station should be computed basing on the regulations made by the appropriate Commission. Therefore, no apparent error is found out on the face of the record."*

105. It is submitted that there is no illegality or infirmity in the impugned order of the State Commission which is in accordance with law and the principle has already been affirmed by this Tribunal in its judgment

dated 10.05.2016 passed in Appeal No. 25/2014 & 179/2014, between the same parties.

106. Further, the review petition No. 14 of 2016 filed by the Appellant before this Tribunal was also dismissed on 22.07.2016. In the light of the above, there is no merit in the appeal and this Tribunal may be pleased to dismiss the appeal.

107. The issue in the present appeal as well as Appellant's Review Petition No. 49/2017 are same and pertain to Transmission constraint of 220 kV Double Circuit Transmission line running between M/s. SEL (M/s. Vedanta Ltd.) and Budhipara Grid Sub-Station of OPTCL and Calculation of PAFM (Monthly Plant Availability Factor).

108. This Tribunal in several cases, after detailed hearing and relying on the law laid down by Hon'ble Supreme Court as well as interpreting Section 114 R/w Order 47 Rule 1 (2) & Rule 7 of Code of Civil Procedure, 1908 has held, that such appeals by a party cannot raise the same grounds and relief as raised in its earlier Review Petition. This Tribunal in its judgment dated 23.09.2019, passed in Appeal No. 145 of 2019; NCL India Ltd. Vs. CERC &Ors. has *inter alia* held that:

> *"Para.6……..In the light of modification of decision on certain issues in the review petition, we are of the opinion that the appeal is maintainable against such decision pertaining to those issues. It is made clear that so far as the decision on other issues in the initial order which were not sought for review and so also decisions of those issues which were sought for review but*

refused cannot form part of grounds/relief sought by the Appellant in the appeal."

109. The impugned order attained finality in two aspect; that are; under principle of *res-judicata* of Section 11 CPC, 1908 under principle scope of appeal after dismissing of Review petition in view of Section 114 R/w Order 47 Rule 1 (2) & Rule 7 of CPC. Thus, the present appeal is not maintainable and deserves to be dismissed.

110. In view of the above submission, proposition of law as laid down by this tribunal, the grounds of the appellant in support of the appeal are untenable and the question of law raised in the appeal does not arise. The appeal deserves to be dismissed on the principle of *res-judicata*.

Our findings and analysis

111. We have heard the Appellant, Respondents, have gone through the appeal and other documents/ written submissions and our observations are as under:

112. Vedanta owns and operates a 2400 MW (4x600 MW) coal fired power plant at Jharsuguda, Orissa, out of which Unit-II (600 MW) is dedicated for supply of 25% of the plant's capacity to the GRIDCO, under the terms of the Power Purchase Agreement.

113. In compliance to the terms and conditions of the PPA, Vedanta was supplying power to GRIDCO from its Unit-II for the period starting

from 10.11.2010 to 05.01.2016, through 220 kV SEL-Budhipadar D/C transmission line.

114. Due to constraint in the transmission system i.e. 220 kV SEL – Budhipadar D/C line, Vedanta was constrained to operate its Unit-II in part load condition at 400 MW.

Order dated 12.06.2013 in Case No. 117 of 2009

115. We note that the issue of transmission constraint was recognized by the OERC while passing an order dated 12.06.2013 in Case No. 117 of 2009, wherein under paras 10 and 16, it was held as under:

"10. Regarding Transmission / Wheeling of Power generated by this power plant it is indicated in the PPA that "Power to GRIDCO shall be made available by SEL at the Bus bars of the Station connected to the transmission lines of OPTCL / PGCIL and it shall be the obligation and responsibility of GRIDCO to make the required arrangement for evacuation of power from such delivery points. SEL shall make independent arrangements for evacuation of the remaining power from the station at SEL costs and responsibility." On this issue M/s SEL has submitted that under the PPA the obligation to prepare infrastructure for evacuation is with GRIDCO and it is also quite clear that the delivery point for supply of power to GRIDCO is the bus-bar of the generating station and it is the obligation of GRIDCO to make necessary arrangements for evacuation of power from the bus-bar in order to avail state share of power. SEL further submitted that they are reviving the abandoned 400 KV Ib-

Meramundali line of OPTCL on deposit work basis and hopeful that upon completion of the same, which is expected by July, 2013, the unit connected to OPTCL Network will be able to run at full 600 MW capacity and normative parameters of operations as per regulations shall be achieved. On this issue the Commission is of the view that since the transmission planning programme of OPTCL for evacuation of power from the upcoming IPPs is under process, GRIDCO/OPTCL may approach the Commission for suitable amendment of the clause in the consolidated PPA, if necessary after finalisation of the same. Till then the present practice of evacuation of power from the power plant of M/s SEL will continue, which is expected to improve after revival of the IbMeramundali line of OPTCL.

Determination of Auxiliary Consumption:

16. M/s. SEL submitted that during construction of the power plant, Unit-II was synchronised to the State Grid first for supplying power to GRIDCO. But GRIDCO could not draw the full State share (600 MW) of the plant due to transmission line constraint which was there due to availability of only two circuits of 220 KV line between SEL and Budhipadar Grid sub-station through which SEL power is injected in to the State transmission system. Therefore, SEL has no alternative but to operate the Unit -II which has installed capacity of 600 MW in part load condition. The under generation of Unit- II has resulted in increase in percentage of auxiliary consumption with respect to the total generation. According to Regulation 26 (iv) (a) (ii) of CERC Tariff Regulations M/s. SEL is eligible for a normative

auxiliary consumption of 6% of the total generation. We agree with the contention of the Petitioner that due to transmission constraint they have not been able to generate at full capacity and inject the State quota of power to the State transmission system. As per CERC norm M/s. SEL is to consume 36 MW as auxiliary consumption irrespective of the loading of the Generator in absolute term. The 220 KV double circuit transmission line running between M/s. SEL and Budhipadar Grid sub-station of OPTCL is capable of carrying power around 400 MW in sustainable mode for which M/s. SEL has limited the generation from Unit –II accordingly. The normative auxiliary consumption of 36 MW for a generation of 400 MW is calculated to be 9% which we accept for the period till the next unit i.e. Unit – I is declared commercially operated and synchronised to the Power Grid system through which its power is evacuated. Therefore, the Commission accept the auxiliary consumption of 9% upto 29.03.2011. It is to be mentioned here that except Unit – II of the power station all other units are connected to 400 KV system of M/s. PGCIL. As per the above principle, subsequent units such as Unit – I, III and IV which were commercially operated in different dates as stated above, their auxiliary consumption is also calculated to be 36 MW each same as that of Unit –II of the power station. Accordingly the Commission calculates the percentage of auxiliary consumption of the power station taking into consideration the units which are actually connected to the Grid either through Power Grid system or OPTCL system on a particular date. The percentage of auxiliary consumption at different point of time till all the four units is commercially operated is given in the table below

………”

116. From a perusal of the aforesaid paragraphs of the order dated 12.06.2013, the following is evident:

(i) The OERC categorically acknowledged Clause 4 of the Consolidated PPA which provides that Power to GRIDCO shall be made available by SEL at the Bus bars of the Station connected to the transmission lines of OPTCL / PGCIL and it shall be the obligation and responsibility of GRIDCO to make the required arrangement for evacuation of power from such delivery points;

(ii) Accordingly, based on the existing arrangement at the point of time, the OERC held that since the transmission planning programme of OPTCL for evacuation of power from the upcoming IPPs is under process, GRIDCO may approach the Commission for suitable amendment of the clause in the consolidated PPA, if necessary after finalisation of the same. However, till then, the Commission categorically held the present practice of evacuation of power from the power plant of M/s SEL will continue, which is expected to improve after revival of the Ib-Meramundali line of OPTCL.

(iii) Further, the OERC observed and agreed that due to the said transmission constraint, Vedanta has not been able to generate at full capacity and inject the State quota of power to the State transmission system.

(iv) The OERC agreed with the contention of the Respondent No. 1 that due to transmission constraint they have not been able to generate at full capacity and inject the State quota of power to the State transmission system. The State Commission held that the tariff parameter of Auxiliary Energy Consumption would be considered by taking/ deeming the installed capacity of the Unit as 400 MW, instead of 600 MW.

117. The above order was challenged by Vedanta before this Tribunal, in an appeal, being Appeal No. 25 of 2014. GRIDCO also filed a cross appeal, being Appeal No. 179 of 2014 before this Tribunal. In Appeal No. 25 of 2014, Vedanta, inter-alia, contended that the installed capacity due to transmission constraint ought to be considered as 350 MW instead of 400 MW, for the purpose of computing tariff.

118 In Appeal No. 179 of 2014, GRIDCO contended that the OERC wrongfully determined tariff parameters by considering installed capacity as 400 MW, and that it was the obligation of Vedanta to make power available at the bus bar of the grid sub-station of OPTCL at Budhipadar.

119. In Appeal No. 25 of 2014, Vedanta filed an application before this Tribunal, being I.A. No. 35 of 2014, seeking for interim relief. In the said application, this Tribunal vide an order dated 28.03.2014 held that the tariff/ Capacity Charges payable to Vedanta for the FYs 2010-11 to 2013-14 shall be worked out based on PAFM computed by considering/ deeming the Unit capacity (installed capacity) as 400

MW, instead of installed capacity of 600 MW. The relevant extract of the aforesaid interim order, is set out herein below:

> *"12. In view of above we pass the following interim order, subject to adjustment on the disposal of the main Appeal.*
>
> *i) There is no dispute regarding the Annual Fixed Charges for unit no. 2 for the period 2010-11 to 2013- 14. The Capacity Charges payable to the Applicant/Appellant for the FYs 2010-11 to 2013-14 shall be worked out based on Plant Availability Factor computed considering the transmission constraints with capacity of 400 MW of the 220 KV Double Circuit line from the SESA Sterlite Plant to Budhipadar sub-station of OPTCL instead of installed capacity of 600 MW. Orissa SLDC is directed to compute the Plant Availability Factor for the FYs 2010-11 (from November 2010) to 2013-14 as per the above directions and inform the Appellant and GRIDCO within 30 days of passing of this order. The Applicant/Appellant will revise the bills for the FYs 2010-11 to 2013-14, reworking the Capacity Charges based on the Plant Availability Factor determined by the SLDC and Energy Charges for respective financial years determined in the impugned order. Regarding Water Charges and Electricity Duty, the same will be paid by GRIDCO as per the bills submitted by the Applicant/Appellant. If the net amount due to the Applicant after adjusting the payment already made by GRIDCO is positive then the GRIDCO will pay the balance amount to the Applicant/Appellant within 30 days of raising of the bill by the Appellant. If the net amount is*

negative then GRIDCO will adjust the same in the current bills of the Applicant/Appellant.

……..”

120. Against the aforesaid order, GRIDCO filed applications being, I.A. No., 278 and 279 of 2014, seeking modification of the said order. Further, Vedanta also filed an application, being I.A. No. 233 of 2014, seeking implementation of the said order. While deciding the above applications, this Tribunal passed an order dated 29.11.2014 thereby holding that the installed capacity of 400 MW, instead of 600 MW, shall be considered for computing PAFM. Further, this Tribunal proceeded to direct GRIDCO to implement the aforesaid interim order dated 28.03.2014 at the earliest.

121. GRIDCO challenged the aforesaid order dated 29.11.2014 of this Tribunal, before the Hon'ble Supreme Court in Civil Appeal No. 1376-1378 of 2015. However, the Hon'ble Supreme Court did not find any reason to interfere with the aforesaid order and accordingly, vide an order dated 16.03.2015, dismissed the aforementioned civil appeals of GRIDCO. The aforesaid order of the Hon'ble Supreme Court is set out herein below:

"We have heard learned counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgment impugned does not warrant any interference.

The civil appeals are dismissed."

122. Subsequently, this Tribunal passed the judgement in Appeal No. 25 of 2015, on 10.05.2016 upholding the view of the Commission, thereby holding as under:

> *"5. In the light of the above, the following issues emerge for our consideration;*
>
> *…….*
>
> *(ii) Whether the State Commission has erred in considering only linkage coal cost for computation of variable cost and disallowing the Actual Auxiliary Consumption and Station Heat Rate for the period till the alleged transmission constraint is resolved?*
>
> *……..*
>
> *8. Now we take up the other issue as contested by the **Appellant regarding the transmission capacity limitation which restricted evacuation of power from the Appellant's generating station and resulting into partially loading of the units, which has caused higher auxiliary power consumption and higher Station Heat Rate ("SHR") as compared to Operating Norms as specified in the prevailing Regulations and as a consequence of which the financial losses are suffered by the Appellant.** We have perused the relevant documents submitted by the Respondents vis-à-vis the Appellants claims on account of restricted power evacuation and are making the following observations.*

………

i) Now the issue before us as alleged by the Appellant pertains to restricted power evacuation capacity resulting into partial loading affecting adversely the performance parameters such as Auxiliary Power Consumption and SHR.

The State Commission in its Impugned Order dated 12.06.2013 accepted the transmission constraint as alleged by the Appellant and stated that since the transmission planning programme of OPTCL for evacuation of power from upcoming IPPs which is under process, the Respondent No. 2/OPTCL may approach the Commission for suitable amendment of the Clause in the consolidated PPA, if necessary after finalization of the same. Till then, the present practice of evacuation from the power station of Appellant will continue.

j) The State Commission in its Impugned Order accepted that due to transmission constraint, the Appellant has not been able to generate at full capacity and to inject the state full quota of power to the State Transmission system and determined the auxiliary power consumption based on the existing transmission capability.

k) In light of the above, the transmission constraint from the bus bar of the generating station upto the

Budhipadar sub-station of the OPTCL has been accepted by the State Commission in its Impugned Order after going through the relevant data furnished by the parties and the same has been reaffirmed by the Tribunal's order dated 28.03.2014.

l) We do not have any doubt that at the time of passing of Impugned Order, the State Commission would have gone into all the requisite details on the transmission capacity and the prevailing constraints in evacuation of power form Unit-II of the generating station.

………

o) After accepting the State Commission's considered view of 400 MW of power transmission in sustainable mode for the transmission line in question for that specific period, the auxiliary power consumption as well as Station Heat Rate (on technical consideration) as considered by the State Commission in its Impugned Order would stand justified. Hence, we would not like to interfere with the State Commission's finding in this regard in its Impugned Order.

p) Therefore, the second issue on the operating parameters seeking upward revision by the Appellant as discussed above arisen due to the alleged transmission constraints is also decided against the Appellant."

123. Further, in cross appeal filed by GRIDCO, Appeal No. 179 of 2014, this Tribunal did not find any infirmities in the order dated 12.06.2013 of the OERC, and passed a similar judgment as was passed in Appeal No. 25 of 2014 on the same date, i.e., 10.05.2016. The relevant extracts of the aforesaid judgment are set out herein below:

"vii) Aggrieved by the Impugned Order dated 12.06.2013, the present Appeal has been filed. Looking into the above facts of the Appeal, the main issues before us for deciding this Appeal are:

(a) Whether the State Commission erred in accepting the allegation of Respondent No.1 in respect of the transmission constraint holding that the 220 KV double circuit line running between Respondent No.1 and Budhipadar grid sub-station of OPTCL is capable of carrying power around 400 MW in sustainable mode without going into the requisite technical details on account of actual load transmitted through the same network and thereof determination of the tariff based on the restricted parameters?

(b) Whether the State Commission was justified in taking the alleged transmission constraint into consideration even though under the consolidated PPA it is the obligation of the Respondent No. 1 to make power available at the bus bars of the grid sub-station of OPTCL at Budhipadar?

…….

7.0 After having gone through all the above issues in detail, our observations are as under;

…….

iii) The State Commission in its Impugned Order accepted that due to transmission constraint, the Respondent No. 1 has not been able to generate at full capacity and inject the state quota of power to the State Transmission system and determines the auxiliary power consumption on the existing transmission capability.

iv) Now, we analyze this Tribunal's Interim Order dated 28.03.2014. The relevant extract is reproduced below;

……..

After perusing this Tribunal's order as above, we observed that the Tribunal considered the findings of the State Commission in its Impugned Order accepting therein the transmission constraint.

v) Since the Appellant failed to comply with this Tribunal's order dated 28.03.2014, the Respondent No. 1 filed IA before the Tribunal seeking implementation of its order of 28.03.2014 which was disposed of by the Tribunal's order dated 29.11.2014 directing the Appellant once again to comply with its order dated 28.03.2014 at the earliest.

vi) In light of the above, the transmission constraint from the bus bar of the generating station upto the Budhipadar sub-

station of the OPTCL has been accepted by the State Commission in its Impugned Order after going through the relevant data furnished by the parties and the same has been reaffirmed by the Tribunal's order dated 28.03.2014.
……

x) ……..

In our opinion, the State Commission is in a better position to ascertain the grid constraints keeping in view the requisite data of the State Load Despatch Centre on this issue in question.

xi) After accepting the State Commission's considered view of 400 MW of power transmission in the sustainable mode for the transmission line in question for that specific period, the auxiliary power consumption as well as Station Heat Rate on account of partial loading as considered by the State Commission in its Impugned Order would stand justified. It is an established fact that if the unit operates at a partial load, it does affect adversely the normative parameters such as auxiliary power consumption, Station Heat Rate etc. Hence, we would not like to interfere with the State Commission's finding in this regard in its Impugned Order.

124. Hence, it is noted that vide the aforesaid two judgments dated 10.05.2016 passed in Appeal Nos. 25 of 2014 and 179 of 2014 respectively, the Tribunal settled the principle that during the period

affected by transmission constraint, the tariff parameters have to be reconciled to 400 MW, instead of 600 MW qua the installed capacity.

We note that the entire issue, qua determination of tariff parameters by considering installed capacity as 400 MW, stands covered.

125. We note that GRIDCO never challenged the aforesaid judgments of this Tribunal before the Hon'ble Supreme Court. Vedanta filed a civil appeal before the Hon'ble Supreme Court, being Civil Appeal Nos. 30263 and 30264 of 2016, which was withdrawn by Vedanta.

As such the aforementioned judgments dated 10.05.2016 of this Tribunal has attained finality.

126. We note that for the relevant period (i.e., from 10.11.2010 to 05.01.2016), as held in the above judgments dated 10.05.2016, the tariff parameters (SHR and AUX consumption) have to be determined by reconciling the same to 400 MW as the installed capacity, instead of 600 MW.

127. We note the submission of Respondent No. 1/ Vedanta that similar to SHR and Auxiliary Consumption (AUX), PAFM is also a tariff parameter. In fact, PAFM can also be computed by considering installed capacity as 400 MW, as evident by the principle contained in the interim order dated 28.03.2014 passed by this Tribunal in Appeal No. 25 of 2014.

128. We also note the submission of the Respondent No. 1/ Vedanta that in any event, under no circumstances, the commercial principles to

be invoked as per Section 61(b) of the Electricity Act, 2003 while determining tariff, can mean that for computation of certain tariff parameters (AUX and SHR) the installed capacity be considered/ deemed as 400 MW, while computation of PAFM, the same would be considered as 600 MW. The commercial principles under Section 61 would entail similar treatment to be given to all tariff parameters with respect to the same Unit.

129. In view of the above, we are of the opinion that the entire issue is covered by the earlier judgments of this Tribunal, the same is no more res-integra, and the Impugned Order dated 17.04.2017 passed by the State Commission in Case No. 08 of 2017 does not call for any interference by this Tribunal.

Accordingly, the Appeal No. 358 of 2018 is dismissed as devoid of merits. The associated Interim Applications are also disposed of accordingly.

130. We direct Appellant/ GRIDCO to make the payments to Vedanta, in terms of the impugned order, expeditiously within a period of one month from pronouncement of this Judgment.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 22nd DAY OF NOVEMBER, 2021.

(Justice R.K. Gauba) **Judicial Member**	**(Ravindra Kumar Verma)** **Officiating Chairperson**

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