BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION AT GANDHINAGAR

PETITION NO. 1456 OF 2014
AND
I.A. NOS. 9 OF 2014 & 13 OF 2019

In the matter of:

Petition under Section 86 (1) (f) of the Electricity Act, 2003 read with Clause 6 of the Settlement Agreement dated 11.12.2009 executed between Essar Oil Limited (now Nayara Energy Limited) and GETCO for refund of wrongful levy of Parallel Operation Charges by PGVCL from Essar Oil Limited.

Petitioner	:	Nayara Energy Limited, (formerly Essar Oil Limited) 5th Floor, Jet Airways Godrej BKC, Plot No. C-68, G Block, Bandra Kurla Complex, Bandra East, Mumbai - 400051.
Represented by	:	Ld. Sr. Adv. Shri Saurabh Soparkar, Ld. Sr. Adv. Shri Sanjay Sen, Ld. Adv. Shri Nisarg Desai, Ld. Adv. Shri Yash Dadhich and Ms. Mandakini Ghosh.
		V/s.
Respondent No. 1	:	Paschim Gujarat Vij Company Limited, Off. Nana Mava Main Road, Laxmipura, Rajkot-360004.
Represented by	:	Ld. Sr. Adv. Shri M.G. Ramachandran, Ld. Adv. Ms. Ranjitha Ramchandran, Ld. Adv. Ms. Harini Subramani, Ld. Adv. Ms. Srushti Khindaria, Shri J.J. Gandhi, Shri S.N. Parmar and Shri J.R. Bavalia.
Respondent No. 2	:	Gujarat Energy Transmission Corporation Limited, Sardar Patel Vidyut Bhavan, Race Course Circle, Vadodara - 390007.
Represented by	:	Ld. Advocate Ms. Ranjitha Ramchandran, Ld. Advocate Ms. Harini Subramani, Ms. Srishti Khindaria, Shri K.J. Bhuva,

		Shri Y.J. Gamit, Shri Vasant Patel and Shri S.C. Jayswal.
Intervener No. 1	:	Shri Bharat T. Gohil, Utility Users' Welfare Association, Laxmi Ginning Compound, Opp. Union Co-Op. Bank, Naroda, Ahmedabad – 382330.
Represented by	:	Shri Bharat T. Gohil
Intervener No. 2	:	Laghu Udyog Bharti, 307, Ashram Avenue, B/h. Kocharab Ashram, Near Paldi Cross Road, Ashram Road, Ahmedabad – 380006.
Intervener No. 3	:	Shri Amarsinh Chavda (now deceased) 127, Heritage Bungalow, Opp. Science City, Ahmedabad – 380060.

CORAM:

Anil Mukim, Chairman
Mehul M. Gandhi, Member

Date: 29/05/2024

ORDER

1. The present Petition is filed under Section 86 (1) (f) of the Electricity Act, 2003 read with Clause 6 of the Settlement Agreement dated 11.12.2009 executed between the Petitioner - Essar Oil Limited (now Nayara Energy Limited) and the Respondent No. 2 - Gujarat Energy Transmission Corporation Limited ("GETCO" in short) for refund of wrongfully levied Parallel Operation Charges (POC) by Respondent No. 1 - Paschim Gujarat Vij Company Limited ("PGVCL" in short) from the Petitioner.

2. **Brief introductory facts**:

2.1 The Petitioner, Nayara Energy Limited (earlier known as Essar Oil Limited) is a Company engaged in the business of refining oil by operating a 20 MMTPA Oil Refinery at Vadinar in the State of Gujarat (hereinafter referred to as 'Oil Refinery'),The Respondents are successors of Gujarat Electricity Board, which was constituted previously under the Electricity (Supply) Act, 1948 (herein after referred to as "GEB" or the Board). Respondent No. 1 - Paschim Gujarat Vij Company Limited (PGVCL) has succeeded to the rights, obligations and benefits of the Board for the purpose of distribution of electricity vide Comprehensive transfer scheme, 2003 framed under the

Gujarat Electricity Industry (R&R) Act, 2003. Whereas Respondent No. 2 - Gujarat Energy Transmission Corporation Limited (GETCO has succeeded to the rights, obligations and benefits of the Board for the purpose of transmission of electricity.

2.2 It may be noted here that earlier this matter has remained pending since 2014 despite several hearings on different dates and, after recusal by one Member of the present Commission, now, after hearing the Petitioner and the Respondents and providing opportunities of hearing to all other Parties on record and also by taking into consideration all the pleadings, submissions and arguments, this Commission would be disposing it by this judgment. Interim Application for urgent nature relief during the pendency of the Petition would also stand disposed of with this judgment.

2.3 It is noted here that the previous Commission has allowed I.A. No. 3 of 2018 regarding change of name of the Petitioner from "Essar Oil Limited" to "Nayara Energy Limited" and accordingly the cause-title of the Petition has been changed and the said I.A. is disposed vide Order dated 26.07.2018.

2.4 It is to be noted here that during pendency of the Petition, Interveners No. 1, 2 and 3, i.e. (1) Utility Users' Welfare Association (UUWA), (2) Laghu Udyog Bharti and (3) Shri Amarsinh Chavda, were impleaded as Parties to the Petition vide Daily Order dated 05.11.2016 of this Commission, which was challenged by the Petitioner by way of Appeal No. 44 of 2017. The Hon'ble APTEL vide its Order dated 11.05.2017 held as under:

> *"We find substance in the submission of learned Senior counsel appearing for the Appellant that while deciding whether Respondent Nos. 4 to 6 should be impleaded in the matter it was not necessary for the State Commission to opine on the merits of the case. In the circumstances of the case therefore we are of the opinion that the issue as to whether Respondent Nos. 4 to 6 are necessary and proper parties should be kept open to be argued at the final hearing of the petition along with other issues. The final order on the petition filed by the Appellant should be passed by the State Commission on all issues independently and uninfluenced by any of the observations made by the State Commission in the impugned order. Order accordingly.*
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> *We make it clear that all the contentions of the Appellant and the Respondents including Respondent Nos. 4 to 6 are expressly kept open to be argued at the stage of final hearing of the petition by the State Commission. We make it clear that we have expressed no opinion on any issues involved in this matter and the State Commission will decide all the issues independently and in accordance with law."*

2.5 From the record it appears that during pendency of this Petition, upon death of Intervener No. 3 Amarsinh Chavda, the Commission was requested by Shri Jayveersinh Chavda, son of deceased Amarsinh Chavda, to allow him to join as Intervenor in place of his deceased father. But no order appears to have been passed in that regard thereafter

till this Order. Further, during the hearing before the present Commission, said Shri Jayveersinh Chavda had not appeared. So far as the question of impleadment of Interveners is concerned, it is required to be noted that in similar Petitions Nos. 1401 of 2014 and 1429 of 2014 related to POC, the Interveners have been allowed to be impleaded. The Interveners were also impleaded in the present Petition by the Commission earlier and their replies and submissions are already on record. The Hon'ble APTEL in the above order has directed the Commission to decide it while passing final order. It is noted that during the hearing before us, the Intervenors and Shri Jayveersinh Chavda have not remained present. Under these circumstances and in the interest of justice, the Commission while preparing this Order has also considered their objections on record treating them as impleaded, except deceased Amarsinh Chavda whose name is now deleted.

3. After noting above, we will now look at the Prayers in the Petition, which are as under:

"(a) Hold that pursuant to the Commission's Judgment dated 01.06.2011, the Petitioner's CPP is governed by the Settlement Agreement and is therefore liable to pay POC, for its entire CPP capacity, connected to the GETCO grid in terms thereof.

(b) Direct PGVCL to refund the sum of Rs. 47.14 Crore (for the period from 01.06.2011 to 31.07.2014) and any other sums thereafter illegally / wrongfully recovered as POC from the Petitioner, in excess of the rates prescribed under the Settlement Agreement, along with further interest at the rate of 15% from 01.06.2011 till amounts are due and payable by the Respondents to the Petitioner;

(c) In the alternative and without prejudice to prayer clause (a) and (b) above, hold that the Petitioner, in the peculiar facts of the present case, is not liable to pay POC at the rate of Rs. 26.50/kVA/month corresponding to its installed capacity;

(d) In the alternative and without prejudice to prayer clause (a) and (b) above, the Commission devise an appropriate mechanism to calculate the POC payable by the Petitioner, if any, considering the peculiar facts and circumstances of the present case and direct PGVCL to refund the sums wrongfully recovered as POC from the Petitioner, in excess of the sums so arrived at by the Commission, along with interest at the rate of 15% from 01.06.2011 till such sums are due and payable by the Respondents to the Petitioner; and

(e) Pass any other order as the Commission may deem fit in the facts and circumstances of the present case."

4. **Background, factual context and facts of the Petition:**

4.1 The present Petition is filed challenging wrongful levy of Parallel Operation Charges (POC), by PGVCL (Respondent No. 1), which is alleged to be illegal and arbitrary.

4.2 It is averred in the Petition that the State Government had on 22.12.1997 issued guidelines for CPPs under Resolution No.CPP/11965/GOI/65/PPCell laying down fees and charges, including POC to be recoverable from the CPPs. Paragraph 11 of the said Resolution states that, while granting consent for installation of CPP/DG sets, the POC charges shall be at the rate of Rs. 5/KVA/month. On 09.11.1998, the State Government issued another Resolution No. CPP-1197/2253/PPCell permitting a company to supply surplus power from its CPP to group companies and incorporating eligibility criteria for defining the group companies. The said Resolution further dealt with fees and charges, including POC to be paid by the CPPs at the rates fixed by GEB with the approval of the State Government. Paragraph 9 of the said Resolution states that, while granting consent for the installation of CPP, the fees shall be charged as decided by GEB/Licensee and POC shall be charged at the rate fixed by GEB/Licensee with the approval of the State Government. GEB implemented the provisions of the above-mentioned State Government Resolution by issuing Commercial Circulars (CC) specifying the terms and conditions for operation of the CPPs in the State of Gujarat.

4.3 The Petitioner in order to meet its power requirement, constructed Captive Power Plant (CPP) of total installed capacity of 600.28 MW comprising of:

(a) **77 MW - Base Plant:** (2 x 38.5 MW) Heavy Fuel Oil based Steam Turbine Generation Units, synchronised on 13.09.2006 (hereinafter referred to as '77 MW Base Plant');

(b) **220.48 MW - Phase 1**: (2 x 110.24 MW) Gas Turbine Generation Units, which were synchronised on 28.10.2010 and 27.01.2011 respectively (hereinafter referred to as '220.48 MW Phase-l Expansion Units'); and

(c) **302.8 MW - Phase 2A**: (2 x 105 MW + 1 x 92.8 MW) coal-based Steam Turbine Generation Units, which were synchronised on 24.06.2012, 15.09.2012 and 15.12.2012 respectively (hereinafter referred to as '302.8 MW Phase-2A Expansion Units').

4.4 On 21.12.1998, GEB issued Commercial Circular (CC) No. 687 providing that POC shall be leviable at the rate of 7.5% of the Demand Charges in accordance with the applicable tariff.

4.5 On 26.01.2000, GEB issued Commercial Circular (CC) No. 706 revising the rate with effect from 01.04.1999 and stating that: (i) No POC shall be leviable if the CPP maintained a Contract Demand of 25% or more of its installed CPP capacity, subject to observing the limits specified in the CPP policy; and (ii) A CPP selling power to GEB for a period exceeding 10 days in a month shall not have to pay POC during the entire month, subject to the CPP fully complying with the despatch instructions given by the Chief Engineer (Load Despatch Centre), corresponding to the availability declared by the CPP.

4.6 By its Order dated 31.08.2000 in Case No. 24 of 2000, the Commission quashed and set aside CC No. 706 and stated that, upon quashing of CC No. 706, CC No. 687 did not automatically become operative. It was kept open for GEB to approach the Commission with necessary application under Sec. 29 of the ERC Act, 1998, for levy of POC. GEB was however permitted to charge Fixed Demand Charges as per the existing tariff rate.

4.7 Accordingly, in Petition No. 256 of 2003 filed by GEB, the Commission by its Order dated 25.06.2004 held that the Petition was legally maintainable and POC could be levied under the Electricity Act and that the support extended by the grid to the CPPs synchronized with it needed to be identified and quantified, and directed GEB to provide the estimate of cost being incurred by it for providing services to the CPPs. GEB was also directed to conduct a study covering the aforementioned aspects and file the findings of the study with the Commission.

4.8 It is submitted that certain CPPs challenged the Order dated 25.06.2004 in Petition No. 256 of 2003 before the Hon'ble Gujarat High Court, by filing Special Civil Application (SCA) No. 14743 of 2004 (with allied matters) titled as *Hindalco Industries Limited & Ors. v. GETCO & Ors.* On 21.10.2008, the Hon'ble Gujarat High Court passed judgment in SCA No. 14743 of 2004 holding as under:

> "(*a*) *The Commission's Order dated 25.06.2004 in Petition No. 256 of 2003 under challenge in the present petition is quashed and set aside with a direction to the Commission that, it shall make deliberations on both the Petitions, i.e.: (i) under which impugned order had been passed; and (ii) the Petition which was filed by the GETCO, as ordered by the Commission, simultaneously and conjointly as if they were one petition. Further, the Commission was directed to afford an opportunity to the petitioners to assail the legality, validity, propriety and justifiability including entitlement to pray for fixation and levy of such grid support charge de novo;*
>
> *(b) The petitioners shall continue to pay POC at the rate of 7.5% of the Demand Charges that were being paid as per CC No. 687 dated 21.12.1998, but such payment that may be made by the petitioners shall be treated as payment made without prejudice to the rights and contentions of the petitioners that they have raised before the Hon'ble Gujarat High Court; and*
>
> *(c) In the ultimate interest and development of the State and growing industrial zones, scope of installations of other CPPs being need of time, some mediation or conciliation proceedings, if possible, can be initiated by the Commission, if it thinks fit and try to resolve the issue amicably, keeping the battle of the Court under suspension because, State Transmission Utilities and private generating activity, both need substantive development."*

4.9 Being aggrieved, some CPP holders filed MCA No. 2967 of 2008 (with allied matters) seeking review of the Hon'ble Gujarat High Court's Judgment dated 21.10.2008 in SCA

No. 14743 of 2004 with regard to tits finding that, the CPPs should continue to pay POC at the rate of 7.5% of the Demand Charges as per CC No. 687 till the Commission determined the applicability and the rate of POC.

4.10 On 28.04.2009, the Hon'ble Gujarat High Court passed Order in MCA No. 2967 of 2008 in SCA No. 14743 of 2004, as under:

> *"4. When the Review Applications came up for hearing I had suggested to the parties to explore possibility to resolve the dispute. I am informed that the parties met and pursuant to such meeting a broad consensus is reached which is to the following effect.*
>
> *[A] The Power utilities and the Companies having Captive Power Plant(s) to agree, by way of a without prejudice settlement for 10 years, to either of the following options:*
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> *(a) Meters with the Three (3) minutes integration period for computing the Demand Charges and no POC would be levied on such CPP Units; or*
> *(b) Adoption of Commercial Circular No. 706, with condition no. 2, therein, being substituted, by the following:*
>
> *"Whenever the power will be sold to GUVIL the parallel operation charges to be paid shall be compensated as part of the cost of generation and rate of sale of power shall be accordingly adjusted."*
>
> *[B] Meter installation or Change in the meter programming for the purpose of Meters having agreed Integration period.*
>
> *After the issue of settlement order by GERC, GEB will take necessary actions for the installation of meter or modification in the program of the meter, as the case may be, for implementing the agreed integration period as suggested above. The cost of making such change for the first time viz. (i) change in setting or program of the meter or (ii) change of the meter to implement the desired integration period for computing the Demand Charges as agreed will be borne by GUVNL/GETCO.*
>
> *CPP units can exercise change in the selected option mentioned above only once during the calendar year i.e. CPP unit can exercise its option from the two options mentioned above only once during the calendar year. The cost of implementation arising from the change in decision any time after exercising the first option will be borne by the CPP unit.*

[C] Excess drawl beyond contract demand, in either option, should be levied as per the prevailing tariff for excess drawl charges [at present @ Rs. 369/per KVA].

[D] The POC shall be levied from the date the settlement is placed before the GERC and GERC passes orders in terms thereof.

[E] The agreed settlement period for above arrangement is 10 years. During the settlement period, there will not be any change in the agreed conditions by either party.

5. The petitioners who agree to the above settlement terms may sign the settlement agreement and place the same before the GERC who will pass orders in terms of the settlement in respect of such parties while offering the same terms to all other similarly situated parties. GERC is directed to issue notice to all the CPPs informing them about the settlement proposal above referred and call upon each of them to indicate, within a period of eight weeks, if they wish to accept proposal, for the term of 10 years or not, without prejudice to rights and contentions of CPPs and power utilities. In the event any party fails to indicate whether they are willing to accept the proposal or not within 8 weeks they would have deemed to have accepted the proposal and shall then have to exercise option of POC or Demand Charges based on meter with 3 minutes integration.

6. In respect of the parties who positively do not refuse to accept the [i.e. those who accept and those who do not respond within 8 weeks], GERC shall pass orders in respect of such parties also in terms of the proposal/settlement.

7. The proceedings before the GERC shall then continue only with respect to the parties who positively refuse to accept the proposal. However, it is clarified that the parties who have settled the dispute would also be entitled to participate in the hearing before GERC. Any decision which is ultimately arrived at in the said Petition No. 256 of 2003 and Petition No. 867 of 2006 shall not bind the CPPs and the power utilities, in so far as the same is covered by the settlement agreement, for term of the settlement, which is said to be of 10 years which will be applicable to such CPPs and Power Utilities."

4.11 It was also held in the said order that POC shall be levied from the date the settlement is placed before the Commission and the Commission passes orders in terms thereof.

4.12 On 11.12.2009, the Petitioner entered into a Settlement Agreement with Respondent No. 2 pursuant to the Hon'ble Gujarat High Court's Order dated 28.04.2009 in MCA No. 2967 of 2008. Some of the provisions of the Settlement Agreement are as under:

(a) So long as the CPP is connected to GETCO's grid, the CPP shall pay to GETCO, in addition to other charges payable as determined by the Commission from time

to time, POC as per the methodology provided in the Hon'ble Gujarat High Court's Order dated 28.04.2009 and as mutually agreed between Petitioner and GETCO, as per the terms contained in the said Order dated 28.04.2009;

(b) The methodology and conditions as provided for the calculation of POC shall be in force for a period of 10 years from 28.04.2009, which shall not be amended or revised by either party during the period of the said Agreement;

(c) The CPP shall abide by all the prevailing norms / conditions / rules / regulations as applicable from time to time governing the parallel operation of CPP; and

(d) Any dispute between GETCO and the Petitioner with regard to the implementation of the terms mentioned in the Agreement shall be referred to the Commission for adjudication.

4.13 The Petitioner by its letter dated 22.04.2010 addressed to Respondent No. 2 sought permission for its 220.48 MW (2 x 110.24 MW) Phase-1 Expansion Units in parallel with GETCO's grid. In the said letter, the Petitioner stated that, in view of the expansion of its Oil Refinery, it was also establishing a Cogeneration CPP of 220.48 MW (2 x 110.24 MW) as Phase-1 Expansion Units, consisting of Gas Turbine Generators with HRSG in order to meet power, steam and feed water requirement of its Oil Refinery.

4.14 On 21.09.2010, the Petitioner provided an Undertaking, i.e. Undertaking No. 2, to Respondent No. 2 while seeking permission to synchronize its 220.48 MW CPP [Total installed capacity of CPP being 297.45 MW (220.48 MW + 77 MW), Undertaking No. l was provided for 77 MW on 21.06.2006]. Some of the provisions of Undertaking No. 2 are as under:

(a) The Petitioner agrees and undertakes to pay POC to the Respondent No. 2 as stipulated in the table below immediately from the date of connectivity of the CPP in parallel with the grid of the Respondent No. 2.

Capacity of the CPP	Rate of Recovery of POC
Up to 1000 kVA	10% of the demand charges corresponding to the CPP capacity.
1001 kVA to 10000 kVA	7.5% of the demand charges corresponding to the CPP capacity **OR** Rs. 8,900/- per month whichever is higher.
10001 kVA to 50000 kVA	5% of the demand charges corresponding to the CPP capacity **OR** Rs. 1,25,363/- per month whichever is higher.
50001 kVA and above	2.5% of the demand charges corresponding to the CPP capacity **OR** Rs. 4,43,575/- per month whichever is

Capacity of the CPP	Rate of Recovery of POC
	higher with a further provision of the ceiling of Rs. 8,00,000/- per month.

(b) If the Commission decides POC in future, the charges so decided by the Commission will be applicable from prospective date and till that date, the above charges will be paid by the Petitioner;

(c) The Petitioner authorizes the Respondent No. 2 to automatically increase the Contract Demand equivalent to the highest demand recorded during the financial year in case the use of power by the Petitioner having been found to be in excess of the Contact Demand more than once in a year. The Petitioner further agrees that, the Respondent No. 2 shall levy excess demand charges from the Petitioner for the instances of drawl exceeding the Contract Demand in a financial year;

(d) The Petitioner shall abide by all the prevailing norms / condition / rules / regulations to the Respondent No. 2 and the Commission governing POC for CPPs from time to time; and

(e) The Petitioner will not challenge or dispute the levy of POC by the Respondent No. 2 as agreed upon, before any forum / court, in future.

4.15 On 05.10.2010, the Petitioner and Respondent No. 2 executed a Connectivity Agreement laying down the standards to be maintained for connectivity to the GETCO grid. Respondent No. 2, by its letter dated 16.10.2010, granted permission to the Petitioner for connectivity of its 220.48 MW Phase-1 Expansion Units (i.e. Existing 77 MW + 220.48 MW = Total 297.48 MW) with the 220 kV sub-station of Respondent No. 2 for any power flow through the GETCO grid charges, open access charges and all other charges and losses applicable.

4.16 The Petitioner, vide letter dated 25.10.2010, requested Respondent No. 2 to grant final permission to synchronize its 220.48 MW (2 x 110.24 MW) Phase-1 Expansion Units with the grid.

4.17 On 28.10.2010, the Petitioner synchronized Gas Turbine-1 (110.24 MW) having installed generating capacity of 1,37,800 kVA (i.e. 110.24 MW Unit of its 220.48 MW Phase-1 Expansion Units of its CPP).

4.18 On 27.01.2011, the Petitioner synchronized Gas Turbine-2 (110.24 MW) having installed generating capacity of 1,37,800 kVA (i.e. 110.24 MW Unit of its 220.48 MW Phase-1 Expansion Units of its CPP).

4.19 On 01.06.2011, the Commission passed its Order in Petition Nos. 256 of 2003 and 867 of 2006. The relevant extract of the said Order is reproduced below:

"24 (i) For the 37 CPPs which have executed agreement with the petitioners as per the directives of the High Court and selected out of the options allowed, the Commission is required to record the same and pass necessary orders in terms of the agreement between the parties. The Commission takes note of the agreement and records the same. The parties to the agreement shall follow the orders passed by the Hon'ble High Court."

(ii) ....

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

4.20 It is further stated in the Petition that, on 24.02.2012 Respondent No. 1 issued a letter to the Petitioner stating that Respondent No. 2 had vide its letter dated 16.10.2010 permitted parallel operation of 220.48 MW Phase-1 Expansion Units in addition to the earlier approved 77 MW Base Plant. Therefore, a total of 297.48 MW capacity had been permitted for parallel operation and hence, the Petitioner was required to pay POC from 16.10.2010 (date of GETCO's letter) for the capacity of 220.48 MW in addition to earlier approved 77 MW.

Respondent No. 1 further stated that following POC were leviable from the Petitioner:

(a) Up to 01.06.2011 POC payable at following rate:

Capacity of the CPP	Rate of Recovery of POC
50001 kVA and above	2.5% of the demand charges corresponding to the CPP capacity OR Rs. 4,43,575/- per month whichever is higher with a further provision of the ceiling of Rs. 8,00,000/- per month.

Further, since the 2.5% of demand charges crosses the ceiling limit of Rs. 8,00,000/-, the Petitioner was required to pay Rs. 8,00,000/- as POC up to 01.06.2011. Thus, the differential amount (i.e. Rs. 8,00,000 less (-) the amount paid towards POC) may be recovered from the Petitioner.

(b) From 1st June, 2011 onwards:

As per the Hon'ble Gujarat High Court's Order, the Petitioner had opted for provisions of CC No. 706, therefore, till the Petitioner maintained the Contract Demand equivalent to 25% or more to the earlier approved capacity of the CPP i.e. 77 MW in parallel with the Grid, no POC was recoverable for 77 MW Base Plant.

However, as soon as such consumers reduce their Contracted Demand and the reduced demand was less than 25% of the Capacity of CPP in parallel with the grid, the POC mentioned hereinabove would be recoverable from the date of reduction in demand.

For the capacity of 220.48 MW, the Petitioner was required to pay POC at the rate of Rs. 26.50/kVA in terms of the Commission's Judgment dated 01.06.2011. Considering power factor as 0.8, the Petitioner was required to pay POC for 2,75,600 kVA. Accordingly, every month the Petitioner had to pay Rs. 73,03,400/- from 01.06.2011 onwards.

4.21 On 08.06.2012, the Petitioner provided another Undertaking, i.e. Undertaking No. 3, to Respondent No. 2, while seeking permission to synchronize its 302.08 MW Phase-2A (Coal based) Expansion Units [Total installed capacity of CPP is 599.8 MW (302.8 MW + 220 MW + 77 MW)] by which, it agreed to fix POC at the rate of Rs. 26.50/kVA/month. Some of the provisions of Undertaking No. 3 are as under:

(a) The Petitioner agrees and undertakes to pay monthly POC of the installed capacity to GETCO of Rs. 1,00,30,250/- [378.5MVA (2 x 131.25 + 1 x 116.00) x 1000 x Rs. 26.50)] as per the Commission's Judgement dated 01.06.2011 and stipulated in the said Undertaking No. 3 immediately from the date of connectivity of the CPP in parallel with GETCO's grid;

(b) If the Commission decides POC in future, the charges so decided by the Commission will be applicable from prospective date and till that date above charges will be paid by the Petitioner;

(c) The Petitioner will abide by all the prevailing norms / condition / rules / regulations of GETCO and the Commission governing parallel operation of CPP from time to time; and

(d) The Petitioner will not challenge or dispute the levy of POC by Respondent No. 2 as agreed upon under the Undertaking No. 3, before any forum/ court, in future.

4.22 Respondent No. 2, by its letter dated 19.06.2012, granted permission to the Petitioner for synchronizing and operating its 302.8 MW Phase-2A Expansion Units over and above of its existing 297.48 MW CPP in parallel with GETCO's grid on the terms and conditions of Undertaking No. 3, and amongst others, *inter alia*, on the condition that, POC would be recovered as per the Commission's Judgment in line with Undertaking No. 3 submitted by the Petitioner.

4.23 On 24.06.2012, the Petitioner synchronized its STG-3 (105 MW) having installed generating capacity of 1,23,530 kVA [i.e. 105 MW Unit of its 302.8 MW (2 x 105 MW + 92.8 MW) Units of its Phase-2A Expansion CPP].

4.24 On 15.09.2012, the Petitioner synchronized its STG-4 (105 MW) Unit having installed generating capacity of 1,23,530 kVA [i.e. 105 MW Unit of its 302.8 MW (2 x 105 MW + 92.8 MW) Units of its Phase-2A Expansion CPP].

4.25 On 15.12.2012, the Petitioner synchronized its STG-5 (92.8 MW) having installed generating capacity of 1,09,176 kVA [i.e. 92.8 MW Unit of its 302.8 MW (2 x 105 MW + 92.8 MW) Units of its Phase-2A Expansion CPP].

4.26 The Petitioner on 23.06.2014 informed the Respondent - GETCO that, upon evaluation of the power requirement of its Oil Refinery it was concluded that, at any point in time, only one 110.24 MW Phase-1 Expansion Unit was required as hot stand-by for the Oil Refinery's emergency requirement. In view of the above, the Petitioner requested the Respondent No. 2 to accord approval / sanction for de-synchronization and withdraw the Parallel Operation Permission of one machine of Phase-1 Expansion Unit (i.e. 110.24 MW Generator Sr. No. 1642 and Turbine Sr. No. GT-183).

4.27 On 23.07.2014, the Petitioner de-synchronized Gas Turbine-l (110.24 MW) having installed generating capacity of 1,37,800 kVA (i.e. one 110.24 MW Unit of its 220.48 MW Phase-1 Expansion Units of its CPP).

4.28 The Petitioner submitted that, on 19.08.2014, it issued a letter to the Respondents submitting that the POC recovered by Respondent No. 1 in respect of the 220.48 MW Phase-l Expansion Units and 302.8 MW Phase-2A Expansion Units of the Petitioner's CPP for the period from 01.06.2011 onwards at the rate of Rs. 26.50/kVA/month was wrong, illegal and contrary to: (i) the Settlement Agreement entered into between the Petitioner and the Respondent No. 2; (ii) the Hon'ble Gujarat High Court's Order dated 28.04.2009; and (iii) the Commission's Judgement dated 01.06.2011. Thus, the Petitioner requested the Respondent No. 1 to refund the sum of Rs. 47,14,15,841.68/- wrongfully recovered from the Petitioner along with interest at the rate of 15% and in the future, recover POC with respect to the Petitioner's CPP connected in parallel to the GETCO grid in terms of the Settlement Agreement.

4.29 On 04.09.2014, Respondent No. 1 issued an invoice bearing No. REV/HT/5385 for the sum of Rs. 2,26,07,024/- to the Petitioner for the month of August, 2014. In the said invoice, Respondent No. 1 wrongfully / illegally and contrary to the Settlement Agreement and the Commission's judgment dated 01.06.2011 continued recovery of POC at the rate of Rs. 26.50/kVA/month for the Petitioner's 600.28 MW CPP. Furthermore, in the said invoice, Respondent No. 1 also levied POC on the Petitioner's entire CPP capacity of 600.28 MW, despite Petitioner having disconnected one of its 110.24 MW (GTG) Unit from its 220.48 MW (GTG) Phase-l Expansion Units (i.e. 110.24 MW Generator Sr. No. 1642 and Turbine Sr. No. GT 183). Vide the said invoice, Respondent No. 1 levied a sum of Rs. 1,73,33,650/- as POC upon the Petitioner for its 600.28 MW CPP.

4.30 On 15.09.2014, the Petitioner issued a letter to the Respondents stating that, contrary to the Petitioner's letter dated 19.08.2014, Respondent No. 1 had by its invoice dated 04.09.2014 once again levied POC at the rate of Rs. 26.50/kVA/month in respect of the Petitioner's 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units contrary to the provisions of the Settlement Agreement and the Commission's judgment dated 01.06.2011. The Petitioner, without prejudice to its rights in law and without admitting to levy of POC in terms of the said Invoice, further highlighted the fact that Respondent No. 1 had wrongly levied POC on the Petitioner's entire CPP capacity of 600.28 MW, despite the Petitioner having disconnected one of its 110.24 MW (GTG) Unit from its 220.48 MW (GTG) Phase-l Expansion Units, which had been acknowledged by CEI vide its letter dated 31.07.2014 and Respondent No. 2 vide its letter dated 14.08.2014.

4.31 By the said letter, the Petitioner also submitted a cheque in the sum of Rs. 2,66,07,024/- as payment towards the Invoice dated 04.09.2014 under protest. It is submitted that, Respondent No. 1 vide its Invoice bearing No. REV/HT/6004 dated 07.10.2014 issued upon the Petitioner for the month of September, 2014, credited / refunded the sum of Rs. 37,69,497/- being POC erroneously recovered for the entire month of August, 2014 and for one day in the month of July, 2014 (i.e. 31.07.2014), for the Petitioner's one 110.24 MW (GTG) Unit which was disconnected from the 220.48 MW (GTG) Phase-l Expansion Units.

5. In view of the above, the Petitioner stated that from 01.06.2011 onwards, POC was payable in terms of the Commission's judgment dated 01.06.2011 in Petition Nos. 256 of 2003 and 867 of 2006. In the said judgement, this Commission has held that, all CPPs who had:

(i) ***Not executed any agreement with GETCO*** as per the Hon'ble Gujarat High Court's Order ***and all new CPPs*** were directed to ***pay POC*** at the rate of ***Rs. 26.50/KVA/month; and***

(ii) ***Executed the Agreement with GETCO,*** were liable to ***pay POC as per the said settlement agreement for a period of 10 years***.

5.1 It is the further submission of the Petitioner that, at the time of seeking permission to operate the CPP in parallel with Respondent No. 2's grid, Respondent No. 2, as a pre-condition, mandated the Petitioner to sign and submit undertakings for grant of permission to synchronise its CPP with Respondent No. 2's grid. Without such undertakings, Respondent No. 2 did not grant permission to synchronise the CPPs with its grid. As such, the Petitioner was constrained to furnish the following Undertakings to the Respondent No. 2:

(a) **Undertaking No. 1:** For the Petitioner's 77 MW Base Plant, thereby agreeing and undertaking to pay POC as per CC No. 706, immediately from the date of connectivity of the CPP in parallel with the Respondent No. 2's grid and pay POC as may be revised / decided by the Commission from time to time.

(b) **Undertaking No. 2:** For the Petitioner's 220.48 MW Phase-1 Expansion Units, thereby agreeing and undertaking to pay POC in terms of the methodology provided in CC No. 706. It was further agreed that, if the Commission decided POC in the future, the charges so decided would be applicable from prospective date; and

(c) **Undertaking No. 3:** For the Petitioner's 302.8 MW Phase-2A Expansion Units, thereby agreeing and undertaking to pay POC at the rate of Rs. 26.50/kVA/month in terms of the Commission's Judgment dated 01.06.2011.

5.2 The Petitioner submitted that the scope of Settlement Agreement for determination of POC in terms of the Hon'ble Gujarat High Court's Order dated 28.04.2009 was limited to:

(a) Determination of POC to be payable by CPPs which had positively refused to accept the settlement proposal; and

(b) Validate the settlement agreements executed between the Respondent No. 2 and the CPPs which were to be implemented for a period of 10 years.

5.3 It is submitted that the true intent of the Hon'ble Gujarat High Court was that the settlement provisions be offered to all CPPs for the period of 10 years and only those CPPs which had positively refused to accept the proposal were to be made liable to pay POC as determined by the Commission.

5.4 As per the direction of the Commission, in response to Respondent No. 2's letter for signing of settlement agreement and opting option pursuant to the judgment of the Hon'ble High Court, the Petitioner on 11.12.2009 entered into the Settlement Agreement with the Respondent No. 2 by selecting "Option-(b)" being, *"Adoption of Commercial Circular No. 706, with condition no. 2, therein, being substituted by the following: Whenever the power will be sold to GUVNL the parallel operation charges to be paid shall be compensated as a part of the cost of generation and rate of sale of power shall be accordingly adjusted"*. The relevant extract of the Settlement Agreement is reproduced hereunder for ease of reference:

*"**AGREEMENT***

***THIS AGREEMENT** is entered into on this 11th day of December 2009 by and between:*

*Messrs **ESSAR OIL LIMITED**, a Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Khambhalia Post, Post Box -24, Dist - Jamnagar, PIN-361305, Gujarat, India (hereinafter referred to as the '**Captive Power Plant of CPP'**), which expression shall, unless repugnant to the context of meaning there of include its successors, legal representatives and assigns) of the ONE PART; and*

*Messrs **GUJARAT ENERGY TRANSMISSION CORPORATION LIMITED**, a Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Vidyut Bhawan, Baroda (hereinafter referred to as the 'GETCO),.....*

NOW THIS AGREEMENT WITNESSESTH AS UNDER:

1. *The parties agree that so long the CPP is connected to GETCO's grid, the CPP shall pay to GETCO, in addition to other charges payable as determined by GERC from time to time, parallel Operation Charges as per the methodology provided for in the Order dated 28.4.2009 passed by the High Court in MCA 2834 of 2008 in SCA 14743 of 2004 and other connected matter and as mutually agreed between the parties, as per the terms contained in the said Order dated 28.4.2009.*
2. *The methodology and conditions as provided above for the calculation of the parallel Operation Charges shall be in force for a period of 10 years from 28.4.2009, which methodology shall not be amended or revised by either party during the period of this Agreement.*
3. *The bill for the Parallel Operation Charges shall be raised by the Distribution Companies either along with the invoices that may be raised by the Distribution Companies on the CPPs for the connected load of the CPP with the Distribution Companies or otherwise in the same manners as the Distribution Companies would raise bills for supply of electricity. Such bills will be raised by the Distribution Companies both on behalf of the Distribution Companies and GETCO and the requisite adjustments shall be made inter-se between GETCO and the Distribution Companies. The Payment of the CPP towards Parallel Operation Charges shall be made by the CPP within 10days of the date of billing.*
4. *The CPP shall abide by all the prevailing norms/condition/rules/regulations as applicable from time to time governing the parallel operation of CPP.*
5. *The CPP shall indemnify and hold harmless GETCO against all claims/losses/damages/compensation, whatsoever nature that may at any time arise to GETCO on account of parallel operation of the CPP with GETCO's grid.*
6. *Any dispute between GETCO and the CPP in regard to the implementation of the terms mentioned in this agreement shall be referred to GERC for adjudication....."*

5.5 As regards the Settlement Agreement, the Petitioner submitted as under:

(a) The Settlement Agreement does not expressly specify or relate to any capacity of the Petitioner's CPP or make any reference to any of its Units;

(b) The Settlement Agreement refers to the Petitioner as the 'CPP'. As such, the Petitioner (as a CPP) has executed the Settlement Agreement as an entity per se and the same cannot by any stretch of imagination be read to be restrictive to any specific capacity, as sought to be done by the Respondents; and

(c) The Settlement Agreement would apply to the Petitioner so long as it is connected to GETCO's grid and therefore the Petitioner is liable to pay POC for its CPP only as per the methodology provided in the said Settlement Agreement for the period of 10 years.

5.6 Therefore, in terms of the Hon'ble Gujarat High Court's Order dated 28.04.2009, the Commission's judgment dated 01.06.2011 read with the Settlement Agreement dated 11.12.2009 executed between the Petitioner and the Respondent No. 2, the Petitioner is not liable to pay POC at the rate of Rs. 26.50/kVA/month for it CPP, for a period of l0 years from 28.04.2009, as long as the Petitioner's CPP is connected to the GETCO grid. Further, the Petitioner's 77 MW Base Plant, 220.48 MW Phase-1 Expansion Units and 302.8 MW Phase-2 Expansion Units constitute one CPP, which is connected to the GETCO grid at a single point i.e. at the 220 kV busbar in the Petitioner's premises. Therefore, the treatment meted out by the Respondent No. 1, i.e. raising POC at the rate of Rs. 26.50/kVA/month for the Petitioner's 220.48 MW Phase-l Expansion Units and 302.8 MW Phase-2A Expansion Units, pursuant to 01.06.2011, is not only contrary to the Orders of the Hon'ble Gujarat High Court and the Commission but also contrary to the intent of entering into the Settlement Agreement.

5.7 It is submitted that, under the Settlement Agreement, the Petitioner has opted for adoption of CC No. 706, with Condition No. 2 therein being substituted and as such is liable to pay POC at the rate of 2.5% of the Demand Charges corresponding to its CPP capacity or Rs. 4,43,575/- per month whichever is higher with a ceiling of Rs. 8,00,000/- It is submitted that, in the present case, in terms of the Settlement Agreement, the Petitioner is only liable to pay a maximum of Rs. 8,00,000/- per month for its CPP consisting of the Base Plant, Phase-1 Expansion Units and Phase-2A Expansion Units.

5.8 However, contrary to the above, Respondent No. 1 has been levying POC upon the Petitioner in terms of:

(a) **For its Phase-1 Expansion Units:** Wrong interpretation of Undertaking No. 2 forcefully sought by the Respondents, whereby it was stated that, the Petitioner was liable to pay POC in terms of the methodology provided therein (akin to CC No. 706), until the Commission determined POC. The Respondent No. 1, post 01.06.2011, has been levying POC on the Petitioner at the rate of Rs. 26.50/kVA/month for its Phase-1 Expansion Units. Respondent No. 1's levy of POC, post the Commission's judgment dated 01.06.2011, is based on incorrect understanding of the intent of levy of POC and contrary to:

(i) Hon'ble Gujarat High Court's Order dated 28.04.2009;
(ii) The Commission's Judgment dated 01.06.2011; and

(iii) Settlement Agreement.

(b) **For its Phase-2A Expansion Units:** Undertaking No. 3 whereby it is submitted that, the Petitioner shall pay monthly POC corresponding to the installed capacity to the Respondents of Rs. 1,00,30,250 (378.5 MVA (2 x 131.25 + 1 x 116.00) x 1000 x Rs. 26.5) as per the Commission's judgment dated 01.06.2011.

5.9 With regard to Undertaking Nos. 2 and 3 provided by the Petitioner, it is submitted that:

(a) Undertaking No. 2 was provided by the Petitioner to Respondent No. 2 prior to the Commission's Judgment dated 01.06.2011 and hence the action of the Respondents in recovering POC in terms of the said Undertaking No. 2 (i.e. at the rate of Rs. 26.50/kVA/month) is without any authority in law.

(b) Both Undertaking Nos. 2 and 3 are contrary to the Hon'ble Gujarat High Court's Order dated 28.04.2009 read with the Commission's Judgment dated 01.06.2011 whereby it is clear that the CPPs which have executed the settlement agreements shall pay in accordance with the settlement agreement and not at the rate of Rs. 26.50/kVA/month. Further, POC at the rate of Rs. 26.50/kVA/month was only leviable / applicable to those CPPs which had positively refused the settlement proposal. Admittedly, the Petitioner has never refused the settlement proposal.

(c) The said Undertakings were compulsorily required to be submitted by the Petitioner, to synchronize its Units / CPP to the Respondent No. 2's grid. Failing which, the Respondent No. 2 did not permit synchronization of CPPs to its grid. The format and terms of the undertakings have always been dictated by Respondent No. 2.

(d) Undertaking No. 2 is also bad in law in terms of the Commission's Order dated:

(i) 31.08.2000 in Case No. 24 of 2000 whereby CC No. 706 was quashed and set aside; and

(ii) 01.06.2011, in Petition Nos. 256 of 2003 and 867 of 2006 whereby POC was to be paid prospectively in terms of the Settlement Agreement / Rs. 26.50/kVA/month, as the case maybe.

(e) The Undertakings obtained by Respondent No. 2 from the Petitioner are bad in law, in light of the fact that, the same bases the recovery of POC on CC No. 706. In this regard, it is submitted that, since CC No. 706 had already been set aside by the Commission's Order dated 31.08.2000, the action of Respondent No. 1 in mandating / requiring the Petitioner to issue such Undertakings and thereafter recovering POC based on the said Undertakings is illegal and in direct contravention of the Commission's Order dated 31.08.2000. It is submitted that, the same has also been reaffirmed by the Hon'ble APTEL in its Judgment dated 04.04.2014 in Appeal No. 74 of 2013 titled *PGVCL & Anr. Vs. GERC & Anr.*

(f) Respondent No. 2 could not have required the Petitioner to submit an Undertaking (i.e., Undertaking No. 3) as a pre-condition to synchronize its Units / CPP to the GETCO grid. The Settlement Agreement having been executed between the Petitioner and the Respondent No. 2 and the Commissions Judgment dated 01.06.2011 specifically provides that, those CPPs who had executed the settlement agreement would be liable to pay POC in terms thereof and would not be liable to pay POC at the rate of Rs. 26.50/kVA/month.

5.10 The Petitioner submitted that the intent of the Hon'ble Gujarat High Court behind the initiation of the entire settlement proposal between the CPPs and the Respondent No. 2 was twofold:

(a) Firstly, to offer the settlement proposal / terms to all CPPs and give them an option to either accept or reject the said settlement proposal; and

(b) Secondly, if the CPPs positively reject the settlement proposal, then only in that case determine POC and make it applicable on those CPPs having specifically rejected the settlement proposal.

Therefore, having accepted the settlement proposal and having executed the Settlement Agreement, the Petitioner had insulated itself from the applicability of POC as per the Commission's Judgment dated 01.06.2011 (i.e. at the rate of Rs. 26.50/kVA/month). Therefore, the Undertakings forcefully sought from the Petitioner cannot alter / negate the entire premise on which POC was made applicable to the CPPs and therefore the Undertakings provided by the Petitioner to Respondent No. 2 are bad in law and contrary to the intent of applicability of POC as substantiated above.

5.11 It is submitted that the Settlement Agreement executed between the Petitioner and Respondent No. 2 was not regular / ordinary settlement between two entities but was guided under the aegis of the Hon'ble Gujarat High Court and the Commission. In fact, the Commission in its Judgment dated 01.06.2011 has at para 23.5 held that, the Judgement of the Hon'ble Gujarat High Court assumes great significance particularly because the Hon'ble Gujarat High Court had put its seal of approval on the settlement reached between the parties. Furthermore, the Commission took note of and validated the said Settlement Agreement, thereby giving it the final seal of approval. In light of the same, any Undertaking forcefully sought by Respondent No. 2 in lieu of grant of permission to synchronise the CPPs to its grid cannot override or negate the Settlement Agreement which has been authorised and sanctioned by the Courts.

5.12 It is submitted that, it is evident from the conduct of the Respondents that on one hand they recognise that the Petitioner is governed under terms of the Settlement Agreement qua its 77 MW Base Plant. However, on the other hand they wrongfully insist that the Petitioner pay POC, at the rate of Rs. 26.50/kVA/month, for its Phase-1 Expansion Units and Phase-2A Expansion Units thereby completely disregarding the Settlement Agreement and its applicability thereof for the said Units of the Petitioner's CPP.

5.13 Thus, if it is to be interpreted that the Settlement Agreement does not apply to the entire capacity of the Petitioner's CPP, then that in itself nullifies the premise and the intent of the parties pursuant to which the Hon'ble Gujarat High Court and the Commission passed its Orders dated 28.04.2009 and 01.06.2011 respectively, thereby initiating and approving the settlement agreements entered into by the CPPs with Respondent No. 2.

5.14 Even otherwise, it is submitted that the entire capacity of the Petitioner's CPP is one CPP and cannot be treated as different CPPs, which is evident from the following:

(a) The Settlement Agreement does not expressly specify or relate to any capacity of the Petitioner's CPP or make any reference to any of its Units;

(b) All the Units of the Petitioner's CPP along with the 220 kV double circuit lines merge at the 220 kV busbar at the Petitioner's premise; and

(c) The Phase-l Expansion Units and Phase-2A Expansion Units are only expansions of the existing 77 MW Base Plant, which were installed to cater to the expansion of the Oil Refinery, to ensure fuel price economy and higher degree of reliability in operation, due to non-availability of commercially viable gas for running the 220.48 MW Phase-l Expansion Units (Gas Turbine Generating Units).

5.15 In view of the aforementioned facts, it is submitted that the Settlement Agreement entails inclusion of all the Units of the Petitioner's 600.28 MW CPP connected to the grid. The Petitioner is liable to pay POC for the period of the settlement (i.e. 10 years from 11.12.2009) only in terms of the methodology accepted in the Settlement Agreement as duly ratified by the Commission on 01.06.2011 and not at the rate of Rs. 26.50/kVA/month as being wrongfully / illegally recovered by the Respondents.

5.16 It is further submitted that the Commission while determining POC leviable for all CPPs operating in parallel with the State grid has gone beyond the mandate prescribed by the Hon'ble Gujarat High Court in its Orders dated 21.10.2008 and 28.04.2009. The Hon'ble Gujarat High Court in its Order dated 28.04.2009 while directing the parties to elect an option of the settlement proposal and execute the settlement agreement had specifically directed the Commission to continue the proceeding in Petition Nos. 256 of 2003 and 867 of 2006 only with respect to the parties who had positively refused to accept the settlement proposal. The said Order dated 28.04.2009 of the Hon'ble Gujarat High Court was binding on the Commission.

5.17 The Commission has at Paragraph 23.6 also rightly stated that the Commission is left with to decide the case on merits of levy of POC on the CPPs who had not signed any settlement agreement in terms of the Hon'ble Gujarat High Court's direction.

5.18 From the above, it is clear that the Hon'ble Gujarat High Court had limited the Commission's scope in terms of deciding on merits levy of POC, only for those CPPs who had positively refused to execute any agreement with Respondent No. 2, as directed by the Hon'ble Gujarat High Court. The Commission itself recognised the mandate

given by the Hon'ble Gujarat High Court in Paragraph 23.6 of its judgment dated 01.06.2011 as reproduced above. However, contrary to the said mandate, the Commission has gone beyond its scope and decided the quantum of POC to be levied on new CPPs operating in parallel with the State grid as well.

5.19 It is submitted that the quantum of POC at the rate of Rs. 26.50/kVA/month as held by the Commission could have only been levied on CPPs that had positively refused to enter into any agreement with the Respondent No. 2 in terms of the Hon'ble Gujarat High Court's Order. POC at the rate of Rs. 26.50/kVA could not have been levied on any new CPPs operating with the State grid, who were not in existence at the time of the settlement proposal or who had not positively refused to accept the settlement proposal as approved by the Hon'ble Gujarat High Court. On the contrary, all new CPPs which came into existence pursuant to 01.06.2011, ought to have been offered the same terms and conditions of the settlement proposal as offered to the existing CPPs.

5.20 From the above it is evident that the Commission in its Judgment dated 01.06.2011 has traversed beyond the mandate prescribed by the Hon'ble Gujarat High Court by determining the quantum of POC to be levied upon new CPPs operating in parallel with the State grid. Without prejudice to the submissions of the Petitioner stated hereinabove, assuming though not admitting that the Petitioner's Phase-1 and Phase-2A Expansion Units are new CPPs and not part of one CPP, even then the Respondents were liable to offer the same terms and conditions of settlement to the Petitioner and only having positively rejected the said settlement proposal, the Respondent No. 1 could charge the Petitioner at the rate of Rs. 26.50/kVA/month for its said expansion Units.

5.21 The Petitioner prayed that the Commission may hold that in respect of the Petitioner's Phase-l and Phase-2A Expansion Units, POC is payable by the Petitioner with effect from 01.06.2011 in lieu of the Settlement Agreement, as is being recovered by Respondent No. 1 and paid for by the Petitioner in respect of its Base Plant. The Settlement Agreement has been duly noted and validated / recorded by the Commission in its Judgment dated 01.06.2011. The Commission was requested to restrain the Respondents from recovering POC in excess of the rate agreed upon under the Settlement Agreement (i.e. in excess of Rs. 8,00,000/- per month) for its entire CPP capacity.

5.22 In light of the above, the Petitioner requested Respondent No. 1 to refund the sum of Rs. 47,14,15,841.68/- wrongfully recovered from the Petitioner along with interest at the rate of 15% and in the future, recover POC with respect to the Petitioner's CPP in terms of the Settlement Agreement.

5.23 However, contrary to the settled position, as demonstrated by the Petitioner by its letter dated 19.08.2014, the Respondents have failed to refund the POC wrongfully levied by it from the Petitioner. Furthermore, on 04.09.2014, Respondent No. 1 raised its Invoice No. REV/HT/5385, for the month of August 2014, disputing the provisions of the Settlement Agreement and the direction of the Commission set out in its Judgment dated

01.06.2011 passed in Petition Nos. 256 of 2003 and 867 of 2006, by once again levying POC at the rate of Rs. 26.50/kVA/month in respect of Petitioner's 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units.

5.24 Aggrieved by the Respondents' wrongful / illegal act of collection of POC in respect of the Petitioner's Phase-1 and Phase-2A Expansion Units for the period from 01.06.2011 onwards at the rate in excess of the rate agreed between the Petitioner and Respondent No. 2 (i.e., in terms of the Settlement Agreement) and its inaction to the Petitioner's request for refund, the Petitioner was constrained to file the present Petition.

Applicability of POC on actual support received from the Grid and not on the installed capacity:

5.25 The Petitioner submitted that the POC wrongfully levied by the Respondents, is being levied corresponding to the installed capacity of the Petitioner's CPP. Without prejudice to the submissions of the Petitioner made hereinabove, that the Petitioner is liable to pay POC only in terms of the Settlement Agreement and not at the rate of Rs. 26.50/kVA/month, and in the alternative, it is submitted that, in any event, POC levied by the Respondents cannot be levied on the installed capacity of the Petitioner's CPP. In this regard the Petitioner made its alternate submissions as below.

5.26 It is submitted that parallel operation is an electrical activity where one electrical system is allowed to connect and operate to another electrical system at similar operating conditions. In this process, the power systems operate in tandem with all the connected generators for better operational efficiency and stability. The grid is an electrical system to which other electrical systems such as generating companies belonging to the Central Government, State Governments, body corporates, persons and CPPs are connected. The Commission by its Judgment dated 01.06.2011 has directed levy of POC only on CPPs operating in parallel with the grid, in lieu of the advantages received / exchanged by it, in the form of system stability, reliability of supply, economy of scale for meeting its emergency requirements, uninterrupted power supply, etc.

5.27 The support / advantages received by the CPPs on operating in parallel with the grid, in the nature of systems stability, reliability of support, uninterrupted power supply are supports / factors which are already factored in while deciding the quantum of the Contract Demand. As regards meeting its emergency requirements, the support received from the grid should be considered keeping in mind the probability of loss of partial / entire CPP capacity, corresponding to the load for the purpose of calculating POC. Even in that case, any excess drawal from the grid by the CPP (as a consumer) over and above the Contract Demand is accounted for and attracts severe penal consequences in terms of tariff formulated for respective categories.

5.28 The total installed capacity of the Petitioner's CPP is 600.28 MW. However, on 23.07.2014, the Petitioner de-synchronised one Unit (i.e. 110.24 MW) of the 220.48 MW Phase-1 Expansion Units of its CPP. Currently, the Petitioner's 490.04 MW CPP

capacity is synchronised with the GETCO grid. The entire load of the Petitioner's Oil Refinery including the CPP's auxiliary load is approximately 165 MW. The expansion of the CPP, in terms of capacity is much higher than the total requirement of the Petitioner's Oil Refinery. Thus, the Petitioner has sufficient Spinning Reserve to cater to its load requirement in case of any loss in its CPP capacity. Therefore, reliance of the Petitioner for any support received from the grid is minimal / marginal and is compensated by the Contract Demand charges paid by the Petitioner for 40 MVA (i.e. approximately Rs. 14.07 Crores per annum). This is also evident from the historical maximum demand recorded from the GETCO grid, whereby the Petitioner has breached its Contract Demand (i.e. 40 MVA) only on 14 occasions from the year 2009 i.e. a period of five years. Even otherwise, these breaches in the Contract Demand are minor and have lasted for only a few minutes, thereby causing minimal impact on the GETCO grid.

5.29 The Petitioner has a Contract Demand of 40 MVA, which is met through the 220 kV transmission line designed as per the Respondents requirements. The demand from the grid is only of stand-by nature. Further, in the past 12 months the Petitioner has been billed for 1.5 million units at 0.5% load factor based on its Contract Demand, which is evident from the past 12 months bills (FY 2013-14) issued by the utility. It is submitted that, the Petitioner has also installed load shedding systems to restrict demand in case of exigencies.

5.30 In view of the above, it is submitted that POC, if any, to be charged from the CPP, should be reflective of the actual support utilised / received / contracted by it on being connected in parallel to the grid. It is submitted that, these charges ought to be levied only in cases where such support charges have not been accounted for. The levy of POC on the basis of the installed capacity of the CPP is not in consonance with the universally accepted fact that, POC are charges payable for compensating the benefits received by the CPP from generating capacity of transmission Licensee.

5.31 Without prejudice to the submissions made hereinabove with regard to the fact that POC are charges to be recovered for the actual benefit received from the grid which has not been accounted for by any other charges / levies, it is submitted that, in the extreme situation (wherein the CPP decides to either shed its load on its CPP capacity), POC can only be charged corresponding to the actual load requirement of the consumer (CPP) and not on the installed capacity of the CPP itself. In any event, there should be no duplication of charges / levies on the CPP in the form of Grid Support Charges (GSC).

5.32 It is submitted that, like any other generator connected to the grid, the CPP when connected to the grid also provides or contributes to the pool of service to the grid and helps in reducing the voltage and frequency excursions in the grid which has all other consumers connected to it. The grid support, if it is so termed, is being availed by all the consumers connected to the grid and not by generators who provide support to grid. The CPPs near to the industrial units play much larger role in maintaining quality of supply to industry in comparison to the utility generators located faraway.

5.33 The Commission during the proceedings in Petition Nos. 256 of 2003 and 867 of 2006 had requested the CEA to analyse and study the report submitted by the Respondent No. 2 on levy of POC. The Commission in its Judgement dated 01.06.2011 has categorically recorded CEA's opinion that, the amount of POC, if any, should only be of nominal nature, as there seems no strong technical justification for levying the same. Further, Shri Bhanu Bhushan, Member, CERC, during the meeting of the FOR dated 18.01.2006 has also stated that there was little justification for levy of POC and GSC. The State Electricity Regulatory Commission should, therefore, ensure that such charges are as low as possible. The cost can be measured by the expenditure incurred in providing access to the grid. It has been submitted by CEA and M/s Feedback Ventures (I) Pvt. Ltd. that, there is no additional cost incurred by the grid for connecting CPPs in parallel to it. The cost of the network set up by utilities is recovered from the consumers over a period of time through components of tariff like demand charges and fixed charges. It is submitted that the utilities have not created any additional infrastructure for evacuation of power from the CPPs or to withstand the CPPs parallel operation with the grid. Protection systems to negotiate grid disturbance, if any, to protect the CPP (over current and earth fault protections, reverse power relays, deadline charging protection, neutral displacement relays, which are paid for by the industry as per the specification of the utility) and the grid have been installed at the cost of the CPP / industry. It is clear from the above that the basic purpose of POC is to compensate the Respondent No. 1 and/or the Respondent No. 2 for providing emergency power and certain other occasional benefits from the grid system and not for recovering the normal capital cost of the licensees.

5.34 However, the methodology adopted by the Commission in its judgement dated 01.06.2011 is contrary to the above, wherein the Commission has directed levy of POC based on the installed capacity of the CPP. This is not only contrary to the universally accepted concept that POC are charges payable for the actual support received from the grid but is also contrary to its own intent as recorded in the said Judgement. As is evident from the Judgement dated 01.06.2011, the Commission has recognized the fact that POC is leviable on the support received from the grid with regard to the load of the CPP consumer and not on the installed capacity of the CPP itself. Only on this understanding and intent, the Commission has come to a conclusion that POC is leviable on CPPs. However, contrary to this understanding and intent, the Commission has formulated POC based on the fixed cost of transmission and distribution network and connected load in the system. The Commission, without any further justification and reasoning has arrived at the conclusion that the POC should be levied at Rs. 26.50/kVA/month for the installed capacity of the CPP. It is submitted that, the same is not only contrary to the intent of levying POC, but also has no technical, scientific, commercial merit and has no nexus with the intent of levying POC.

5.35 Without prejudice to the submissions made hereinabove and assuming though not admitting that, POC is payable in terms of the Judgment of the Commission dated 01.06.2011, it is submitted that, POC levied should reflect the intent (of levying POC)

as recorded in the said Judgment. In other words, POC should be levied on the benefits received from the grid, with regard to the load of the CPP consumer and not on the installed capacity of the CPP itself. For implementing the Commission's Judgement dated 01.06.2011, in its true spirit, the particular facts and circumstances of each case has to be taken into account before levying POC uniformly across the board.

5.36 It is pertinent to note the unique / specific facts with regard to the Petitioner's CPP and its load requirements as a consumer, before implementing the Judgement dated 01.06.2011. In this regard, the following is noteworthy:

(a) In the year 2006, the power and steam requirement to operate the 9 MMTPA Oil Refinery was 63 MW and 185 TPH respectively. For this requirement, the Petitioner set up 77 MW (2 x 38.5 MW) STG with 3 x 175 TPH HFO based boiler. It is submitted that the cost of Heavy Fuel Oil was very low as the same was available from the Oil Refinery operation as a by-product. Thereafter, in lieu of the expansion of the Oil Refinery from 9 MMTPA to l4 MMTPA, the Petitioner enhanced its CPP capacity by adding 220.48 MW (2 x 110.24 MW) GTGs with 2 x 315 TPH HRSG. This was done due to the fact that, Heavy Fuel Oil was no longer economical / commercially viable. The Gas based turbines set up as the natural gas prices were economical / reasonable at that given point in time. Further, for the refinery operations, gas turbines were more efficient and were capable of black-start operations. The lower capital cost of Gas based plants made it more economical for the Petitioner vis-à-vis the coal based plants. In the year 2012, the Oil Refinery capacity was expanded from 14 MMTPA to 20 MMTPA. During the said period, the Petitioner's CPP capacity was also expanded with addition of 302.8 MW (2 x 105 MW + 1 x 92.8 MW) with Coal fired boiler (2 x 750 TPH). This was so done as the cost of natural gas had gone up from $ 4/mmbtu to $ 15/mmbtu during the year 2010. At that given point in time, the cost of coal was cheaper and more easily available vis-à-vis natural gas. The cost of generation using coal as a fuel at that point in time was much cheaper as compared to other fuels like natural gas, Heavy Fuel Oil, naptha, etc.

(b) Modern day refinery operations require extremely high energy supply in the form of electricity and steam. Any interruption in such supply for even a small duration of time has huge cost implications (in the nature of refinery restart, plants stability, product rejection, safety of equipment, etc,). In this context, the Petitioner has set up a CPP of 600.28 MW consisting of 7 Units based on different technologies (i.e. 2 x 38.5 MW based on Heavy Fuel Oil, 2 x 110.24 MW based on Gas / Naptha, and 2 x 105 + 1 x 92.8 MW based on Coal) for supplying power and steam to its Oil Refinery. Although the total installed capacity of the Petitioner's CPP is 600.28 MW, the Oil Refinery's entire load including, the CPP's auxiliary consumption is only approx. 165 MW. It is submitted that, the CPPs' expansion in terms of its capacity is much higher than the load requirement of the Oil Refinery due to:

(i) Volatility in fuel prices and flexibility available to the Petitioner to operate its Units in any combination for optimal utilisation of resources.

(ii) High degree of reliability of operation which aides in competing in the dynamic market.

(c) It is submitted that, a consumer may have a Contract Demand / Plant Load depending upon its requirement of redundancy and reliability. However, the same does not affect the requirement on the grid, which is based on usage only. For example, in an Oil Refinery, where the redundancy required is very high (e.g. N+1 or N+2 depending upon the Consumer perception and design philosophy criticality and safety of the process and equipment), does not affect the capital investment made by the licensee in the grid. Capacity and configuration of a CPP is decided on the requirement of the industrial process in terms of reliability, redundancy and spatial requirement. For example, a refinery's requirement of 100 MW could be met by machine configuration of 2 x 100 MW, 3 x 50 MW, 4 x 35 MW, 5 x 25 MW for N+1 basis. For N+2 basis, it could be 3 x 100 MW, 4 x 50 MW, 5 x 35 MW, 6 x 25 MW. Each of these configurations will have implication in terms of capital cost and running cost in the form of fuel economy and operational flexibility. It is evident from the above that, configuring decision is independent of the licensee's investment in the system and would impose no additional burden on it.

(d) Different types of load mandate different support from the grid. The support required by an Oil Refinery is way different than the support required by an arc furnace or heavy rolling mill or metallurgical industry, etc. The support required, by Arc furnaces and rolling mills is of continuous nature, while that of refinery's is of contingent nature. In its Judgement dated 01.06.2011, the Commission has relied upon the study conducted by Electrical Research and Development Association, Vadodara (ERDA) for the Chhattisgarh State Electricity Regulatory Commission in Petition No. 20 of 2009 (M). Unlike, arc furnaces or heavy rolling mill or metallurgical industry, Oil Refineries (like that of the Petitioner) have a steady load with no violent fluctuations, harmonics and where no wave chopping is involved.

(e) The installed capacity of Petitioner's CPP far exceeds the capacity of the connected 220 kV transmission line. The said 220 kV transmission line has been set up as per specification approved by the Respondent No. 2 to meet the demand of 40 MVA in terms of Supply Code. The transmission line has a capacity on single circuit basis of 300 MVA. Transmission line capacity is seven times the Contract Demand and twice the load requirement of the Oil Refinery. The said 220 kV transmission line / network has a maximum capacity to carry 300 MVA power in terms of the statutory mandates. Therefore, the support received / receivable from the grid by the Petitioner cannot exceed the actual load requirement and in any event cannot exceed the capacity of the transmission line. Therefore, charging POC on the installed capacity of the CPP has no basis or reasoning. At no given point of time the Petitioner can receive support, from the grid, corresponding to the installed

capacity of the CPP. Hence, it cannot be inferred that the transmission system starting from Petitioner's premises in the upstream manner is capable of meeting the full capacity of CPP in any way.

(f) In every power system, the utility installs controlling and protective equipment. The controlling / protective equipment have the characteristics that the power flow in either way is limited by the parameters set in the upstream and downstream. Should the 'set-point' in either stream be breached, the protective / controlling equipment automatically isolate the consumer from the grid. In the Petitioner's case, the protective / controlling equipment are designed and set to isolate the system in a time graded manner, at a fraction of the CPP capacity. Thus, the installed capacity of the CPP cannot be considered for levying POC on the Petitioner.

(g) POC is payable for the benefits received by the CPP from the grid. This has also been appreciated in the Commission's Judgement dated 01.06.2011. The benefits received by the CPP from the grid, if any, are received for import of power from the grid as a result of interconnection exchange (perturbation in the system) or in certain events as a consumer and not during export of power as a generator. As demonstrated above, there are certain limitations for import of power from the grid and as a result, limitations on the benefits received, if any, which in no event can extend to the installed capacity of the CPP. Historically, from 24.04.2006 (since inception / date of connection) till date, the maximum power recorded in the Petitioner's tariff meter is 94 MVA.

5.37 Therefore, in the peculiar facts and circumstances of the present case, as demonstrated hereinabove, POC cannot be levied and/or recovered from the Petitioner on the installed capacity of its CPP.

5.38 It is submitted that the Electricity Act was enacted for taking measures conducive to development of the electricity industry, promoting competition, protecting interest of consumers, rationalisation of electricity tariff, and promotion of efficient and environmentally benign policies. Section 86 of the Electricity Act provides for certain mandatory and discretionary functions to be carried out by the State Commission while discharging its duties as a regulatory body. One of the important mandatory functions prescribe under Section 86 of the Electricity Act is to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. The State Commission shall ensure transparency while exercising its power and discharging its functions. In discharge of its functions, the State Commission shall be guided by the National Electricity Policy and the Tariff Policy as published by the Central Government. As per Clause 5.2.24 of the National Electricity Policy (NEP) dated 12.02.2005, provision regarding CPP was introduced in the Electricity Act with respect to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry. Further, Clause 5.12.3 of the NEP provides that, industries in which both process heat

and electricity are needed, are well suited for co-generation of electricity. A significant potential for co-generation exists in the country. Co-generation system needs to be encouraged in the overall interest of the energy efficiency and also grid stability. Further, Clause 6.3 of the Tariff Policy dated 06.01.2006 provides that captive generation is an important means to making competitive power available. Appropriate Commission should create an enabling environment that encourages CPPs to be connected to the grid. The Judgement dated 01.06.2011 of the Commission is not only contrary to the intent of levying POC but also contrary to the provisions / intent as set operation and grid connectivity of CPPs. The order also defeats the provisions of Sections 60 and 66 of the Electricity Act.

5.39 In light of the above, it is submitted that levy of POC based on the installed capacity of the CPP is totally unscientific, inequitable and unfair. It would be perverse and a travesty of justice if the installed capacity of a CPP is continued to be the basis of calculating the quantum of POC.

5.40 It is submitted that the Open Access Consumers are not required to pay POC / GSC as is evident from:

(a) Regulation 20(6) of the CERC (Open Access in Inter-State Transmission) Regulations, 2008, prior to its amendment dated 29.05.2009, in terms of which POC was specifically not payable by Open Access customers. The relevant extract of Regulation 20(6) is provided hereunder:

> *"(6) In an interconnection (integrated A.C. grid), since MW deviations from schedule of an entity are met from the entire grid, and the local utility is not solely responsible for absorbing these deviations, restrictions regarding magnitude of deviations (except on account of over-stressing of concerned transmission or distribution system), and charges other than those applicable in accordance with these regulation (such as standby charges, grid support charges, parallel operation charges) shall not be imposed by the State Utilities on the customers of inter-State open access." [Emphasis supplied]*

(b) Regulation 20(6) of the CERC (Open Access in Inter-State Transmission) (Amendment) Regulations, 2009 dated 29.05.2009 ('Open Access Regulations, 2009'), which provides as under:

> *"No charges, other than those specified under these regulations shall be payable by any person granted short-term open access under these regulations."*

(c) The Statement of Reasons of the Open Access Regulations, 2009, wherein the Northern Region Load Despatch Centre had suggested that in order to have clarity on the issue amendment of Regulation 20(6), charges such as GSC and POC be specifically stated therein. However, the Hon'ble CERC while considering the

suggestions received, was of the view that the intention required to be conveyed had been adequately conveyed in the proposed amendment regulations and no further change was required.

5.41 Therefore, if GSC and POC cannot be levied on Open Access consumers, it cannot be levied on consumers who are operating captive generating plants in parallel with the grid. In this regard, the observations of the Andhra Pradesh Electricity Regulatory Commission in its Order dated 23.07.2010 in R.P. No. 9 of 2010 in O.P. No. 20 of 2008, in the matter filed by Eastern Power Distribution Company of Andhra Pradesh Limited are noteworthy.

6. **Reply dated 30.01.2015 of the Respondents**:

6.1 The Respondent contended that the Petition seeking remission or reduction of the POC in regard to its CPPs and interpreting the scope of the Settlement Agreement dated 11.12.2009 entered between the Petitioner with the Respondents as providing for the application of the charges as per CC No. 706 to the CPPs of 220.48 MW - Phase I and is liable to be rejected. The POC as per the amount provided for in CC No. 706 has no application to the CPPs of 220.48 MW described as Phase I Expansion Units or 302.8 MW described as Phase II Expansion Units have been synchronised with the Grid after the decision on Parallel Operation was made by the Commission in the Order dated 01.06.2011 in Petition Nos. 256 of 2003 and 867 of 2006. The said facility is restricted to the initial CPP capacity of 77 MW only.

6.2 Respondent No. 2 submitted that the claim of the Petitioner to contend that POC in respect of the Expansion Units (excluding initial 77 MW) are not to be charged POC determined in terms of the Order dated 01.06.2011 passed by the Commission is wrong. The Petitioner is trying to take undue advantage of the POC under the Order dated 01.06.2011 being higher than the POC that was provided for in the Settlement Agreement dated 11.12.2009 based on CC No. 706 and the riders of the Hon'ble High Court of Gujarat.

6.3 The Petitioner is also wrongly seeking to challenge the levy of POC itself and also methodology of relating such charges to the installed capacity of the CPPs. These have been adjudicated by the Commission in the order dated 01.06.2011 and the said order has attained finality. Further, the levy of POC and the methodology of relating it to the installed capacity has been settled by binding judicial precedents by Full Bench of the Hon'ble APTEL in the case of ***Chhattisgarh State Power Distribution Company Ltd Vs. Godawari Power Limited dated 18.02.2011 passed in Appeal No. 120 of 2009*** wherein it has been held has under:

"SUMMARY OF OUR FINDINGS:

26. (1) The 1st Respondent, Godawari Power & Ispat Ltd. is the Captive Power Plant. This plant is being operated in parallel with the grid. The relationship in

regard to the parallel operation with the grid is between the Captive Power Plant, the 1st Respondent herein and the Appellant, the Distribution Licensee. This is not a dispute between the Appellant a Distribution Licensee and the Respondent No. 1 as a consumer of the electricity. This is a dispute regarding the levy of parallel operation charges to be levied and collected by the Appellant being a Distribution Licensee from the 1st Respondent, Captive Power Plant which is a generator. Therefore, the State Commission has got the jurisdiction to entertain and adjudicate upon this dispute under Section 86(1)(f) of the Electricity Act,2003.

(2) ***The parallel operation charges are payable on the installed capacity of the Captive Power Plant.*** *The Captive Power Plant consists of a number of machines and equipments. Then capacity of Captive Power Plant cannot be considered in isolation of one or two equipments. MVA capacity of generating plant shall be worked out on the basis of designed power factor which is recorded in the nameplate of the generator. From the quantum of the steam generated by the three boilers installed in the premises of the 1st Respondent, only one 10 MW generating plant can run of a time along with the 30 MW power plant. Thus, the effective connectivity of generating plant with the grid is 40 MW and not 60 MW. Therefore, the 1st Respondent should be billed for parallel operation charges for 40 MW only and not for 60 MW."*

(Emphasis supplied)

6.4 It is submitted that the CPP with the capacity of 77 MW (2 x 38.5 MW) was synchronised on 13.09.2006 and was the subject matter of the Settlement Agreement of 11.12.2009. The generating capacity of 220.48 MW described as Phase I Expansion Units and 302.8 MW described as Phase II A Expansion Units were not part of the Settlement Agreement. These were not governed by the charges as per the amount provided for in the CC No. 706 for the period from 01.06.2011 onwards. The allegations to the contrary are wrong and are denied.

6.5 The contents of the Petition dealing with the capacity and quantum of captive consumption viz-a-viz the quantum of sale of the generated units are within the knowledge of the Petitioner and are irrelevant to the matter in issue. The subject matter of the petition is the scope and applicability of the Settlement Agreement in regard to the payment of the POC and the capacity of the generating units which are covered for payment of the POC as provided in the CC No. 706 for the period from 01.06.2011 onwards. The allegations to the contrary are wrong and are denied.

6.6 Further, the Petitioner had been granted parallel operation facility on its giving specific undertakings in the year 2006 and in the year 2008. In SCA No. 14743 of 2004, the Hon'ble High Court directed to continue to pay charges at 7.5% as per CC No. 687. The Commission in its interim order dated 30.12.2008 called for list of the persons paying parallel operation charges and in view of the order of the Hon'ble High Court, did not grant any stay. In its daily order dated 17.01.2009, the Commission in Petition No. 944

of 2008 took note that CPPs were paying POC and the matter was subjudice as some of the CPPs in SCA 14742 of 2004 filed MCA No. 2967 of 2008 for review against the direction to pay POC as per CC No. 687. In Petition No. 941 of 2008 filed by Consumer Education and Research Society (CERS), the Commission observed as under:

> *"3. Learned Advocate Shri Premal Joshi submitted that the co-petitioners, M/s Mid India Power and Steel limited and M/s Gallant Metal Ltd have withdrawn from the petition. There are 51 EHT consumers who CPPs are in parallel with GETCO grid. He submitted a list showing name of 18 CPPs out of a total of 51 POC recovery is being done on the basis of the undertakings given by them during the years 2006 - 07, 2007 - 08 and 2008 - 09. He also submitted a list of 33 HT consumers having CPPs parallel with GETCO grid who are not being charged any POC. He further submitted that they are not compelling the CPP owners for giving undertaking but they have given undertaking as they are willing to pay POC voluntarily. A similar matter is pending before the Hon'ble High Court of Gujarat and therefore, undertakings have been accepted from those CPP holders who are ready to pay POC subject to the decision of the Hon'ble High Court of Gujarat. Adjustment will be made as per the final decision of the Hon'ble High Court of Gujarat in the matter."*

6.7 The Respondents placed on record the list of 18 CPPs who were paying POC in terms of the undertaking given. This was noted by the Hon'ble High Court as under:

> *"2. By these Review Applications, the Applicants have prayed for review of the observations made in paragraphs 53 and 64 of the Common CAV Judgement dated 21.10.2008 and to review the directions given for continuing payment of POC @ 7.5% as being contrary to the admitted factual position on record, which is that no POC is being presently levied or paid by the CPPs except CPPs who are paying as per mutual agreement and undertaking (presently 18 Nos of CPPs)"*

Thereafter in the year 2009, the Hon'ble High Court by Order dated 28.04.2009 in MCA No. 2967 of 2008 in SCA 3429 of 2007 allowed the CPPs to enter into a settlement with GETCO to either accept payment of POC as per CC No. 706 with certain conditions or agree for installation of meter with three minute integration and billing of demand charges based thereon. Many of the CPPs chose one of the above two options.

6.8 In the remand proceedings In Petitions No. 256 of 2003 and No. 867 of 2006, the Commission passed daily order dated 08.05.2009, as under:

> *"7. We have carefully perused the judgment of the Hon'ble High Court of Gujarat. We have also considered the submissions mode by the Ld. Advocates of some of the parties. We are of the opinion that we have to act as per the directions given by the Hon'ble High Court of Gujarat. As per direction given by the Hon'ble High Court, the petitioners who have agreed to the settlement, have to place the agreement before the Commission. Hence, the petitioners who have agreed to the settlement*

terms are directed to sign the settlement agreement and place the same before the Commission and thereafter we will pass appropriate orders in respect of such parties.

7.1 The petitioner, GETCO, is directed to submit the list of 51 CPP owners or more as per the latest count before the Commission within 2 weeks. Office is directed to issue notices to all such CPP owners informing them about the settlement proposal in the High Court order by enclosing a copy of the order and calling upon each of them to indicate within a period of eight weeks whether they wish to accept either of the proposal for the term of 10 years or not. It is hereby clarified that in the event any party fails to indicate whether he is willing to accept the proposal or not within eight weeks he would be deemed to have accepted the proposal and shall then have to exercise option of POC or demand charges based on meter with 3 minutes integration.

7.2 It is also clarified that in respect of the parties who positively do not refuse to accept the proposal (i.e. those who accept and those who do not respond within 8 weeks), the Commission shall pass orders in respect of such parties also in terms of the proposal / settlement.

7.3 It is also clarified that the proceedings before the Commission shall then continue only with respect to the parties who positively refuse to accept the proposal.

7.4 It is also clarified that the parties who have settled the dispute would also be entitled to participate in the hearing before Commission."

6.9 The Commission also passed daily order dated 13.11.2009 for implementation of the settlement agreement.

6.10 The Petitioner by its letter dated 11.12.2009 approached Respondent - GETCO with regard to POC for its 77MW CPP, stating as under:

"We are having 220 KV Grid Connection (PGVCL Connection No. 27145) of 40 MVA for our Refinery Complex at Vadinar near Jamnagar. Our Refinery Complex is having 77 MW CPP and running parallel with Grid.

With above referred GETCO's letter, we have been advised to execute Agreement for the Parallel Operation Charges (POC) for our 77 MW and select options for Parallel Operation Charges (POC) for calendar year 2009.

With this we wish to go for Option (b) as under for calendar year 2009.

Adoption of Commercial Circular No. 707 with condition No. 2 therein, being substituted by the following:

Whenever the power will be sold to GUVNL the parallel operation charges to be paid shall be compensated as a part of the cost of generation and rate of sale of power shall be accordingly adjusted.

Our humble request is kindly to accept the same."

6.11 During the proceedings in Petitions No. 256 of 2003 and No. 867 of 2006, certain CPPs again raised the issue of collection of POC by the Respondent on the basis of the undertaking and prayed for staying the same. In that regard, the Commission in Daily Order dated 08.02.2010 observed as under:

"7. Shri AK Yadav, on behalf of Videocon International Ltd (VIL) submitted that POC is not applicable to them due to the following reasons:

……..

He further submitted that while getting the permission for operating the CPP in parallel with the grid, GETCO asked to sign an agreement and VIL furnish such undertaking under the impression that it is normal practice and one has to go for this procedure for operating their CPP parallel with the grid However, as per the settlement VIL is regularly paying Rs. 4 28 lakhs towards POC every month under protest. According to them, as no norms / regulations favouring the POC it must be withdrawn from their electricity bills. No POC charges must be applicable to them till the final verdict comes and he has requested to instruct GETCO/DGVCL to refund the amounts paid by them for POC till date.

……..

10. The petitioner submitted that agreement was signed by 35 respondents out of 35 respondents, 26 and opted for Commercial Circular No. 706 of 2000 issued by erstwhile GEB and 9 has opted for installation of 3 minutes integration meters. None of the above respondents has objected to the terms and conditions of the agreement before the Commission. Thus, we record that these respondents had exercised the option given by Hon'ble High Court of Gujarat in its order dated 28.04.2009.

……..

Now, we deal with the issue of CGPs who have contract demand equal to or more than 25% and opt f or Commercial Circular No. 706 of 2000. The order dated 28.4.2009 of the Hon'ble Gujarat High Court in MCA No. 2844 of 2008 directed that CGP holders are entitled to opt for any of the two options and that they are entitled to change the option on annual basis. Hence, the respondents who opt for Commercial Circular No, 706 of 2000 of erstwhile GEB are entitled to opt for installation of 3 minutes integration period in another year. Also, if the CGP reduces the contract demand to below 25% of the CGP capacity, they have to pay the POC. Hence, the agreement needs to be signed by the respondents for opting their options as directed by Gujarat High Court."

The Commission, however, did not grant any stay or interim order on the collection of POC based on mutual undertaking given by the CPPs.

6.12 In Tariff Petition No. 990 of 2010 for the Tariff FY 2010-2011 of GETCO, the Commission asked GETCO to share information of POC.

6.13 The Petitioner requested for Parallel Operation facilities and submitted an undertaking for 220 MW seeking Parallel Operation during 2010, to pay the POC provisionally equivalent to the CC No. 706 dated 28.01.2000 and the charges as per the decision of the Commission in future as and when the charges are decided. The Undertaking given by Respondent No. 2 specifically stated, inter alia, as under:

"WHEREAS the Obliger has approached the Gujarat Energy Transmission Corporation Limited (GETCO) a company registered under Companies Act, 1956 having its registered office at Vidyut Bhavan Baroda (hereinafter referred to as "the Obligee" which expression shall unless excluded or repugnant to the context include its successors and permitted assigns) with a request for grant of permission of paralleling / Wheeling from its Captive Power Plant (CPP) having rated capacity of 220 MW (Total Installed Capacity of CPP is 297 MW {220 MW+77MW}. Undertaking for 77 MW existing CPP had been already given in past) in parallel with the grid of the Obligee.

WHEREAS petition No. 867/2006 filed by the Obligee and all the distribution companies of the erstwhile GEB for levy of Parallel Operation Charges (POC) from the Captive Power Plants (CPPs) have been pending for adjudication before the Gujarat Electricity Regulatory Commission (GERC). The GERC has made it known that the Parallel Operation Charges are leviable under the provision of the Gujarat Electricity Industry (Reorganization and Regulation) Act, 2003 - (Gujarat Act 24 of 2003) and the Electricity Act, 2003 and that the aforesaid petition is legally maintainable.

WHEREAS on due consideration of the request made by the obliger for grant of permission of wheeling of its aforesaid CPP, the Obligee has agreed to accede the same.

AND WHEREAS in consideration for request by the obligee to grant permission for operating CPP in parallel with the grid of the obligee. We the obligator hereby:

1. *Agree and undertake to pay the Parallel Operation Charges (POC) to the obligee as stipulated here under immediately from the date of connectivity of our CPP in parallel with the GRID of the Obligee. Such payment of POC will be made by the Obliger to the Obligee within 10 day from the date of billing to be recovered through DISCOM Bill.*

Capacity of CPP	*Rate of Recovery of POC*
Up to 1000 kVA	*10% of the demand charges corresponding to the CPP capacity.*
1001 kVA to 10000 kVA	*7.5% of the demand charges corresponding to the CPP capacity OR Rs. 8,900/- per month whichever is higher.*
10001 kVA to 50000 kVA	*5% of the demand charges corresponding to the CPP capacity OR Rs. 1,25,363/- per month whichever is higher.*
50001 kVA and above	*2.5% of the demand charges corresponding to the CPP capacity OR Rs. 4,43,575/- per month whichever is higher with a further provision of the ceiling of Rs. 8,00,000/-.*

2. If the GERC decides these charges in future, the charges so decided by GERC will be applicable from prospective date and till that date above charges will be paid by obliger.

……

The obliger hereby acknowledges and declares that it has willingly and voluntarily agreed to make the payment of parallel operation charges against the GRID support services rendered by the Obligee and the Obliger has consented to the same in its best interest as a mutually agreeable, commercial transaction with the Obligee. The Obliger hereby further undertakes that it will not challenge or dispute the levy of parallel operation charges by the obligee as agreed upon herein above, before any forum / court in future."

6.14 One of the CPPs again raised the issue of POC in remand proceedings in Petitions No. 256 of 2003 and 867 of 2016 wherein the Commission in Daily Order dated 28.10.2010 made the following observations:

"6. Shri A.K. Yadav, DGM, Videocon International Pvt Ltd, Cahvaj, on behalf of Respondent No. 8, submitted that the paying the parallel operation charges to the petitioner as per the undertaking given by them while the respondent applied for great connectivity. He submitted that the Commission may direct the petitioner not to collect POC from them until the final order of the Commission, or the same may be taken in the form of a bank guarantee, so that the respondent may not be burdened unnecessarily by way of monthly payment. The Commission has so far not decided the matter and as such the petitioner may be directed not to collect parallel operation charges daily Commission decides the matter.

7. In the light of submission mode by the respondent, Ms. Venu Birappa submitted that the petitioner has formulated a common draft for all the respondents. They cannot make amendment for the individual respondent as per their requirement. She further submitted that the Indian oil Corporation is having captive generating plant but has not operating in parallel with the grid. It is functioning in isolation. Heavy water plant does not have captive generating plant. She submitted that GETCO will provide the correct status of the captive generating plant which were

earlier declared as sanction holders and were wheeling the power to their sister concerns under the old Act or Govt. of Gujarat Policy. She submitted that so far as the payment of parallel operation charges are concerned, the respondents who have signed the agreement as per the order of the Hon'ble High Court have to continue to pay the some and no stay on this account may be given"

Thus the Commission did not grant any interim orders preventing the Respondents from collecting POC on the basis of mutual undertaking.

6.15 The Commission finally decided Petitions No. 256 of 2003 and No. 867 of 2006 holding that POC is leviable at Rs. 26.50/kVA to all the CPPs operating in parallel with the Grid.

6.16 Thus, the Respondents submitted that the Petitioner had duly undertaken to pay the POC as per the Order dated 01.06.2011 passed by the Commission and had taken the parallel operation facility from the Respondents. According to the Respondents, the applicable POC for the CPPs of the Petitioner are as under:

(a) With regard to 77 MW (2 x 38.5 MW), the POC are payable as per the amount equivalent to the CC No. 706 dated 28.01.2000 for a Period of 10 Years;

(b) With regard to other generating capacity, namely, 220.48 MW - Phase I and 302.8 MW - Phase II A, the POC are payable of an amount equivalent to those specified in CC No. 706 till the decision dated 01.06.2011 of the Commission and from 01.06.2011 onwards in terms of the Order dated 01.06.2011 passed by the Commission. These capacities, namely of 220.48 MW and 302.8 MW, cannot be covered by payment of POC as per the Settlement Agreement at the rate equivalent to those specified in CC No. 706 for a period of 10 years. The allegations to the contrary are wrong and are denied. Respondent has correctly charged the POC on the Petitioner for different units.

6.17 Respondent No. 2 denied that the Petitioner falls in the exemption category provided in the judgement and Order dated 01.06.2011 and is not liable to pay the POC as claimed by the Respondents including at the rate of Rs 26.50 per kVA in respect of such CPPs. In the Order dated 01.06.2011 the Commission has decided that POC is leviable for the CPPs operating in parallel with the State Grid excluding those who had executed the agreement with the Respondents accepting the option of a time integration less than up to 3 minutes or the liability to pay the POC as per CC No. 706. The POC as per Order dated 01.06.2011 was to be applied to all those persons who had not entered into the above agreement. In the case of Petitioner herein, the agreement for 10 years to charge as per the commercial circular is limited to 77 MW generating stations and does not extend to any other generating units or capacity. The allegations to the contrary are wrong and are denied.

6.18 The Respondents denied that they have recovered excess amount of POC from the Petitioner and the Respondents have acted contrary to the Settlement Agreement or the Order dated 28.04.2009 passed by the Hon'ble High Court of Gujarat or the judgement dated 01.06.2011 passed by the Commission. It is wrong and denied that the amount recovered by the Respondents is required to be refunded. The petition filed by the Petitioner is liable to be rejected.

6.19 It is submitted that the POC is to be levied and collected on the installed capacity of the CPPs. The Grid support is given to the entire capacity of the CPPs. Accordingly, it is wrong and denied that there is a requirement to derive the quantum of actual support received by the CPPs for levy of the POC. In the present proceedings it is not open to the Petitioner to challenge or question either the methodology for determination of the POC provided for in the Order dated 01.06.2011 or the quantum of POC determined in terms of the said Order. The Petitioner has not challenged the Order dated 01.06.2011. The said Order has become final and binding on the parties. The Commission has rightly decided that the POC should be corresponding to the installed capacity of the CPPs. Further, this issue stands settled by the Full Bench decision of the Hon'ble APTEL.

6.20 Respondents denied that the Petitioner cannot be said to have received the Grid support on account of the fact that the installed capacity of all the CPPs together is in excess of the capacity that can be connected to 220 kV Transmission Line and import power. The Petitioner has failed to appreciate that the Grid support given to the CPPs is instantaneous and not a continuous support. The POC are also not equivalent to the charges that would be payable by the units importing power under the contract demand at the tariff terms and conditions approved by the Commission.

6.21 Respondents further denied that POC cannot be levied on the Petitioner based on the installed capacity. It is wrong and denied that levy of POC based on installed capacity is unscientific or unfair or perverse or contrary to the scheme and objective. The Petitioner is attempting to challenge the Order dated 01.06.2011 in the present proceedings after it had become final and binding. In any event this aspect stands settled by the decision of the Full Bench of the Hon'ble APTEL.

6.22 It is submitted that the facilities under the Settlement Agreement dated 11.12.2009 of availing the Parallel Operation for a period of 10 years by paying the amount equivalent to those specified in the CC No. 706 is restricted to the CPP of the capacity of 77 MW (2 x 38.5 MW). It does not extend to the remaining CPPs, namely, 220.48 MW and 302.8 MW.

6.23 Respondent No. 2 submitted that it is correct that the Respondents approached the Commission for determination of POC. The proceedings of the Forum of Regulators are however not relevant for determination of the matter in issue. Determination of POC was for the Commission to decide in accordance with the provisions of law and not by the Forum of Regulators.

6.24 It is submitted that at the time when the Petitioner approached the Respondents for the facility of Parallel Operation in the year 2006, the Commission had by Order dated 25.06.2004 decided on the validity of levy of Parallel Operation but had not determined the quantum of charges payable. The said Order of the Commission had been challenged before the Hon'ble High Court of Gujarat and the matter was pending. In view of the proceedings before the Hon'ble High Court, the quantum of POC was not determined. Accordingly, the Respondents were not required to provide the Parallel Operation Services in the absence of POC being decided. Since the Petitioner and other similarly placed entities were desirous of having Parallel Operation with the Grid even pending determination of the POC and the Petitioner and others were willing to pay POC for such services during pendency of the proceedings before the Hon'ble High Court, the arrangement was entered into with the Petitioner agreeing to pay POC of an amount equivalent to that specified in CC No. 706 of 28.01.2000 and the Respondents agreeing to provide Parallel Operation to the extent of the existing CPPs. The Parallel Operation services were agreed to be provided for the existing capacity of the CPPs as such capacity required services. In pursuance of the above, the Petitioner and other similarly placed entities gave an undertaking to the Respondents to pay POC of an amount equivalent to those specified in CC No. 706. The arrangement entered into was restricted to 77 MW capacity of the CPP which was synchronised on the basis of the above undertaking on 13.09.2006. The Petitioner is bound by the terms and conditions of the above arrangement including the undertaking given by the Petitioner on 21.06.2006.

6.25 The facility of Parallel Operation was given to the Petitioner based on the charges to be paid of an amount equivalent to those specified in CC No. 706 with reference to 77 MW capacity. It is admitted by the Respondents that the parties entered into the Settlement Agreement dated 11.12.2009 as per the Orders of the Hon'ble High Court dated 28.04.2009. The Settlement Agreement was with respect to 77 MW of the CPP. At the time the Settlement Agreement was signed, the aspects of 220.48 MW or 302 MW were not raised and the Settlement Agreement did not cover such additional capacities.

6.26 It is not denied that the Petitioner sought permission of Respondent No. 1 for operating its 220.48 MW of the CPP in parallel with the Grid. The undertaking given by the Petitioner for such Parallel Operation on 21.09.2010, inter alia, provided that on the decision by the Commission on POC in future, the charges so decided will be applicable from the prospective date and till the date the charges as specified in the undertaking would be payable. There was no option to be exercised by the Petitioner for 3 minutes integration or payment of POC or any agreement for taking parallel operation for 10 years on the POC at the fixed charges. The basis, on which the Petitioner had sought for and obtained the facilities from the Respondent No. 1 and executed various agreements, was clearly as stated in the Undertaking.

6.27 The Petitioner requested for Parallel Operation facilities and submitted an undertaking for 220 MW seeking Parallel Operation during 2010, to pay the POC provisionally

equivalent to CC No. 706 dated 28.01.2000 and the charges as per the decision of the Commission in future as and when the charges are decided.

6.28 By the time the additional capacity of 302 MW was established and the parallel operation facility was taken, the Commission had decided on the applicable parallel operation charges vide order dated 01.06.2011 and such charges were payable. Accordingly, in respect of additional capacity of 220.48 MW and 302.8 MW, the Petitioner is bound to pay the POC for the period up to 01.06.2011 as per the rate specified in the undertaking and thereafter as per the Orders of the Commission, namely, Order dated 01.06.2011 passed in Petition Nos. 256 of 2003 and 867 of 2006.

6.29 It is submitted that Respondent No. 1 had correctly claimed the POC for the various CPPs of the Petitioner for the period up to 01.06.2011 as per the undertaking and for the period from 01.06.2011 onwards as per the amount mentioned in CC No. 706 for the capacity of 77 MW and for the remaining capacity as per the charges determined in the Order dated 01.06.2011 for the period from 01.06.2011.

6.30 Respondent No. 2 submitted that the pleadings and submissions raised by the Petitioner in Petition No. 1429 of 2014 (already disposed of) challenging levy of Parallel Operation Charges for the period up to 01.06.2011 were inconsistent with the pleadings raised in the present Petition. It is denied that the entire capacity of 600.78 MW constitutes One Captive Power Plant and that the capacity of 220.48 MW and 302.8 MW should be treated only as an Expansion Capacity and subject to the same levy as applicable to the 77 MW. In the context of the undertaking and other documents, it is abundantly clear that the agreement between the parties in regard to the additional capacity of 220.48 MW and 302.8 MW were to be charged with effect from 01.06.2011 as per the charges determined by the Commission in the Order dated 01.06.2011. It is also denied that the Petitioner is entitled to refund of the charges as alleged or otherwise.

6.31 It is denied that POC are not payable based on the installed capacity of the CPPs. It is submitted that the aspect of liability to pay the POC and the methodology of determination for computation of the POC, capacity to be considered etc. were decided by the Commission in the Orders dated 25.06.2004 and 01.06.2011. These Orders have become final and binding. These Orders have not been modified or reversed by the Appellate Court. The Petitioner herein did not challenge the above Orders. It is, therefore, not open to the Petitioner to raise basic issues on the liability to pay the POC qua the installed capacity of the power plant. Without prejudice to the above, the POC are with reference to the quantum of power that can be used from the CPPs for which support is taken from the Grid. The Grid support is for the entire installed capacity of the CPPs irrespective of the capacity that could be injected from the transmission line connected to the premise. It is wrong and denied that there are any peculiar circumstances of the case which leads to non-levy of POC on the Petitioner in respect of the premise where the CPPs have been installed. The POC levied on the Petitioner is consistent with the provisions of the Electricity Act, 2003. Levy of POC has been examined by the Full Bench of the Hon'ble APTEL, inter alia, in the case of

Chhattisgarh State Power Distribution Company Ltd. Vs. Godawari Power Limited dated 18.02.2011 passed in Appeal No. 120 of 2009 wherein it has held that POC are correctly leviable.

6.32 The Respondent submitted that the Regulations notified by the Central Commission relate to Inter State Transmission Licensees and not to Intra State Transmission Licensees and distribution licensees. As held by the Full Bench decision of the Hon'ble APTEL, POC are payable and reference to the decision of the Hon'ble Andhra Pradesh Electricity Regulatory Commission is not relevant.

6.33 The Petitioner is bound to pay the POC with regard to various CPPs maintained by the Petitioner and with reference to their installed capacity as per the claim made by Respondent No. 1 in the letter dated 24.02.2012.

7. **Rejoinder dated 17.04.2015 of the Petitioner**:

7.1 It is submitted by the Petitioner that Respondent No. 1 has recovered and is recovering POC from the Petitioner as under:

Period	Unit	Methodology
From 01.06.2011 till date	77 MW Base Plant	In terms of the Settlement Agreement dated 11.12.2009
From 01.06.2011 till date	220.48 MW Phase-1 Expansion Units *[One 110.24 MW Unit de-synchronised on 23.07.2014]	@ Rs. 26.50/kVA/month corresponding to the said Unit capacity, as per Undertaking dated 21.09.2010 ("Undertaking No. 2").
From 24.06.2012 / 15.09.2012 / 15.12.2012 till date	302.8 MW Phase-2A Expansion Units	@ Rs. 26.50/kVA/month corresponding to its installed capacity, as per Undertaking dated 08.06.2012 ("Undertaking No. 3").

7.2 It is submitted that in terms of the aforesaid wrongful levy of POC by Respondent No. 1, the Petitioner has been constrained to pay a sum of approximately Rs. 1.733 Crores per month as POC for its CPP instead of a maximum of Rs. 8.00.000/- per month actually liable to be paid in terms of the Settlement Agreement.

7.3 The Petitioner denied that:

(a) The Petitioner's 220.46 MW Phase-I Expansion Units and 302.8 MW Phase-2A Expansion Units constitute different CPPs.

(b) POC in terms of the Settlement Agreement (i.e. for an amount equivalent to that provided for in CC No. 706) has no application to the Petitioner's 220.48 MW Phase-I Expansion Units and 302.8 MW Phase-2A Expansion Units.

(c) The 220.48 MW Phasc-1 Expansion Units were synchronised with the Grid after the decision on POC was made by the Commission vide its judgement dated 01.06.2011.

(d) The amount of POC as determined under the Settlement Agreement should be restricted to the Petitioner's 77 MW Base Plant only.

(e) The Petitioner is trying to take undue advantage of the Settlement Agreement in light of the POC under the Commission's Judgement date 01.06.2011 being higher than POC as provided for in the Settlement Agreement. (i.e. based on CC No. 706).

7.4 It is further submitted that **all Units Constitute one CPP** and that the entire capacity of the Petitioner's CPP (i.e. 77 MW + 220.48 MW + 302.8 MW) constitutes one CPP and cannot be treated as different CPPs. The same is evident from the following:

(a) All the Units of the Petitioner's CPP along with the 220 kV double circuit lines are connected to the GETCO Grid i.e. at the 220 kV Bus-Bar at the Petitioner's premise. at one specific point. The Respondents have never sought for the Petitioner to connect each of its Units to the Grid. as individual CPPs.

(b) All the Units of the Petitioner's CPP are located on the same part and parcel of land and also have common facilities / sources in relation to their cooling system, fuel and other requirements.

(c) The 220.48 MW Phase-I and the 302.8 MW Phase-2A Expansion Units are only expansions of the existing 77 MW Base Plant, which were installed to cater to the expansion of the Oil Refinery. The said expansion was to ensure fuel price economy and higher degree of reliability in operation, due to non-availability of commercially viable gas for running the 220.48 MW Phase-I Expansion Units (Gas Turbine Generating Units).

(d) Even the Respondents have all along considered the various Units of the Petitioner's CPP as one CPP and not as different CPPs, as now sought to be wrongly alleged. In this regard. it is pertinent to note that, both Undertaking No. 2 and Undertaking No. 3, forcibly and illegally procured by GETCO at the time of synchronizing the various Units with the GETCO Grid, specifically and distinctly refer to all Units as part of one CPP and not as different CPPs. The relevant extracts of the said Undertakings are reproduced hereunder for ease of reference:

(i) Undertaking No. 2

"...with a request for the grant of permission of Paralleling / wheeling from its Captive power plant (CPP) having rated capacity of 220 MW (Total installed capacity of CPP is 297 MW (220 MW + 77 MW....."

(ii) Undertaking No. 3

"...with a request for the grant of permission of Paralleling / wheeling from its Captive power plant (CPP) having rated capacity of 302.8 MW (Total installed capacity of CPP is 599.8 MW (302.8 MW + 220 MW + 77 MW....."

(e) Further, the Respondent No. 2 while granting permission to the Petitioner, to connect its 220.48 MW Phase-l and the 302.8 MW Phase-2A Expansion Units to the GETCO Grid has always considered the entire capacity as part of one CPP and not as different CPPs. The relevant extracts of the said permission for connectivity granted by the Respondent No. 2 are reproduced as under:

(i) The Respondent No. 2's permission dated 16.10.2010 - 220.48 MW Phase-1 Expansion Units

"GETCO has agreed to grant permission for connectivity as Captive Power Plant for additional 220.48 MW capacity i.e. (77 MW existing + 220.48 additional = 297.48 MW Total) with the 220 kV S/S of GETCO subject to following conditions:"

(ii) The Respondent No. 2's permission dated 19.06.2012 - 302.8 MW Phase-2A Expansion Units

"Sub: Permission for operating Additional 302 8 MW Captive Power Plant (CPP) over and above existing 297.48 MW CPP of M/s Essar Oil Limited in parallel with GETCO grid system located at village Vadinar, Jamnagar."

(f) It is submitted that the Undertakings were signed by the Petitioner at different points in time as the Units were synchronised at different stages. However, it does mean that the Units constitute different CPPs. It is submitted that, so long as the Petitioner has not sought for additional connection points and all the Units are connected to the GETCO Grid at one specific point, the Expansion Units of the Petitioner's CPP cannot be construed to be new and different CPPs as alleged by the Respondents.

7.5 It is further submitted that Respondent No. 2 has always been aware of the fact that all the Units of the Petitioner's CPP constitute one CPP. The same is also evident from the Petitioner's letter dated 30.08.2012 whereby the Petitioner had sought Medium Term Open Access for 80 MW power sale to Essar Steel Limited wherein the Petitioner had clearly indicated that all the Units constituted one CPP alone.

7.6 It is submitted that the Petitioner at the time of seeking 'Standing Clearance / No Objection Certificate' from the Gujarat State Load Despatch Centre (SLDC) for selling

power on the IEX has always considered the various Units of its CPP (i.e. 77 MW + 220.48 MW + 302.48 MW) as one CPP and not as individual / different CPPs as sought to be now alleged by the Respondents.

7.7 It is submitted that the Settlement Agreement does not expressly specify or relate to any capacity of the Petitioner's CPP or make any reference to any of its Units per se. Thus, it is clear that the allegations of various Units being different CPPs now sought to be made by the Respondents is an afterthought and contrary to its own understanding all along. Respondents is an afterthought and contrary to its own understanding all along.

7.8 Not only the Petitioner's 220.48 MW Phase-I Expansion Units synchronised, but also were operating in parallel with the GETCO Grid way prior to the Commission's Judgement date 01.06.2011. As regards the 302.8 MW Phase-2A Expansion Units, the same were synchronised on 24.06.2012, 15.09.2012 and 15.12.2012 respectively, i.e. after the judgement dated 01.06.2010 passed by the Commission. However, the POC, if any that could be charged by the Respondents, ought to have been in terms of the judgement dated 01.06.2011 i.e. as per the Settlement Agreement and not otherwise.

7.9 It is submitted that there is no reference to the capacity of the CPPs either in the Settlement Agreement or in the Commission's Judgement dated 01.06.2011. On the contrary, the Settlement Agreement and the Commission's Judgement dated 01.06.2011 only refer to the entities as the CPP while not linking it to its existing installed capacity.

7.10 The Petitioner denied that levy of POC and the methodology of relating the same to the installed capacity has been settled by binding judicial precedents. It is submitted that the Petitioner is challenging wrongful levy of POC by the Respondents, which is illegal, arbitrary and contrary to the Settlement Agreement executed between the Petitioner and Respondent No. 2 in terms of the Review Order dated 28.04.2009 passed by the Hon'ble Gujarat High Court and the Commission's Judgement dated 01.06.2011. It is further pertinent to note that the said Units were operational before the Settlement Agreement was validated by the Commission on 01.06.2011 in terms of the directions of the Hon'ble Gujarat High Court. In light of the same. the allegation of the Respondents that POC in terms of the Settlement Agreement is not applicable to the Petitioner's 220.48 MW Phase-I Expansion Units considering it was synchronized with the Grid after the Commission's Judgment dated 01.06.2011 is wrong and denied. As regards the 302.8 MW Phase-2A Expansion Units, the same were synchronised on 24.06.2012. 15.09.2012 and 15.12.2012 respectively i.e. after the Judgment dated 01.06.2011 passed by the Commission. However. the POC, if any, that could be charged by the Respondents, ought to have been in terms of the Judgment dated 01.06.2011 i.e., as per the Settlement Agreement, and not otherwise. Any Undertaking contrary to the said position is per se illegal. The scope of the Settlement Agreement as well as the correct interpretation of the Commission's Judgment dated 01.06.2011 and the Hon'ble Gujarat High Court's Review Order dated 28.04.2009 have been elaborated hereinbelow.

7.11 As regards the contention that the Settlement Agreement is restricted only to the Petitioner's 77 MW Base Plant and for the 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units the Petitioner is liable to pay POC at the rate of Rs. 26.50/kVA/month in terms of the Commission's Judgment dated 01.06.2011, it is submitted that on a bare perusal of the Settlement Agreement executed between the parties, the following is evident and noteworthy:

(a) The Settlement Agreement does not expressly specify or relate to any capacity of the Petitioner's CPP or make any reference to any of its Units.

(b) The Settlement Agreement refers to the Petitioner as the 'CPP'. As such the Petitioner (as a CPP) has executed the Settlement Agreement as an entity per se and the same cannot by any stretch of imagination be read to be restrictive to any specific capacity, as sought to be done by the Respondents. Admittedly, the Respondents have stated that the Settlement Agreement is applicable to the Petitioner's 77 MW Base Plant. As is evident from the Settlement Agreement, no capacity has been specified therein and the same only refers to the Petitioner as the CPP. Therefore, it is clear that any expansion of Units within the same premises by the same entity, connected through one interconnection point would constitute as one CPP and not multiple CPPs. Therefore, as long as the Settlement Agreement is applicable to the Petitioner, it is applicable to all its Units and cannot be said to be applicable only for a part of the CPP. The Respondents have admitted that the Settlement Agreement is applicable to the Petitioner's CPP albeit only it's 77 MW Base Plant.

(c) The Settlement Agreement would apply to the Petitioner so long as it is connected to GETCO's Grid and therefore the Petitioner is liable to pay POC for its CPP only as per the methodology provided in the said Settlement Agreement for a period of 10 years.

7.12 The Petitioner is only seeking implementation of the Settlement Agreement in its true spirit and intent i.e. levy of POC on the entire capacity of the Petitioner's CPP (i.e. 600.28 MW) in terms of the Settlement Agreement and/or reconsideration of the applicability of POC and/or its quantification in the peculiar facts of this case.

7.13 It is submitted that the Petitioner is not challenging the Commission's Judgement dated 01.06.2011, as alleged by the Respondent. On the contrary, the Petitioner is seeking the correct implementation of the said Judgement. From the said Judgement, it is clear that for all the CPPs who had executed the Settlement Agreement shall pay POC in terms of the said Settlement Agreement for a period of 10 years. Only those CPPs who had not executed any agreement with Respondent No. 2 as per the Hon'ble Gujarat High Court's Order and all new CPPs would be liable to pay POC at the rate of Rs. 26.50/kVA/month corresponding to their installed capacity.

7.14 It is submitted that the Order dated 18.02.2011 passed by the Hon'ble APTEL in Appeal No. 120 of 2009 titled ***Chhattisgarh State Power Distribution Company Limited Vs. Godawari Power Limited*** had been relied upon by the Commission in judgement dated 01.06.2011 only while determining the POC for the CPPs who had not signed the Settlement Agreement. The Hon'ble APTEL in its said Order dated 18.02.2011 had held that POC is payable on the installed capacity of the CPP based on the facts of that case and the study carried out which was specific to the system and load study for the State of Chhattisgarh, as such are distinct from the present case. The Hon'ble APTEL while dealing with the issue of POC, in the said Order dated 18.02.2011, was dealing with the industry mainly comprising of arc furnaces, rolling mills and metallurgical industries which primarily have CPPs in the State of Chhattisgarh. The nature of these industries is such that the same experiences instantaneous surges and spikes while drawing power from the Grid. However, on the contrary majority of the CPPs in the State of Gujarat are co-generation plants and have negligible support that they received from the Grid. There are no surges and spikes noticed while drawing power from the Grid. It is submitted that each State has different investments and configurations of the power system. It is further submitted that different types of loads mandate different support from the Grid. The support required by an Oil Refinery is way different than the support required by an arc furnace or heavy rolling mill or metallurgical industry, etc. The support required by arc furnaces and heavy rolling mills are of continuous nature while that of Oil Refineries is of contingent nature.

7.15 In the judgement dated 01.06.2011, the Commission has relied upon the study conducted by ERDA, Vadodara, for the Chhattisgarh State Electricity Regulatory Commission. It is submitted that, unlike arc furnaces or heavy rolling mill or metallurgical industry, Oil Refineries (like that of the Petitioner) co-generation plants have a steady load with no violent fluctuations, harmonies and where no wave chopping is involved. Further, unlike the State of Chhattisgarh, there are no industries in Gujarat that creates problems such as phase imbalance, load spikes, harmonics, etc. The Judgement of the Hon'ble APTEL will not be applicable to the facts of the present case. Even otherwise, the Commission in its Judgement dated 01.06.2011 has categorically stated that POC is to be paid as a compensation for the support received by the CPPs from the Grid. As explained above, the support received by co-generation plants are quite varied and distinct from the support received by the metallurgical industry, arc furnaces, rolling mills, etc. and hence no parity can be drawn between the two.

7.16 It is submitted that from the various orders passed by the Hon'ble Gujarat High Court, Hon'ble APTEL and the Commission, including the Judgement date 01.06.2011, it is clear that the POC is in the nature of Tariff. As such, the Respondents cannot take the stand that the Petitioner cannot challenge the basis of levy of Tariff. It is submitted that the Commission while determining tariff under Electricity Act has the powers to differentiate (without showing undue preference to any consumer) according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is

required, etc. Therefore, without prejudice to the fact that the Respondents have not implemented the Commission's Judgement date 01.06.2011 in its true spirit and essence, it is submitted that POC (which is in the nature of tariff), if applicable, ought to be decided / levied in the facts and circumstances of the present case keeping in mind the quantum of grid support, if any, received by the Petitioner's CPP.

7.17 The Petitioner denied that its 220.48 MW Phase-I and 302.8 MW Phase-2A Expansion Units are beyond the scope of the Settlement Agreement executed between the Petitioners and the Respondent No. 2 and therefore not governed by the Settlement agreement for the period 01.06.2011 onwards.

7.18 Further, the Petitioner denied that the capacity and the quantum of captive consumption by the Petitioner's CPP vis-à-vis the quantum of sale of power generated from the Units of the Petitioner's CPP are irrelevant to the present issue. In the Petitioner's case there exist unique / specific facts / circumstances which necessitate why POC should not be leviable on the installed capacity of the Petitioner's CPP.

7.19 The Petitioner submitted that it has requested the Respondent No. 1 to refund the sum of Rs. 47,14,15,841.68/- wrongfully recovered from the Petitioner along with interest at the rate of 15% and in the future, recover POC with respect to the Petitioner's CPP in terms of the Settlement Agreement. It is submitted that Section 62(6) of the Electricity Act specifically provides as under:

> *"(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."*

Thus, Respondent No. 1 is statutorily mandated to refund the said sums wrongfully recovered from the Petitioner.

7.20 The Petitioner denied that it does not fall under exemption category provided in the Commission's Judgement dated 01.06.2011 and is therefore liable to pay POC as claimed by Respondent No. 2, including at the rate of Rs. 26.50/kVA/month in respect of its CPP. It is also denied that the Settlement Agreement is limited to the Petitioner's 77 MW Base Plant and does not extend to any other generating Unit(s) or capacity (namely the 220.48 MW Phase-I and 302.8 MW Phase-2A Expansion Units). In this regard, it is submitted that, considering the Petitioner has executed the Settlement Agreement with Respondent No. 2 which is valid for a period of 10 years and has been duly validated / ratified by the Commission, the Petitioner does not fall under the categories of CPPs which are liable to pay POC at the rate of Rs. 26.50/kVA/month corresponding to its installed capacity. The Petitioner instead falls under the exemption category provided in the Commission's Judgement dated 01.06.2011.

7.21 As such, even in terms of CC No. 706 the Petitioner is liable to pay maximum POC of Rs. 8.00.000/- per month for its capacity over and above 50001 kVA. Therefore, as is evident from the understanding between the parties (Settlement Agreement), POC for any capacity over and above 50001 kVA was capped at Rs. 8.00.000/- per month. This was the true intent of entering into the Settlement Agreement which was to govern the payment of POC for a period of 10 years. Therefore, any expansion of the capacity was also to be capped at Rs. 8.00.000/-. In view of the above. the Settlement Agreement in itself contemplated expansion of capacity especially in light of the fact that it was not limited or specific to any set capacity.

7.22 It is denied that in the absence of POC being decided by the Commission, the Respondents were not required to provide parallel operation services to the Petitioner. It is denied that the Petitioner had willingly signed and submitted Undertakings to the Respondents for payment of POC, during the pendency of the proceedings before the Hon'ble Gujarat High Court and the Commission. On the contrary, it is submitted that, at the time of seeking permission to operate the CPP in parallel with Respondent No. 2's Grid, Respondent No. 2 as a pre-condition constrained the Petitioner and other similarly placed CPPs to sign and submit undertakings for grant of the said permission. It is submitted that without signing such undertakings, Respondent No. 2 did not permit synchronisation of any CPP to its Grid. As a result, the Petitioner had provided the aforementioned Undertakings to Respondent No. 2 by which the Petitioner was made to pay POC as per CC No. 706 and/or as may be revised / decided by the Commission from time to time.

7.23 Thus, the Petitioner was not liable to pay POC prior to 01.06.2011 and the Undertakings sought by the Respondents were illegal and contrary to the various Orders of the Commission and the Hon'ble APTEL to the extent of POC leviable. This was also upheld by the Hon'ble APTEL in its Order dated 04.04.2014 in Appeal No. 74 of 2014. The Commission in its Order dated 30.12.2008 passed in Petition No. 941 of 2008 title as ***Consumer Education and Research Society Vs. GETCO and PGVCL*** has held as under:

> *"6.... It is admitted that the respondent no. 2 has issued notices for collection of POC on the basis of Commercial Circular No. 706 which is already quashed by the Commission. The Order passed by the Commission in Petition No. 24 of 2000 on 31.8.2000 has not been challenged and therefore it remains as it is.*
>
> *6.1 The Hon'ble Appellate Tribunal has also confirmed the decision of the Commission regarding Circular No. 706 which has been quashed by the Commission. Yet the Respondents have tried to collect the POC on the strength of Circular No. 706. Therefore, we hold that the act of taking undertakings for recovering POC charges by the Respondent is illegal.....*

Only the commission has the jurisdiction to fix the POC (Parallel Operation Charges). The Commission has not yet fixed the POC."

7.24 Further, the Hon'ble APTEL in its Order dated 04.04.2014 in Appeal No. 74 of 2013 has also categorically held as under:

> *"11.3 ... that the learned State Commission vide its order dated 31.08.2000 in Petition No. 24 of 2000 quashed and set aside the circular no. 706 dated 28.01.2000. Therefore. the undertaking given by the Respondent no. 2, Shaifali Rolls stating that the recovery of POC, for the erstwhile GEB, based on commercial circular no. 706. was not valid as the State Commission in its order had already disallowed charging of POC."*

7.25 It is further submitted that the Petitioner had filed another Petition being Case No. 1429 of 2014 seeking refund of POC wrongfully recovered by Respondent No. 1 based on the said Undertakings prior to 01.06.2011.As regards Undertaking No. 3 is concerned, the same is contrary to the Commission's judgment dated 01.06.2011 and therefore is per se illegal and void. As admitted, POC is in the nature of tariff and cannot be mutually agreed between the parties contrary to the Commission's judgment dated 01.06.2011.

7.26 It is submitted that the Hon'ble Gujarat High Court keeping in mind that POC could not be mutually decided between the parties had upon directing the parties to enter into the settlement agreements with Respondent No. 2 for payment of POC, specifically stated that, the agreements would come into force and POC would be payable only after the said settlement agreements were placed before the Commission and the Commission passed orders in terms thereof, thereby, approving the payment of POC. The said direction of the Hon'ble Gujarat High Court reaffirms the Petitioner's submission that POC could not have been mutually agreed between the parties, especially without the express approval / consent of the Commission.

7.27 It is denied that POC is payable as per the communication dated 24.02.2012 issued by Respondent No. 1. It is also denied that the Petitioner is liable to pay POC prior to 01.06.2011 in terms of the Undertakings submitted by the Petitioner. It is reiterated that POC is in the nature of Tariff and can only be determined by the Commission and not at the whims and fancies of the parties.

7.28 The Petitioner denied that the submissions made by it are inconsistent with the pleadings and submissions made in Case No. 1429 of 2014. It is submitted that the Petitioner has challenged two issues emanating from the Commission's Judgment dated 01.06.2011, being:

(a) Illegal recovery of POC by PGVCL from the Petitioner prior to 01.06.2011 (Case No. 1429 of 2014); and

(b) Collection of POC in terms of the Settlement Agreement for the entire capacity of the Petitioner's CPP post 01.06.2011 (Case No. 1456 of 2014. i.e. the present Petition).

7.29 As is evident, the Petitioner has not challenged the Commission's Judgment dated 01.06.2011 but has in fact sought the implementation of the same in its true spirit. It is submitted that in light of the fact that POC was leviable from 01.06.2011 as per the Judgment dated 01.06.2011 no POC could be recovered prior thereto and therefore is liable to be refunded. Further, as stated hereinabove, having executed the Settlement Agreement, the Petitioner is liable to pay POC in terms thereof and not at the rate of Rs. 26.50/kVA/month as being wrongfully / illegally recovered by the Respondents.

8. Written Submissions (dated 05.06.2015, 17.08.2020, 05.10.2020 & 20.09.2023) of the Petitioner:

8.1 It is submitted that the propositions that require consideration of the Commission are as follows:

(a) The Petitioner is liable to pay POC only in terms of the Settlement Agreement irrespective of the fact that on the date of the settlement, the Petitioner had only one operating Unit of 77 MW.

(b) The Settlement Agreement read with CC No. 706 envisages a ceiling on the quantum of POC payable and not on the capacity of the CPP (i.e., for CPP capacity of 50001 kVA and above, POC shall be levied at 2.5% of the demand charges corresponding to the CPP capacity or Rs. 4,43,575/- per month whichever is higher, with a further provision of the ceiling of Rs. 8,00,000/- per month).

(c) Since the Settlement Agreement was qua the parties and not capacity of the CPP, it does not make any difference if the CPP capacity was in existence on that date or was added / expanded subsequently.

(d) The expansion of CPP capacity (by adding additional units) at the same location and having a common point of connection to the GETCO Grid cannot constitute new CPPs for the purposes of the Settlement Agreement. The fact that, it is an expansion of the existing CPP has been admitted by GETCO from time to time.

(e) The Undertakings obtained by GETCO for granting connectivity to its Grid are illegal for want of prior regulatory approval, as categorically held by the Commission. When the subject matter is regulated by statute or regulation, there is no jurisdiction / power with GETCO to unilaterally and without approval of the Commission to seek any Undertaking. Such Undertakings are in violation of the Orders of the Commission and have been expressly rejected. The Commission in its recent Order dated 14.10.2019 in Case No. 1640 of 2017 has categorically held that the Commission alone has the authority and jurisdiction to determine POC and

the Licensees and/ or consumers are not free to decide anything without the consent and approval of the Commission.

(f) In the alternative, and without prejudice to the above, the Petitioner is not liable to pay POC at the rate of Rs. 26.50/kVA/month corresponding to its installed capacity, given the unique scenario / peculiar facts of the present proceedings. The POC regime envisaged under the Commission's Judgment dated 01.06.2011 does not factor the special facts applicable to the Petitioner's case where the CPP capacity has been expanded due to interchangeability of fuels favouring economy of coal versus gas.

8.2 The Petitioner submitted that it is evident from CC No. 706 that there is no ceiling on the capacity of the CPP. However, a ceiling of Rs. 8 Lacs per month, was prescribed on the POC recoverable by the Utility.

8.3 It is submitted that on 28.04.2009 the Hon'ble Gujarat High Court by its Order allowed the review petition filed by the CPPs and directed the parties to consider the settlement terms as set out thereunder. Primarily, the terms of the settlement, as suggested by the Hon'ble Gujarat High Court, gave an option to the CPP's to:

(a) Pay POC in terms of CC No. 706; or

(b) Not pay POC, by installing Meters with three minutes integration period for computing the Demand Charges.

The said settlement agreements once approved by the Commission would then be valid for a period of 10 years. All parties, which had positively executed the settlement agreements, would not be subjected to POC determined by the Commission in Petition Nos. 256 of 2003 and 867 of 2006, during the term of the settlement agreement.

8.4 It is submitted that the Petitioner's entire 600.28 MW (i.e. 77 MW + 220.48 MW + 302.8 MW capacity constitutes one CPP and cannot be treated as different CPPs as alleged by the Respondents.

In fact, the Commission accepted Petitioner's arguments, and had approved and taken note of the Settlement Agreements signed by 37 CPPs, only while passing the final order / judgment on 01.06.2011. The Commission had accepted Petitioner's submission while holding that, the parties to the Settlement Agreement shall follow the orders passed by this Hon'ble High Court.

8.5 It is submitted that even if Undertaking Nos. 1 and 2 provided to GETCO were deemed to be valid, post 01.06.2011, POC with regard to the Petitioner's 77 MW Base Plant and 220.48 MW Phase-1 Expansion Units, were payable in terms of the Settlement Agreement, which has not only been recognized, but also been sanctioned by the Commission in its Judgment dated 01.06.2011.

8.6 It is reiterated that, vide its various Orders the Commission had held that, POC levied prior to 01.06.2011 was bad in law. Therefore, providing an Undertaking does not make an illegal charge (levied by the Respondents) legal / legitimate. It is further submitted that, no provision under the Electricity Act, requires any undertaking to be provided, by a consumer, for payment of any charge. If a particular charge is legally leviable, there is no necessity of seeking any undertaking. Without prejudice to the above, it is submitted that, a (legal) charge ought to stand on its own legs. Where a charge is required to be determined by the Appropriate Commission, the parties' actions cannot be the basis for levy of such charge.

8.7 It is not the Respondent's case that had the Petitioner's capacity exceeded 77 MW, GETCO would have been entitled to a higher quantum of POC. In fact, the Respondents could never make out such a case, since as per the list of CPPs relied upon by the Respondents, there were various other entities / companies whose CPP capacity at the time of executing the Settlement Agreement and adopting CC No. 706 (i.e., limiting monthly POC to Rs. 8 Lacs) was far in excess of 77 MW. In this regard, the following is noteworthy:

Sr. No.	CPP Name	Location of CPP	CPP Capacity (MW)	Date of POC Agreement	Option for POC
1.	M/s. Essar Steel Ltd.	Hazira	644.00	30.09.09	C.C. No. 706
2.	M/s. Reliance Industries Ltd.	Hazira	295.52	27.01.10	C.C. No. 706
3.	M/s. IPCL (Gandhar Complex)	Dahej	154.50	23.12.09	C.C. No. 706
4.	M/s. Hindalco Industries Ltd.	Dahej	134.80	29.06.09	C.C. No. 706
5.	M/s. GSFC	Vadodara	117.32	24.07.09	C.C. No. 706

8.8 Evidently, the monetary ceiling of Rs. 8 Lacs/month towards actual grid support provided by the Respondents was not only scientifically calculated, but also accepted by them. Had that not been the case, the Respondents would never have agreed to adopting the provisions of CC No. 706 and/or sought to amend the same, as was done for the other provision while executing the Settlement Agreement.

8.9 Evidently, the Respondents have erred by seeking to recover POC from the Petitioner at the rate of Rs. 26.50/kVA/month in terms of the Commission's Judgment dated 01.06.2011, whereas recovering only Rs. 8 Lacs/ month as POC from other entities who have CPPs with capacity of over 600 MWs operating in parallel with the grid.

8.10 As regards the Respondent's contention that the Petitioner is estopped from raising issues qua the Undertakings given the facts of the case, it is submitted that the same is

based on an erroneous understanding of law. It is settled principle of law that there cannot be an estoppel against statute / court orders. Any concession made either in court or otherwise, on a legal proposition, cannot be the basis for adjudicating the matter since:

(a) The party on a reconsideration of a proposition is free to resort to a different construction of contract, as more appropriate.

(b) Construction of contract cannot be decided based on the stand adopted by any party in the *lis*.

(c) Parties cannot be nailed to a position of a legal interpretation which they adopted at a particular point of time because saner thoughts can throw more light on the same specially at a later stage. The following judgments are noteworthy:

(i) C.M. Arumugam v. S. Rajgopal: (1976) 1 SCC 863 (Para 7 & 8);
(ii) Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.: (2006) 5 SCC 275 (Para 9);
(iii) P. Nallammal v. State : (1999) 6 SCC 559 (Para 7);
(iv) M.P. Gopalakrishnan Nair v. State of Kerala : (2005) 11 SCC 45 (Para 51); and
(v) LML Ltd. v. State of U.P., (2008) 3 SCC 128 (Para 44).

8.11 As regards the Supplementary Written Submissions filed by the Respondents on 14.09.2020 to contend that the Undertakings procured from the Petitioner were not taken under coercion or by force, is based on an afterthought. It is submitted that, the legal sanctity of the Undertakings obtained by GETCO has already been dealt with by the Commission and upheld by the Hon'ble Appellate Tribunal in the Shaifali Rolls matter. By raising the same issues in the present case, the Respondents are seeking to review the decision of the Hon'ble Appellate Tribunal which is not permissible in law.

8.12 In their reply and submissions before the Commission, the Respondents have contended that parallel operations facility would not have been granted by the Licensees in the absences of POC being determined by the Commission and had the Petitioner not provided the undertakings for payment of POC. This submission / contention of the Respondents clearly demonstrates the monopolistic attitude and the unwarranted coercion with which the Undertakings were taken from those CPPs who desired to operate in parallel with the grid post 2000 and prior to the Commission's Judgment dated 01.06.2011. The Respondents being Licensees under the Electricity Act being regulated entities cannot be permitted to coerce consumers in such manner.

8.13 In this regard, it is further pertinent to highlight that it is an admitted fact that, similar Undertakings were sought by the Respondents only from 18 Nos. CPP's (including the Petitioner herein) who had sought connectivity to the Grid post 2000, during the pendency of the dispute qua levy of POC. Whereas there were in total 51 CPP's

operating in parallel with GETCO's Grid (i.e., No Undertaking was ever taken from 33 CPP's and No POC was recovered from these 33 CPP's prior to the Commission's Order dated 01.06.2011 determining the applicability and quantum of POC). As a result, it is evident that:

(a) Differential treatment was meted out by the Respondents to similarly placed entities (CPPs).

(b) The Respondents argument that the pre-condition for CPP's connecting to the grid prior to 01.06.2011 was furnishing an Undertaking adopting payment in terms of CC No. 706 is not only wrong, but also has already been dealt with by the Commission and upheld by the Hon'ble Appellate Tribunal.

(c) The Respondents have not addressed this issue.

8.14 As such, the Respondents contention that coercion or duress has to be conclusively established with sufficient proof is categorially demonstrated hereinabove, from the submissions of the Respondents themselves and the past orders of the Commission. Even otherwise, the Respondents reliance on the Hon'ble Supreme Court's judgment in ***Transmission Corporation of Andhra Pradesh Limited -v- Sai Renewables Power Private Limited and Ors, (2011) 11 SCC 34***, is erroneous in the present facts of the case. The ***Sai Renewables*** matter was in relation to a Power Purchase Agreement, which is a standard form contract prepared by the ministry and executed by the parties therein. Per contra, the Undertakings procured by GETCO from the Petitioner is neither a contract (it being signed only by the Petitioner) nor does it have any statutory / legal basis or blessing. In fact, similar undertakings for the same period have already been held to be illegal and void ab initio.

Petition not barred by Limitation

8.15 It is submitted that, by the present Petition, the Petitioner is only seeking implementation of the Settlement Agreement in its true spirit and intent i.e., levy of POC on the entire capacity of its CPP (i.e., 600.28 MW) in terms of the Settlement Agreement. As admitted by the Respondents, the Petitioner's cause of action accrued only on 01.06.2011, i.e., when the Commission passed its judgment dated 01.06.2011, deciding the quantum of POC for the first time.

8.16 The issue of limitation has been raised by the Respondents, keeping in view the Judgment dated 16.10.2015 of the Hon'ble Supreme Court in ***A.P. Power Coordination Committee & Ors. vs. Lanco Kondapalli Power Ltd. & Ors. reported as 2015 ELR (SC) 1123***. In this regard, it is submitted that while the Hon'ble Supreme Court has taken a view in the aforesaid case that Limitation Act will apply to adjudicatory proceedings initiated under the Electricity Act, the Hon'ble Supreme Court is of the view that the Limitation Act will not apply to regulatory and administrative proceedings.

8.17 It is submitted that the Commission has to decide whether recovery of a wrongful demand / payment of POC is a regulatory matter (admittedly POC is in the nature of Tariff, as held by the Commission in its Suo-Motu Order dated 31.08.2000 - Para 22), or would it be purely an adjudicatory function under Section 86(1)(f) of the Electricity Act.

8.18 This aspect becomes relevant because POC forms part of the ARR Petition of the Licensees, and as such is a Tariff issue, which is governed by Chapter VII of the Electricity Act. The Commission has held that POC is a Tariff issue which has an implication on the ARR and the consumers of the State. Having said that, it is necessary to clarify while the Petitioner has filed the instant Petition under Section 86(1)(f), the same may not be of any consequence for the reason that, nomenclature of filing of petition cannot be a determinable factor for exercise of jurisdiction. It is submitted that, courts have time and again held that, it is the substance of the matter which is relevant for determining the questions raised therein. Nomenclature is not the criterion to determining the same. The label or nomenclature of an application or petition may not matter, it is even possible to grant the relief in some other provision and an applicant ought not be denied due relief to which he is entitled to, as the case may be.

8.19 Even otherwise, the Commission in its Interim Order dated 17.11.2016 passed in the captioned Petition, allowing impleadment of certain consumer bodies has also held that POC is a Tariff matter and the consumers have a vital interest in the same. Having taken the aforesaid view, the Commission cannot now, in the same proceedings hold that the present proceedings are purely adjudicatory in nature.

8.20 Apart from the aforesaid, it is submitted that the principles laid down in the Lanco Kondapalli judgment (supra), is in conflict with other judgments of the Hon'ble Supreme Court. In this context reference has been made to the Hon'ble Supreme Court's judgments dated 04.04.2014 in ***TANGEDCO vs. PPN Power Generating Company Ltd.,*** reported in ***(2014) 11 SCC 53;*** and in ***Ganesan vs. Commissioner, The Tamil Nadu Hindu Religious and Charitable Endowments & Ors***. reported in ***2019 SCC OnLine 651.***

Therefore, it will not be correct for the Respondents to submit that the principle laid down in the Lanco Kondapalli case (supra) is the only operating principle on the subject and as such the other judgments have to be considered while determining the applicability of the Limitation Act to proceedings before the Commission, more so when there is a case for refund of tariff wrongfully charged by a Licensee. Under the Electricity Act, Tariff can only be determined by the Commission. There can be no levy of tariff which has not been determined by the Commission.

8.21 Keeping in view the aforesaid core purpose of the Statute, the Commission has to decide whether a Licensee who illegally collects money (only from a select few CPP's who have no option but to connect to the grid) without a Tariff Order only on the basis

of an Undertaking can thereafter be permitted to say that it will not refund the monies recovered illegally, on grounds of limitation. It is necessary to reiterate the admitted fact that 33 CPP's who were already connected to the Grid, were not paying POC charges. Evidently, differential treatment was given to applicants like the Petitioner, who as pre-condition for getting grid connectivity were required to submit Undertakings for payment of POC. If there was a law requiring payment of POC, where was the reason for any condition of requiring an Undertaking. Furthermore, a closer examination of the case will establish that collection of money on the basis of an Undertakings without a tariff order is a violation of the terms of Licence. Also, the action of the Licensee is an abuse of its dominant position and monopolistic powers.

8.22 Without prejudice to the above, even otherwise Petitioner's cause of action is continuous and there is no delay on account of the Petitioner in filing the present Petition. In fact, the Respondents, till date, continues to levy/ recover POC at the rate of Rs. 26.50/kVA/month for Petitioner's 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units, in contravention to the Settlement Agreement. As submitted earlier, there cannot be an estoppel against statute. POC levied / recovered by the Respondents is not in accordance with the charge (Settlement Agreement) adopted by the Commission.

8.23 It is submitted that, the Respondents have alleged that, the Petitioner cannot question the levy of POC either generally or in the facts and circumstances of the present case, in light of the same having been examined by the Hon'ble Tribunal, inter alia, in Appeal No. 120 of 2009 titled ***Chhattisgarh State Power Distribution Company Limited vs. Godawari Power Limited by its Order dated 18.02.2011***, wherein a full bench had held that, POC are correctly leviable and ought to be levied on the installed capacity. In this regard, it is submitted that, the Order dated 18.02.2011 passed by the Hon'ble Tribunal in Appeal No. 120 of 2009 had been relied upon by the Commission in its Judgment dated 01.06.2011 only while determining the POC for the CPPs who had not signed the settlement agreements. Without prejudice to the above, it is submitted that the Hon'ble Tribunal in its said Order dated 18.02.2011 had held that POC is payable on the installed capacity of the CPP based on the facts of that case and the study carried out which was specific to the system and load study for the State of Chhattisgarh, as such are distinct from the present case. The Hon'ble Tribunal while dealing with the issue of POC, in the said Order dated 18.02.2011, was dealing with the industry mainly comprising of arc furnaces, rolling mills and metallurgical industries which primarily have CPPs in the State of Chhattisgarh. The nature of these industries is such that the same experiences instantaneous surges and spikes while drawing power from the Grid. However, on the contrary majority of the CPPs in the State of Gujarat are co-generation plants and have negligible support that they receive from the Grid. There are no surges and spikes noticed while drawing power from the Grid. In this regard, the table summarizing the maximum demand recorded from the Grid by the Petitioner between January 2009 and March 2015 is noteworthy. The Petitioner has also submitted a summary of the maximum demand recorded from the Grid along with the Graph.

Petitioner's Alternative Submissions

8.24 It is submitted that, in terms of the aforesaid alternative submissions if POC is considered on the monthly average load of the Petitioner vis-à-vis its installed capacity and charged at the rate of Rs. 26.50/kVA/month, the Petitioner shall be entitled to a refund of Rs. 102,03,88,112/-. In this regard, the following table is noteworthy:

POC Refund Amount as per Alternative Prayer
(Considering Monthly Avg. Load and POC @ Rs. 26.5/KVA)

PARTICULARS	AMOUNT (RS.)
Total POC amount paid by NAYARA from June-2011 to June-2023	2,02,94,56,170
POC required to be paid @ Avg. Load basis for 111 months	63,77,51,486
Refund Amount	1,39,17,04,684

In terms of the alternative submissions, if POC I considered with the cap of Rs. 8 lakhs per month, the Petitioner shall be entitled to a refund of Rs. 1,91,34,56,170. In this regard, the following table is noteworthy-

POC refund amount as per alternative prayer:

PARTICULARS	AMOUNT (RS.)
Total POC amount paid by NAYARA from June-2011 to June-2023	2,02,94,56,170
POC required to be paid @ Rs. 8 lakhs per month	11,60,00,000
Refund Amount	1,91,34,56,170

The Petitioner has sought an alternative relief that POC cannot be levied on the installed capacity and also submitted that that the rate prescribed under Order dated 01.06.2011 is not scientific. The Petitioner has not challenged this Order but requested to evolve appropriate methodology and further requested for refund of POC already levied. For the sake of brevity, we have dealt with this alternative prayer and pleadings and submissions of both the sides thereon in the latter part of this Order.

8.25 The Petitioner further submitted that it is well settled principle of law that, it is the duty of the court to interpret the contract as was understood between the parties. Therefore, the terms of the contract have to be construed strictly without altering the nature of the contract as it may adversely affect the interest of the parties. A quasi-judicial body must ascertain the intentions of the parties and interpret commercial contracts from the express language used in the contract. In this regard, the Judgment of the Hon'ble Supreme Court of India in ***Polymat India (P) Ltd. vs. National Insurance Company Ltd.*** **reported as (2005) 9 SCC 174** (para 19) is noteworthy.

8.26 It is submitted that the Respondents have contended that, POC in terms of the Settlement Agreement is applicable / limited only to the Petitioner's 77 MW Base Plant, as:

(a) It was the only Unit in existence at the time of execution of the Settlement Agreement.

(b) The Petitioner's 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units were synchronized with the GETCO Grid, after the decision on POC was made by the Commission on 01.06.2011.

(c) The covering letter dated December, 2009 to the Settlement Agreement, refers to the Petitioner's CPP as having 77 MW capacity.

(d) The list of 18 CPPs which had been submitted by the Respondent No. 2 to the Commission also referred to the Petitioner's CPP as having 77 MW capacity.

8.27 In this regard, the Petitioner submitted that:

(a) The Petitioner's letter of December, 2009 and the list of 18 CPPs as submitted by the Respondent No. 2, records the Petitioner's CPP capacity as 77 MW, as it was the only existing Unit of the Petitioner's CPP at that point in time. Hence, the Petitioner could not have mentioned about any expansion capacity. In any event, neither the Settlement Agreement nor the Commission's Judgment dated 01.06.2011 read with CC No. 706 restrict / cap the applicability of the Settlement Agreement only to the Petitioner's 77 MW Base Plant.

(b) Without prejudice to the above, it is submitted that, a covering letter (such as the Petitioner's letter of December, 2009) does not form part of an agreement. The covering letter is a mere statement of fact that, the Petitioner as on that particular date had only its 77 MW capacity operational.

8.28 The Petitioner submitted that the Respondents have relied upon the Commission's ***Order dated 03.04.2012 passed in Petition No. 1141 of 2011*** titled **as *M/s. Saurashtra Cement Ltd. vs. GETCO & Ors***. By this Order, the Commission had specifically held that, the settlement agreement was executed for the existing capacity of the CPP (i.e., 34.5 MW), which was prior to 01.06.2011 and as such, any further capacity could not be included into the settlement agreement. In light of the above, it is contended by the Respondents that the said Order is squarely applicable to the facts of the present case. The said contention is wrong and misplaced. As is evident from the Saurashtra Cements matter, the settlement agreement executed between M/s. Saurashtra Cement Ltd. and the Respondent No. 2, specifically mentions the CPP capacity to which it is applicable (34.5 MW), unlike the Settlement Agreement executed with the Petitioner, which does not mention / restrict its applicability to any fixed capacity. In fact, the settlement agreement was executed by M/s. Saurashtra Cement Ltd. only on 10.12.2009, i.e. a day prior to the Settlement Agreement executed with the Petitioner. As is evident from the above, it is clear that the Respondent No. 2 specifically chose not to restrict the applicability of the Settlement Agreement to the Petitioner's 77 MW (unlike that of

M/s. Saurashtra Cement Ltd. (34.5 MW)), since the Petitioner's CPP capacity fell under category 4 of the Settlement Agreement (i.e. 50001 kVA and above), whereby, the POC is limited to / capped at Rs. 8 Lakh / month, irrespective of the CPP capacity (i.e. above 50001 kVA).

8.29 The Petitioner submitted that it is a settled principle of law that:

(a) A rule deducible from the application of law to the facts and circumstances of a case constitutes its ratio decidendi and not some conclusions based upon facts, which may appear to be similar.

(b) One addition and different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

(c) A decision often takes it colour from the questions involved in the case in which it was rendered. The scope and authority of a precedent would never be expounded unnecessarily beyond the needs of a given situation.

(d) Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated.

(e) In this regard, the following Judgments of the Hon'ble Supreme Court of India are noteworthy:

(i) State of Karnataka vs. C. Lalitha reported as (2006) 2 SCC 747
(ii) Escorts Ltd. vs. CCE reported as (2004) 8 SCC 335
(iii) CCE vs. Alnoori Tobacco Products reported as (2004) 6 SCC 186

8.30 The Petitioner submitted that, without prejudice to the fact that, the issues raised by the Respondents in terms of Undertaking Nos. 1 and 2, pertain to Case No. 1429 of 2014 (since both these Undertakings were taken by the Respondents prior to the Commission's Judgment dated 01.06.2011), and do not form part of the present proceedings, it is submitted that:

(a) As set out by the Commission in its Order dated 31.08.2000 in Case No. 24 of 2000, POC is in the nature of Tariff. The said Order dated 31.08.2000, has not been challenged by any party and has attained finality. If it is tariff, there is no need for an Undertaking. Neither the Regulation nor the Commission's Judgment dated 01.06.2011 determining POC recognises or requires issuance of Undertakings. In a regulated regime, there is no legal basis for an Undertaking.

(b) In terms of the provisions of the Electricity Act, the law laid down by the Commission and the Hon'ble APTEL provides that, the Commission has the exclusive power to determine POC. The POC approved by the Commission is final and binding and it is not permissible for the licensees, utilities or anybody else to charge different POC. Any POC levied and or recovered, which is in variance to the POC approved by the Commission, is *per se* illegal.

(c) As is evident from the Commission's Judgment dated 01.06.2011, Order dated 19.01.2013 passed in Petition No. 1222 of 2012 (Shaifali Rolls Ltd. Vs. PGVCL) the Hon'ble APTEL's Order dated 04.04.2014 in Appel No. 74 of 2013 (PGVCL vs. Shaifali Rolls Ltd.), no POC was payable from 01.09.2000 till 01.06.2011. Therefore, the Undertakings taken during such period were illegal and void *ab initio* and no POC could have been recovered by the Respondents in terms of any such Undertakings.

(d) The Commission in its Oral Order dated 30.12.2008 passed in Petition No. 941 of 2008 had specifically recorded that, the Respondent No. 2's act of taking undertakings for recovering POC charges was illegal and only the Commission has the jurisdiction to fix POC (which was not fixed until 01.06.2011).

It is submitted that, the Respondents in its submission have conveniently omitted to quote Para 6.1 of the said Oral Order dated 30.12.2008, which categorically holds that the Respondents act of taking undertakings for recovery of POC (prior to 01.06.2011) was illegal. On the contrary, the Respondents have falsely submitted on oath that, the Commission had refused to stay collection of POC from CPPs who had entered into an agreement with the Respondents.

(e) As regards Undertaking No. 3 procured by the Respondent No. 2 for Petitioner's 302.8 MW Phase-2A Expansion Units, it is submitted that, any undertaking contrary to the Commission's Judgment dated 01.06.2011 is *per se* illegal and void. The Commission's Judgment dated 01.06.2011 clearly records the fact that, POC of Rs. 26.50/kVA/month shall not be applicable to the CPP's who had entered into the Settlement Agreement. Having executed the Settlement Agreement, the Petitioner had insulated itself from the applicability of POC at the rate of Rs. 26.50/kVA/month. No Undertakings sought from the Petitioner can alter / negate the entire premise on which POC was made applicable to the CPPs. Therefore, the Petitioner is liable to pay POC for its entire CPP capacity only in terms of the Settlement Agreement and not at the rate of Rs. 26.50/kVA/month. In any case, admittedly, POC is in the nature of tariff and cannot be mutually agreed between parties, contrary to the Commission's Judgment.

(f) It is further submitted that, the Hon'ble Gujarat High Court keeping in mind that POC could not be mutually decided between the parties had, upon directing the parties to enter into the settlement agreements with the Respondent No. 2 for

payment of POC, specifically stated that, the agreements would come into force and POC would be payable only after the said settlement agreements were placed before the Commission and the Commission passed orders in terms thereof, thereby approving the payment of POC. The said direction of the Hon'ble Gujarat High Court reaffirms the Petitioner's submissions that, POC could not have been mutually agreed between the parties, especially without the express approval / consent of the Commission.

8.31 It is further submitted that, the Undertakings taken by the Respondent No. 2 are in exercise of its monopolistic position and without approval of the Commission. The provisions of the Undertaking are also unilateral and violative of the provisions of the Electricity Act. It is submitted that, in Suo-Moto Petition No. 1226 of 2012 (in the matter of Implementation of Intra-State Open Access in the Distribution System), the Commission by its Order dated 16.08.2012 has taken note of such unilateral undertakings (for granting open access) and has held that, such undertakings are without approval, invalid and void *ab initio*. In contrast to the above, the Settlement Agreement executed between the Petitioner and the Respondent No. 2, has the consent of the Commission. In this regard, the relevant extract of the Commission's Order dated 16.08.2012 passed in Suo-Moto Petition No. 1226 of 2012 is reproduced hereunder:

> *"8.7 On the examination of the said clause, we observe that the aforesaid clause of the Undertaking is unilateral and without approval of the Commission. The said clause is also in violation of section 43 of the Electricity Act, 2003 read with section 62 of the Electricity Act, 2003. It is the duty of the distribution licensees to supply power to the consumers of its license area at the tariff rate determined by the Commission."*

8.32 The Petitioner submitted that the Respondents have made the following submissions with regard to the Undertakings:

(a) POC was provisionally taken, based on the Undertakings, as the matter was pending adjudication before the Commission.

(b) The Respondents were not liable to provide Parallel Operation facility to the CPPs pending the decision of the Commission. The same was provided only on the basis of the Undertakings provided by the CPPs (including the Petitioner).

(c) The Hon'ble Gujarat High Court and the Commission were well aware of the fact that the Respondent No. 2 was providing Parallel Operation facilities to CPP's against the payment of POC as per the undertakings. The Commission did not grant any stay on collection of POC in terms thereof.

8.33 With regard to the aforementioned contentions raised by the Respondents, it is submitted as under:

(a) The Respondents had, in Petition No. 941 of 2008, submitted that the matter was pending before the Hon'ble Gujarat High Court and therefore, undertakings had been accepted from those CPP holders who were ready to pay POC subject to the decision of the Hon'ble Gujarat High Court and adjustment would be made as per the final decision of the Hon'ble Gujarat High Court in the matter.

(b) The Commission had not, in any of its Daily / Oral Orders passed in Petition Nos. 256 of 2003, 867 of 2006 and 941 of 2008 refused to grant stay on the collection of POC by the Respondents. It is submitted that, the Commission had only stated that, in view of the matter pending before the Hon'ble Gujarat High Court, the issue regarding stay of recovery of POC need not be separately addressed at that stage.

(c) Without prejudice to the above, it is submitted that, the Daily / Oral Orders relied upon by the Respondents are interim orders and the said matter attained finality by the Commission's Judgment dated 01.06.2011. Therefore, the Commission's Judgment dated 01.06.2011 is final and applicable. The Commission by its Judgment dated 01.06.2011, has made POC applicable only prospectively and not retrospectively. In this regard, the Orders passed in the case of M/s. Shaifali Rolls Ltd. and the Hon'ble APTEL's Judgment in the case of *SIEL Ltd. vs. PSERC & Ors.* reported as 2007 APTEL 931 are noteworthy.

(d) It is submitted that, the Commission in its Order dated 19.01.2013 passed in Petition No. 1222 of 2012 titled *M/s. Shaifali Rolls Ltd. vs. PGVCL & Anr.* has specifically dealt with the Respondents' contention qua interim orders and held as under:

> *"8.17 The respondent contended that the Commission had in its oral order dated 17.4.2009 in petition No 941 of 2008 not granted any stay to some of the organizations against the levy of POC by the respondent based on the agreement between the parties and GETCO, We note that the said oral order is an interim order and the said matter was finalized alongwith other petitions Nos. 256 of 2003 and 867 of 2006 on 1.6.2011. Hence, the order dated 1.6.2011 passed in the above petitions on 1.6.2011 is final and applicable. Based on which POC is leviable."*

8.34 It is submitted that the Respondents had made identical submission before the Commission (in Petition No. 1222 of 2013) and the Hon'ble APTEL (in Appeal No. 74 of 2013) in its dispute with M/s. Shaifali Rolls Ltd., which is evident from the table below:

Sr. No.	Respondents' submissions in their Additional Reply dated 28.04.2015 to the present Petition	Respondents' submissions in Appeal No. 74 of 2013
1.	In the circumstances mentioned above, the claim for POC was not by enforcement of the CC No. 706 dated 28.01.2000. If the CC No. 706 dated 28.01.2000 was valid and enforceable, the Respondents could have demanded the POC without the need to take any consent or approval or undertaking from the CPPs including M/s Essar Oil Ltd. and during the proceedings before the Hon'ble High Court. In the absence of POC being payable to the Respondents, there was no need for the Respondents to allow the services of Parallel Operation to the CPPs including M/s Essar Oil Ltd.. The Respondents could have refused to provide such services to those CPPs seeking such facilities.	• That the claim for POC was not by enforcement of the CC No. 706 dated 31.08.2000. If the CC No. 706 dated 31.08.2000 was valid and enforceable, the appellants could have demanded the POC without the need to take any consent or approval or undertaking from the CPPs including Shaifali Rolls. The appellants were not enforcing the CC No. 706. [Para 4.3 of the Hon'ble APTEL's Order] • That in absence of POC being payable to the appellants, there was no need for the appellants to allow the services of Parallel Operation to the CPPs including Shaifali Rolls. The appellants could have refused to provide such services to those CPPs seeking such facilities after the setting aside of CC No. 706. [Para 4.4 of the Hon'ble APTEL's Order]
2.	The Respondent submitted that there was a peculiar situation which developed after the CC No. 706 was set aside by the Commission vide Order dated 31.08.2000 and thereafter vide Order dated 25.06.2004, the Commission held the petition filed by the Respondents for POC being maintainable but directed to conduct study to decide the matter. There were number of CPPs desirous of having Parallel Operation with the Grid. These CPPs were willing to pay the POC for such services. However, the issue of the quantum of the POC and the	That due to the peculiar situation which developed after quashing of CC No. 706 by the State Commission vide order dated 31.08.2000 and thereafter vide order dated 25.06.2004, whereby the State Commission directed the appellants to conduct a study to decide the matter of POC. Since the number of CPPs were desirous of having Parallel Operation with the grid and willing to pay the POC for such services, although the said issue was pending consideration before

Sr. No.	Respondents' submissions in their Additional Reply dated 28.04.2015 to the present Petition	Respondents' submissions in Appeal No. 74 of 2013
	provisions of the Parallel Operation services based on such POC being payable was pending consideration before the Commission and the Hon'ble High Court. The Commission had also decided not to proceed with such determination till the disposal of the writ petition pending before the Hon'ble High Court of Gujarat.	the State Commission. [Para 4.5 of the Hon'ble APTEL's Order]
3.	In view of the above and in order to facilitate the CPPs, at the instance of the CPPs including the Petitioner, the Respondents agreed to provide Parallel Operation services subject to the payment of the POC of an amount equivalent to what was specified in the CC No. 706 dated 28.01.2000. This was a voluntary move on the part of the CPPs with an undertaking from the CPPs to get the Parallel Operation services even pending the proceedings before the Commission and the Hon'ble High Court.	That in order to facilitate the CPPs, at their instance including Shaifali Rolls, the appellants agreed to provide Parallel Operation services subject to the payment of the POC of the amount equivalent to what was specified in the CC No. 706 dated 28.01.2000. This was a voluntary offer with an undertaking from the CPPs to get the Parallel Operation services even pending the decision on the jurisdiction of the State Commission to levy the POC. [Para 4.6 of the Hon'ble APTEL's Order]

(a) It is submitted that, after taking into consideration the aforementioned contentions / submissions, raised by the Respondents, the Commission and the Hon'ble APTEL have observed as under:

(i) The undertaking given by M/s. Shaifali Rolls Ltd. stating that the recovery of POC was based on CC No. 706 was not valid, as the Commission had already disallowed charging of POC and had not decided any POC at that time.

(ii) The Commission after going through the whole exercise qua identify and quantify the support extended by the grid to the CPPs and after hearing the parties decided Petition Nos. 256 of 2003 and 867 of 2005 vide its Judgment dated 01.06.2011 held that POC was leviable from the date of the Judgment, namely, 01.06.2011. In light of the above, the findings recorded by the Commission that, POC is leviable from 01.06.2011 and the recovery of POC for the period under dispute was illegal and invalid, was based on legal and

correct appreciation of material available on record and there is no reason to deviate from the same.

(b) It is submitted that, after the Hon'ble APTEL has categorically dismissed the Respondents' claim / submissions and held that: (a) No POC was recoverable prior to 01.06.2011; and (b) Any amounts recovered as POC for the said period was illegal, the Respondents cannot in the present Petition rely upon the same submissions / grounds as dismissed earlier by the Hon'ble APTEL, to allege that the Undertakings granted by the Petitioner were valid and had the force of law (in as much as the Hon'ble Gujarat High Court and the Commission had knowledge of the same and had not granted any stay).

(c) Allowing the submissions made by the Respondents would amount to indirectly reviewing the Order dated 04.04.2014 passed by the Hon'ble APTEL in Appeal No. 74 of 2013, which is not permissible.

(d) ln view of the above, the findings of the Hon'ble APTEL in Appeal No. 74 of 2013 are squarely applicable in the present case and the Respondents are estopped from raising the same contentions before the Commission which have been duly adjudicated upon by the Appellate forum. It is submitted that, the Hon'ble APTEL's Order dated 04.04.2014 in Appeal No. 74 of 2013 has precedential value. In light of the above, the Commission ought not take a contrary view in the present case.

8.35 The Petitioner submitted that, as admitted by the Respondents, the Petitioner's cause of action accrued only on 01.06.2011, i.e. when the Commission passed its Judgment dated 01.06.2011 deciding the quantum of POC for the first time and, according to the Respondents, the Petitioner's claim is barred by limitation.

8.36 In this regard, it is submitted that, the full bench of the Hon'ble APTEL vide its Judgment dated 13.03.2015 passed in Appeal No. 127 of 2013 titled ***M/s. Lafarge India Pvt. Ltd. vs. Chhattisgarh State Electricity Regulatory Commission & Anr***. has categorically held that, the Limitation Act, 1963 is inapplicable to the matters pending before the State Electricity Regulatory Commissions and Central Electricity Regulatory Commission.

8.37 While arriving at the said decision, the Hon'ble APTEL has relied upon the Hon'ble Supreme Court of India's Judgement dated 04.04.2014 passed in ***Tamil Nadu Generation and Distribution Corporation Limited vs. M/s Lanco Tanjore Power Company Ltd. & Anr.*** **reported as 2014 (4) SCALE 560** and the Hon'ble APTEL's Order in ***Gridco Ltd. Odisha vs. Bhushan Power & Steel Limited*** **reported as 2014 ELR (APTEL) 1344,** wherein also, it was held that the Limitation Act, 1963 is not applicable to the proceedings before the State Commissions.

8.38 It is submitted that, without prejudice to the above, even otherwise the Petitioner's cause of action is continuous and there is no delay on account of the Petitioner in filing the

present Petition. In fact, the Respondents, till date, continues to levy / recover POC at the rate of Rs. 26.50/kVA/month for the Petitioner's 220.48 MW Phase-l and 302.8 MW Phase-2A Expansion Units, in contravention to the Settlement Agreement. As submitted earlier, there cannot be an estoppel against statute. The POC levied / recovered by the Respondents is not in accordance with the charge (Settlement Agreement) adopted by the Commission.

8.39 It is submitted that, in the facts of the present case the levy of POC based on the installed capacity of the CPP is totally unscientific, inequitable and unfair. It would be perverse and a travesty of justice if the installed capacity of the Petitioner's CPP is continued to be the basis of calculating the quantum of POC. In this regard, it is submitted that, even the ***Hon'ble Chhattisgarh State Electricity Regulatory Commission in its Order dated 31.12.2008 passed in Suo Motu Petition No. 39 of 2006 (M),*** while determining POC has held as under:

> *"13. CONCLUSION AND ORDER OF THE COMMISSION:*
>
> *In the light of the above discussion the Commission agrees with the recommendation of ERDA and comes to the conclusion that the rates of parallel operation charges should be as derived on the basis of Base MVA Support method i.e. Rs. 21 per KVA. However, instead of levy of parallel operation charges on the installed capacity of the CPP, as being done at present, we consider that the demand towards auxiliary consumption of CPP (which shall not be more thon 70% of the capacity of the plant), contract demand of the CPP agreemented with the utility, the power supplied by the CPP to CSEB or sold inside/outside the State through open access, should be excluded from the installed capacity for the purpose of calculation of POC. It is because, parallel operation charges ore not leviable on industrial consumers of the Board. The intra-State supply either to the Board or to any consumer under open access and inter-State transactions and demand of auxiliary consumption of CPP are not the captive load and parallel operation charges has to do with the captive load of the CPP (i.e. the load of the captive consumer) and not the total capacity of the captive power plant as such. This also takes care of the main objection of the CPPs, raised repeatedly before this Commission that the charges should not be levied on the basis of their installed capacity. Calculated on the above basis, the rate of parallel operation charges determined in this order will vary from CPP to CPP depending on the above factors."*

9. The Respondents, vide affidavit dated 28.04.2015, submitted as under:

The petition filed on 09.10.2014 is belatedly time barred and otherwise suffers from latches. The Petitioner had voluntarily paid the POC to avail the services from the Respondents.

9.1 If CC No. 706 dated 28.01.2000 was valid and enforceable, the Respondents could have demanded the POC without the need to take any consent or approval or undertaking from the CPPs including the Petitioner and during the proceedings before the Hon'ble High Court. In the absence of POC being payable to the Respondents, there was no need for the Respondents to allow the services of Parallel Operation to the CPPs including the Petitioner. The Respondents could have refused to provide such services to those CPPs seeking such facilities. The Commission had not granted any stay against recovery of POC in CC No. 706.

9.2 In the circumstances mentioned above, there was a bilateral arrangement between the Respondents and the CPPs in regard to the provision of Parallel Operation against the payment of POC as per the undertaking given by the CPPs. The scheme of providing Parallel Operation services against the payment of POC equivalent to those specified in the CC No. 706 dated 28.01.2000 was duly taken note of with approval by the Hon'ble High Court in the writ petition as well as by the Commission in various orders. The relevant details are as under:

(a) By order dated 28.04.2009 the Hon'ble High Court had proposed the parties to arrive at a mutually agreeable settlement and in that context took note of the adoption of the CC No. 706 dated 28.01.2000 with certain conditions. There was a clear recognition of the CPPs paying the POC as per the CC No. 706 dated 28.01.2000, notwithstanding that the said Commercial Circular was set aside by the Commission vide Order dated 31.08.2000. The payment of POC equivalent to the amount specified in the Commercial Circular was based on the undertaking given by the CPPs to avail the service of the Parallel operation which they would not have got in the absence of the agreement to pay the POC;

(b) Tariff Order No. 944 of 2008 dated 17.01.2009 also deliberated the same issue where CERS raise issue of collection of POC by CPPs and in a response the Respondent No. 2 stated that same is collected against grid support and subsequently reduced the tariff recovered by distribution licensee.

(c) The Commission issued Tariff Order in the matter of Tariff Petition No. 990 of 2010 for the tariff of FY 2010-11 of the Respondent No. 2, discussing the issue of POC being recovered by the Respondent No. 2 and asked the Respondent No. 2 to share information on Income from POC.

At this point the Commission was already informed about the recovery of the POC by the Respondents on the basis of undertaking and had directed the Respondent No. 2 to share the information in the Tariff order and not granted any Stay for such recovery.

9.3 In the Final Order dated 01.06.2011 disposing off Petitions 256 of 2003, 867 of 2006 and 941 of 2008, the Commission inter alia held as under:

"24. Considering the above, the Commission orders as under:

(i) For the 37 CPPs which have executed agreement with the petitioners as per the directives of the High Court and selected out of the options allowed, the Commission is required to record the same and pass necessary orders in terms of the agreement between the parties. The Commission takes note of the agreement and records the same. The parties to the agreement shall follow the orders passed by the Hon'ble High Court.

(ii) As M/s Nirma Ltd. and M/s. Varasana Limited have agreed to execute agreement under the 3 minutes integration meter clause, the Commission records the same, and orders the petitioners to enter into the agreement accordingly and proceed as ordered in case of 36 CPPs in (i) above.

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

There is nothing in the Order dated 01.06.2011 setting aside the recovery of POC as per the undertaking given.

9.4 The parallel operation during the above period was paid by the Petitioner pursuant to the voluntary Undertaking dated 21.06.2006 and 21.09.2010 given by the Petitioner and through such undertaking the Petitioner requested and availed the services which the Petitioner was otherwise not entitled to. In the said undertaking, Petitioner was also informed about adjudication proceedings of POC matter in the Commission.

9.5 Even in the Order dated 30.12.2008, on being aware of the collection of POC based on a mutual undertaking, the Commission refused the stay the collection of POC from existing CPPs who had entered into a mutual agreement.

9.6 Further, in the remand proceeding, the Commission vide Order dated 17.04.2009 specifically sought for information from Respondent No. 2 about the 18 CPPs to whom the Parallel Operation was granted which was duly supplied. However, no interim orders were granted by the Commission and the Petitioner cannot assume that there were no charges for availing Parallel Operation facility from 2006 to 2011.

10. Further submissions dated **09.07.2015, 14.08.2020 and 24.08.2023** of **the** Respondent**s:**

10.1 It is submitted that the petition filed by the Petitioner on 09.10.2014 claiming that the POC for 220.48 MW and 302.8 MW should be as per the Settlement Agreement dated 11.12.2009 and not as per order dated 01.06.2011 passed by the Commission is liable to be rejected *in limine* without considering any other aspects for the reasons:

(a) The claim being belated;
(b) The Petitioner being estopped from raising the claim;
(c) Because of the application of doctrine of approbate and reprobate;
(d) The doctrine of acquiescence being applicable;

10.2 It is submitted that irrespective of whether or not the Limitation Act, 1963 is applicable to the proceedings under the Electricity Act, 2003, it is a settled principle of law that the belated or stale claims are not to be entertained. The undertaking to pay the parallel operation charges as per the Order passed by the Commission in respect of 220.48 MW was given in the year 2010. The claim now made is that the undertaking was forcefully taken. The cause of action, if any, accrued in the year 2010. Further the order was passed by the Commission on 01.06.2011 and thereafter the POC was levied and collected as per the order dated 01.06.2011. The same was paid by the Petitioner without reservation or protest. The claim for change in the payment of parallel operation charges as per settlement agreement was made in October 2014 when Petition No. 1456 of 2014 was filed. Such a claim being much beyond the period of 3 years and taking the principles of time barred claim with reference to the Limitation Act as per the decision of the Hon'ble Supreme Court, the present petition should be rejected *in limine*. The reference in this connection being made to the decision of Hon'ble Supreme Court, Hon'ble Hight Court and Hon'ble APTEL, in the following cases:

i. Corporation Bank vs. Navin J. Shah, AIR 2000 SC 761:

> *"12. We may further notice that there is another strong reason as to why the claim made by the respondent should not have been granted. The transactions in question took place in the years 1979 and 1981. The difficulties in realisation of the amounts due from the consignee also became clear at the time when the claim was made before the Corporation and the claim had been made as early as on December 19, 1982. The petition before the Commission was filed on September 25, 1992 that is clearly a decade after a claim had been made before the Corporation. A claim could not have been filed by the respondent as this instance of time. Indeed, at the relevant time there was no period of limitation under the Consumer Protection Act to prefer a claim before the Commission but that does not mean that the claim could be made even after unreasonably long delay. The Commission has rejected this contention by a wholly wrong approach in taking into consideration that foreign exchange payable to Reserve Bank of India was still due and, therefore, the claim is alive. The claim of the respondent*

is from the bank. At any rate, as stated earlier, when the claim was made for indemnifying the losses suffered from the Corporation, it was clear to the parties about the futility of awaiting any longer for collecting such amounts from the foreign bank. In those circumstances, the claim if at all was to be made, ought to have been made within a reasonable time thereafter. What is reasonable time to lay a claim depends upon facts of each case. In the legislative wisdom, three years period has been prescribed as the reasonable time under the Limitation Act to lay a claim for money. We thin, that period should be the appropriate standard adopted for computing reasonable time to raise a claim in a matter of this nature. For this reason also we find the claim made by the respondent ought to have been rejected by the Commission."

ii. State of Orissa vs. Mamata Mohanty, (2011) 3 SCC 436

"52. In the very first appeal, the respondent filed Writ Petition on 11- 11-2005 claiming relief under the Notification dated 6-10-1989 w.e.f. 1-1-1986 without furnishing any explanation for such inordinate delay and on laches on her part. Section 3 of the Limitation Act, 1963, makes it obligatory on the part of the court to dismiss the Suit or appeal if made after the prescribed period even though the limitation is not set up as a defence and there is no plea to raise the issue of limitation even at appellate stage because in some of the cases it may go to the root of the matter. (See Lachhmi Sewak Sahu v. Ram Rup Sahu: AIR 1994 PC 24 and Kamlesh Babu v. Lajpat Rai Sharma: (2008) 12 SCC 577.)

53. Needless to say that Limitation Act, 1963 does not apply in writ jurisdiction. However, the doctrine of limitation being based on public policy, the principles enshrined therein are applicable and writ petitions are dismissed at initial stage on the ground of delay and laches. In a case like at hand, getting a particular pay scale may give rise to a recurring cause of action. In such an eventuality, the petition may be dismissed on the ground of delay and laches and the court may refuse to grant relief for the initial period in case of an unexplained and inordinate delay. In the instant case, the Respondent claimed the relief from 1-1-1986 by filing a petition on 11-11-2005 but the High Court for some unexplained reason granted the relief w.e.f. 1-6-1984, though even the Notification dated 6-10-1989 makes it applicable w.e.f. 1-1- 1986.

54.This Court has consistently rejected the contention that a petition should be considered ignoring the delay and laches in case the petitioner approaches the Court after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. A litigant cannot wake up from deep slumber and claim impetus from the judgment in cases where some diligent person had approached the Court within a reasonable time. (See Rup Diamonds v. Union of India: (1989) 2 SCC 356, State of Karnataka v. S.M. Kotrayya: (1996) 6 SCC 267 and Jagdish Lal v. State of Haryana: (1997) 6 SCC 538.)"

iii. Dr. Avtar Singh vs. Guru Nanak Public School & Ors., Order dated 16.04.2015 passed by Hon'ble Delhi High Court in Writ Petition No. 4107 of 2013:

"4. The aforesaid paragraphs make it clear that though strictly the Limitation Act, 1963 does not apply to writ petitions but the principle of limitation will definitely apply, and on applying the principle of limitation i.e. a period of three years in this case, the writ petition would be barred by the doctrine of delay and laches inasmuch as the cause of action in this case accrued on 15.4.2009 when the petitioner left the services of the School and he was not paid the benefits payable and which were to be claimed by the petitioner in terms of the report of the 6th Central Pay Commission and the circular of the Director of Education dated 11.2.2009."

iv. Amol Pharmaceuticals vs. Rajasthan Electricity Regulatory Commission Order dated 23.11. 2006 passed by Hon'ble APTEL in Appeal Nos. 180 to 197 of 2006:

"23) Neither the Electricity Act 2003 mor the Regulations framed by the 1st respondent, Regulatory Commission prescribes the limitation to seek review of the orders. A contention was advanced by Mr. P.N. Bhandari, that the provisions of The Limitation Act have no application and therefore at any time the Review Petitioners could invoke review jurisdiction, maintain and seek a review. In this respect, Mr. P.N. Bhandari relied upon the pronouncement of the Hon'ble Supreme Court in (1) Sakuru v. Tanajiin (1985) 3 Supreme Court Cases 590 (2) Smt. Sushila Devi v. Ramanandan Prasadand Others, 1968 Pat LJR 91, AIR 1976 Supreme Court 177 (3) Town Municipal Council v. Presiding Officer, Labour Court, Hubli and others, AIR 1969 Supreme Court 1335 (4) Nityanand M. Joshi and Another, v. The Life Insurance Corporation of India and others in AIR 1970 Supreme Court 209 and contended that the provisions of The Limitation Act will have no application to the Regulatory Commission, as it is not a Court. Mr. R.K. Agarwal, learned counsel appearing for the appellant, disputed the proposition and sought to contend that it may not be necessary to examine this proposition as already merits of the appellant's contention has been examined by the Regulatory Commission and arguments have been allowed to be advanced in this appeal as well. The propositions of law laid down by Hon'ble Supreme Court, in the above case are not in dispute.

24) In this context, this Appellate Tribunal pointed out to Mr. P.N. Bhandari, learned counsel for the appellants, that even if The Limitation Act has no application, the appellant should have approached the Regulatory Commission within a reasonable time and for latches on the part of the appellants / review petitioners and the Review Petition could be rejected on that score. Mr. P.N. Bhandari could not dispute this legal position. The Hon'ble Supreme Court has taken identical view and if within a reasonable time remedy of review is not invoked, the Petition for review could be rejected on ground of laches, when the

Review Petitioners approach the Forum after a lapse of several months. It cannot be stated that the period of eight months is a reasonable time in any view matter."

10.3 It is submitted that, the claim made by the Petitioner in the present case is also hit by the principles of estoppel. The Petitioner by conduct had acknowledged, accepted and acquiesced the payment of POC as per the Order dated 01.06.2011. This is clear from the fact that the Petitioner consistently paid the POC as per the Order dated 01.06.2011 at all times from 01.06.2011 till October, 2014, without raising any issue. It is not open to the Petitioner to change the stand in October, 2014. Reference in this connection is made in the following decisions:

i. Suresh Jindal vs. BSES Rajdhani Power Limited and Ors., (2008) 1 SCC 341:

"40. At the outset we have noticed that the appellant did not object to the change of the meter. It proceeded on the basis that the change of the meter is permissible in law. He being allegedly unaware of his rights allowed the respondent to enter into his premises and change a correct meter by another one which according to him is also correct. It, therefore, in our opinion does not lie in the mouth of the appellant now to turn round and contend that electronic meters do not record correct consumption of electrical energy. It is one thing to say that electronic meters when tested do not register the actual consumption, as a result whereof, the consumer would have to pay the energy charges more than he is otherwise liable but it is another thing to say that it was legally impermissible. It is not, however denied or disputed that whether meter is installed by the licensee or by the consumer himself, the same must have the requisite certificate granted in terms of the regulations, the provisions where for have been made in the regulations made under the 2000 Act."

ii. Bhubaneshwar Development Authority vs. Susanta Kumar Mishra, (2009) 4 SCC 684:

"The case of the respondent in its complaint was that the interest could not be charged from September, 1989 as the allotment was made only on 1.5.1991 followed by the lease-cum-sale agreement on 6.5.1991 and delivery of possession on 9.5.1991. He also contended that there was no provision for payment of any interest by the lessee as Clause (6) of the agreement was applicable only in the event of default and he had not committed any default. It should be noted that the respondent did not protest against the provisions of clauses (2) and (6) of the lease-cum-sale agreement requiring payment of installments with effect from 1.9.1989 and took possession of the house in terms of the said agreement. Therefore, he could not be heard to say that the installments should commence only prospectively."

10.4 Further, it is submitted that it is also a settled principle of law that a party cannot approbate and reprobate. Reference in this connection is made in ***Mumbai International Airport (P) Ltd. vs. Golden Chariot Airport, (2010) 10 SCC 422.***

10.5 It is submitted that the scope of the Settlement Agreement is clear from the summary / sequence of events as submitted above. The Settlement Agreement was entered into in the context of the following important events:

(a) By Order dated 25.06.2004 the Commission decided that the Parallel Operation Charge is leviable but certain studies are to be conducted for making appropriate decision on the quantum of the Parallel Operation Charges that may be levied. Accordingly, the legality of the chargeability of POC for the services that the CPPs does get from the Grid System operated and maintained by the Respondents was decided by the Commission.

(b) In terms of the above, the CPPs deriving Grid support were required to pay appropriate charges as consideration. In other words, the Respondents were not required to give services of the Parallel Operation in the absence of the payment of consideration for such services;

(c) The Order dated 25.06.2004 passed by the Commission was challenged by the CPPs before the Hon'ble High Court as a result of which the determination of the POC was delayed. In the absence of the POC determined, there was no obligation of the Respondents to provide Parallel Operation / Grid Support services. There cannot be a provision of any services without payment of charges as consideration.

(d) However, many of the CPPs sought for such Grid Support / Parallel Operation even pending the decision by the Hon'ble High Court and determination of the POC by the Commission;

(e) In the context of the above, the Petitioner agreed to pay the POC in respect of its 77 MW CPP then existing at an amount equivalent to that specified in the Commercial Circular No. 706 of 28.01.2000. There were other similar CPP Holders who sought for the Parallel Operation;

(f) By communication dated 11.12.2009, the Petitioner approached the Respondent No. 2, inter alia, stating as under:

"We are having 220 KV Grid Connection (PGVCL Connection No. 27145) of 40 MVA for our Refinery Complex at Vadinar near Jamnagar. Our Refinery Complex is having 77 MW CPP and running parallel with Grid.

With above referred GETCO's letter, we have been advised to execute Agreement for the Parallel Operation Charges (POC) for our 77 MW

and select options for Parallel Operation Charges (POC) for calendar year 2009.

With this we wish to go for Option (b) as under for calendar year 2009.

Adoption of Commercial Circular No. 707 with condition No. 2 therein, being substituted by the following:

Whenever the power will be sold to GUVNL the parallel operation charges to be paid shall be compensated as a part of the cost of generation and rate of sale of power shall be accordingly adjusted.

Our humble request is kindly to accept the same."

(g) An agreement dated 11.12.2009 as referred to in the letter dated 11.12.2009 was executed.

(h) The letter and the Agreement both dated 11.12.2009 were in pursuance of the arrangement reached at the instance of the Petitioner which required the Grid Support and in the context the Respondent No. 2 having no obligation to give the Grid Support in the absence of the POC being determined by the Commission;

(i) It is submitted that the Settlement Agreement dated 11.12.2009 has to be read along with the letter dated 11.12.2009. In the context of the above and with specific reference to the contents of the letter dated 11.12.2009 of the Petitioner having 77 MW CPP and running in parallel with the Grid, the reference in the Settlement Agreement, namely, to the generating units at Vadinar both in the Recital and in the operative part, obviously and can only be with reference to the said 77 MW. The Settlement Agreement cannot be read as extending to all the capacities that may be established from time to time by the Petitioner at subsequent dates;

(j) It is also of utmost importance to take note of the fact that the above arrangements for the Parallel Operation facilities was reached in the context of the Order dated 21.10.2008 passed by the Hon'ble High Court in Special Civil Appeal No. 14743 of 2004 and others (quoted in the Agreement dated 11.12.2009). The aspect of POC were considered only in regard to the existing capacity of various companies. In this regard the list of the CPPs with the capacities was duly placed before the Commission and was taken note of by the Commission in the Orders passed. In so far as the Petitioner is concerned at Item 10, the capacity is mentioned as 77 MW. Similarly, the capacity is mentioned in respect of other CPPs also. These have been mentioned under the head 'Status of 49 CPP Holders' submitted to the Commission running in parallel with GETCO's Grid;

(k) Further, a perusal of the various Orders passed by the Commission at the relevant time, namely, the Orders dated 17.01.2009, 17.04.2009, 22.04.2009, 28.04.2009, 08.05.2009, 13.11.2009, 08.02.2010, 31.03.2010, 28.10.2010 clearly were in the context of the existing CPPs which were firstly considered by the Hon'ble High Court and by the Commission on the aspect of Grid Support to be given pending the decision on the POC pursuant to the Order dated 21.10.2008 passed by the Hon'ble High Court;

(l) In regard to the above, it is also important to take note of the Undertakings given by the Petitioner for the subsequent capacity on 21.09.2010 which specifically states that "*if the GERC decides these charges in future, the charges so decided by GERC will be applicable from prospective date and till that date above charges will be paid by obliger"*. This Undertaking of 21.09.2010 was given after the Order of the Hon'ble High Court dated 21.10.2008, and the Settlement Agreement dated 11.12.2009 in respect of 77 MW of the existing CPPs. Despite the above, there was a stipulation that the POC will be payable as per the Commission's decision in future. It is important to take note of the fact that as per the said undertaking if the POC had been decided by the Commission as NIL or lesser than what has been stipulated in commercial Circular 706 of 2000, the Petitioner could have sought for the applicability of the same in the proceedings before the Commission leading to the Order dated 01.06.2011 levy of POC.

The Petitioner consciously did not want the POC to be levied on the additional capacity of 220.48 MW and specifically stipulated that the applicability of charges in respect of the said capacity was to be as per the decision of the Commission. The Petitioner cannot take an inconsistent stand after the decision dated 01.06.2011. In so far as the capacity of 302.8 MW is concerned, it was established after the order dated 01.06.2011.

(m) Accordingly, in respect of the capacity other than 77 MW, the POC were leviable as per the decision dated 01.06.2011 and not as per the Settlement Agreement dated 11.12.2009 which was only confined to 77 MW. Similarly, the subsequent Undertaking dated 08.06.2012 which was given subsequent to the Order dated 01.06.2011 in respect of further additional CPPs clearly stipulates that the POC shall be payable as per the Order dated 01.06.2011.

10.6 It is submitted that, in view of above, there cannot be any dispute on the factual aspects of the matter, namely, the differentiation between 77 MW CPP which was covered by the Settlement Agreement and the capacities of 220.48 MW and 302.8 MW which are not covered by the Settlement Agreement in regard to the option exercised to avail the Grid Support for a period of 10 years on payment of charges as per the CC No. 706 of 2000. Each of the documents mentioned in the summary of event table clearly refers to the obligation of the Petitioner to pay the POC as per the decision of the Commission in respect of the capacity other than 77 MW. The Petitioner had duly accepted the above, had executed the Undertaking on the above basis.

10.7 It is submitted that the Petitioner had availed the Grid Support from 01.06.2011 onwards till October, 2014 without any objection on the payment of the charges for 220.48 MW and 302.8 MW based on the Order dated 01.06.2011. The petition filed in the year 2014 is clearly an afterthought. There is no explanation whatsoever which has been offered by the Petitioner as to why it had paid the charges as per the Order dated 01.06.2011 during the period from 01.06.2011 till 2014, if according to the Petitioner there was a Settlement Agreement in respect of 220.48 MW and 302.8 MW also. The Petitioner is estopped, by its conduct of payment of the charges as per the Order dated 01.06.2011, from now claiming that the charges were to be paid as per the Settlement Agreement. It is well settled principle that where a party by his words or conduct made a promise or assurance to other party who has acted on that basis, the Party is estopped from claiming to the contrary.

10.8 It is submitted that, the agreement / undertaking for 302.8 MW was entered into in the year 2012 after the Order dated 01.06.2011. It cannot be that the Petitioner will, at all times to come, have the benefit of paying the POC for a period of 10 years as per the CC No. 706 of 2000, but others will pay as per the Order dated 01.06.2011.

10.9 It is submitted that the POC are payable as per the Orders of the Commission. The Order dated 01.06.2011 is a statutory Order determining the POC payable by the CPP for Grid Support. The Settlement Agreement dated 11.12.2009 is an exception in the context of the recommendations / suggestions made by the Hon'ble High Court in the Orders passed in Writ Petition pending before the Hon'ble High Court. The exception is through an agreement between the parties. The agreement reached needs to be confined to the status as was prevalent on the date of the agreement. The agreement reached was in respect of the specified capacity of the CPP which was duly placed before the Commission and taken note of in the Order dated 08.02.2010. This was duly accepted and evidenced by the fact that the Petitioner never claimed that it is entitled to the Grid Support as per the Settlement Agreement in respect of 220.48 MW and 302.8 MW. The Petitioner cannot subsequently change its stand that even after 01.06.2011, the POC is payable in respect of the above two additional capacities as per the Settlement Agreement. If the Petitioner's intention was to cover additional capacities of 220.48 MW and 302.8 MW also under the Settlement Agreement, the Petitioner ought to have raised this issue at the relevant time in which case the Respondents may not have even given the Parallel Operation facility to the Petitioner. Keeping quiet during all these years and having availed the Parallel Operation for 220.48 MW and 302.8 MW by paying POC as per the Order dated 01.06.2011, it is a fraud on the part of the Petitioner to raise such issues subsequently.

10.10 It is submitted that the Settlement Agreement should be restricted to the capacity which was available then, namely, the CPPs of 77 MW which were in operation and required Grid Support. It cannot be that the Respondents can enter into an agreement to the effect that notwithstanding any order that may be passed by the Commission deciding on the POC in future, they will give Grid support at the specified charges mentioned in the CC

No. 706 of 2000 for a period of 10 years. Such an action on the part of the Respondents will be contrary to all the regulatory control by the Commission.

10.11 A limited exception was made in the capacity listed in the Order dated 08.02.2010 by the Commission. Any other interpretation and application would mean that the Petitioner will have a benefit different from other CPP Holders. This would be a ranked discrimination and undue favour to the Petitioner, contrary to the well settled legal principles.

10.12 In the light of the above, where the legal and factual position is clear, the Petitioner is raising hyper-technical issues of the Agreement dated 11.12.2009 not referring to 77 MW capacity in contrast to the case of CPP of Saurashtra Cement Limited where the capacity is mentioned. Firstly, it cannot be that the Respondent No. 2 is dealing with the case of the Petitioner, different from the case of Saurashtra Cement. Secondly, the draft of the Settlement Agreement was prepared commonly to all the CPPs. These drafts were circulated as such. Merely because of Saurashtra Cement chose to incorporate the capacity of 35 MW in its agreement does not make any change. There is no explanation as to why the covering letter dated 11.12.2009 and the Settlement Agreement dated 11.12.2009 refers to 77 MW. Further, the recital in the Settlement Agreement dated 11.12.2009 refers to "Captive Power Plant is operating a Generating Unit". This clearly refers to the existing operating unit which is of 77 MW capacity. Further, in the operative part in Clause 1, the agreement refers to "so long the Captive Power Plant is connected to GETCO's Grid". This also refers to the existing unit. Above all, the Petitioner duly paid the charges as per order dated 01.06.2011 during the years 2011, 2012, 2013 and 2014 without raising any issue.

10.13 It is further submitted that it is also wrong on the part of the Petitioner to make distinction between the Petitioner as being defined in the Settlement Agreement as the CPP and, therefore, whatever capacity the Petitioner establishes in future, it will be covered by the Settlement Agreement. Reference to CPP in the Agreement has to be read along with the letter dated 11.12.2009 as well as in the recital and the operating part of the Settlement Agreement which refers to the operating units. Further, the distinction between Undertaking as mentioned herein above is also clearly with reference to 77 MW capacity only.

10.14 The Petitioner is making submissions totally out of context and the surrounding circumstances of the Settlement Agreement. The Petitioner is picking one or two expressions in the Settlement Agreement out of context and making a frivolous and baseless submission. There is no explanation as to why the Petitioner referred to 77 MW also and also paid Parallel Operation Charges as per the Order dated 01.06.2011 for the period till the filing of the petition without protest or objection or reservation, if according to it, the Settlement Agreement was with reference to all the capacities.

10.15 In the context of the above, it is a well settled principle of Contract Law that an agreement has to be interpreted based on the objective of what the parties had intended

at the time of the signing of the agreement. In this regard Chitty on Contract (31st Edition, Chapter 12-Express Terms [12-043]) states as under:

> *"The cardinal presumption is that the words of the agreement mean what the parties have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself: One must consider the meaning of the words used, not what one may guess to be the intention of the parties. However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. The courts will, in principle, look at all the circumstances surrounding the making of the contract and available to the parties (usually referred to as the "factual matrix" or "available background") which would assist in determining how the language of the document would have been understood by a reasonable person in their position."*

10.16 The above legal principle has been laid down by the Hon'ble Supreme Court also in the following cases:

a) ***Ganga Saran Vs. Charan Ram Gopal, AIR 1952 SC 9***

b) ***Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd., AIR 1962 SC 1810***

c) ***Sundaram Finance Ltd. Vs. State of Kerala and Anr., AIR 1966 SC 1178***

d) ***Modi & Co. Vs. Union of India (UOI), AIR 1969 SC 9***

e) ***Delta International Limited Vs. Shyam Sundar Ganeriwalla & Another, AIR 1999 SC 2607***

f) ***McDermott International Inc. Vs. Burn Standard Co. Ltd. and Ors., (2006) 11 SCC 181***

g) ***Udaipur Sahkari Upbhokta Thok Bhandar Ltd. Vs. Commissioner of Income Tax, (2009) 8 SCC 393***

h) ***Bank of India and Anr. Vs. K. Mohandas and Ors., (2009) 5 SCC 313***

10.17 Accordingly, the issue whether the Settlement Agreement dated 11.12.2009 would cover the capacity other than 77 MW has to be decided in an objective manner from the factual position and surrounding circumstances at the relevant time and not based on what the Petitioner contends today. In the facts and circumstances of the present case, there cannot be any dispute whatsoever that the parties did not intend at the relevant time to extend the Settlement Agreement to the capacity other than 77 MW. This is obviously so as there is no explanation whatsoever for the Petitioner paying the POC as per the Order dated 01.06.2011 during the period from 2011-2014 and further referring to 77 MW in the covering letter dated 11.12.2009 by which the Settlement Agreement was forwarded.

10.18 It is submitted that, in the light of the above, there is absolutely no merit in the petition filed by the Petitioner and the same is liable to be rejected with exemplary cost. The Petitioner is attempting to make unlawful gains at the cost of other open access user including and in particular the Distribution licensee and thereby the public at large. As an afterthought, the Petitioner is raising the issue on its liability to pay POC for the capacities of 220.48 MW and 302.8 MW after having:

(a) Agreed to pay the POC as per the decision of the Commission as stated in the undertaking;

(b) After having duly paid a POC in terms of the order dated 01.06.2011 during the period for 01.06.2011 to 31.03.2012, 2012-13 and 2013-14, etc. without raising any issue on its liability to pay such charges.

10.19 It is submitted that this is a classic case of changing the stand at the belated stage and attempting to make financial gain. In the light of the above, there is no merit whatsoever in the claim made by the Petitioner. Since the Petitioner has raised a number of extraneous and irrelevant issues, the Respondent No. 2 is briefly dealing with the same as under:

Undertaking for 220.48 MW and 302.8 MW was obtained by GETCO forcibly illegally and there was no regulatory approval:

10.20 In this regard, the Respondent No. 2 submitted that, the undertakings were given in the year 2010 and 2012. There was not even a whisper of such undertaking having been taken forcibly at any time till the filing of the present proceeding in the year 2014. It is preposterous on the part of the Petitioner to rake up the issue of undertaking being forcefully taken after so many years of availing grid support and duly paying the applicable POC.

10.21 The undertaking taken by the Respondent No. 2 was in the standard format and all parallel operation users had given such undertakings. It was not an exception only for the Petitioner.

10.22 The undertaking given is to the effect that the Petitioner will pay the grid support charges as decided by the Commission. In respect of the period 01.06.2011 onwards (which is the subject matter of the present petition), the Commission has determined such charges. The Respondent No. 2 has been billing and the Petitioner has been paying the charges as decided by the Commission. The undertaking given is fully consistent with the order passed by the Commission there is, therefore, no question of any illegality in taking the undertaking.

10.23 The Petitioner has purported to challenge the undertaking at the belated stage since the undertakings given by the Petitioner fully and completely demolish the claim in the

petition. In the absence of any defence in the light of the undertaking given, the Petitioner has chosen to attack the undertaking in a frivolous and baseless manner.

Interpretation of Settlement Agreement

10.24 The Respondent No. 2 submitted that, the Settlement Agreement dated 11.12.2009 has to be interpreted contextually and taking in to account the surrounding circumstances. Admittedly the draft settlement agreement was forwarded by the Respondent No. 2 to the Petitioner as well as to other in a standard format. The draft to the Petitioner was forwarded on 09.06.2009. Since, it was a standard format the capacity was not specifically mentioned. The Settlement Agreement however contains sufficient language to apply to an operating and existing unit. The wordings of the Settlement Agreement are not in the nature to extend to subsequent capacity that may be added / expanded.

10.25 Above all the surrounding circumstances namely a letter dated 11.12.2009 referring to 77 MW which was the existing capacity; the list of CPP with capacities taken note of by the Commission in the Order dated 08.02.2010; the wordings of the undertaking given in the year 2010 and 2012 being different from Settlement Agreement dated 11.12.2009 and referring to POC payable as per the decision of the Commission, and unequivocally establishes that the parties (more specifically the Petitioner) never intended the settlement agreement to cover the 220.48 MW and 302.9 MW.

10.26 The above is further fortified by the conduct of the Petitioner paying the POC as per Order dated 01.06.2011 for the period till 2014 without any reservation, condition or protest. In the circumstances, there is no basis whatsoever for the Petitioner to claim the applicability of the Settlement Agreement as covering the capacities of 220.48 MW and 302.9 MW.

10.27 It is submitted that, the attempt made by the Petitioner to base its claim on hyper technical aspect of the settlement agreement not referring to specific capacity, settlement agreement referring to the Petitioner as CPP, CC No. 706 providing for same charges beyond a particular capacity, etc. have no basis.

Decision in Shaifali Rolls Case:

10.28 The Respondent No. 2 submitted that, the decision of the Commission dated 19.01.2013 in Shaifali Rolls case upheld by the Hon'ble APTEL in the decision dated 04.04.2014 in the Appeal No. 74 of 2013, besides being a subject matter of the second appeal being Civil Appeal No. 5991 of 2014 before the Hon'ble Supreme Court, is otherwise clearly distinguishable and has no application to the present case.

10.29 In the Shaifali Rolls case, the Commission had essentially dealt with the collection of POC beyond a period of limitation. In that case, the parallel operation was availed

between the period from 16.07.2006 to September 2008. It was held that the Distribution licensee remained silent till 25.07.2011.

10.30 Further, in the above decision the Commission was not dealing with the levy of POC for the period after 01.06.2011 in terms of the Order dated 01.06.2011 passed by the Commission. In the present case, the relevant period is after 01.06.2011.

10.31 In addition to the above, the Commission in the Shaifali Rolls case was dealing with a undertaking to pay the POC as per the CC No. 706 not with an undertaking as in the present case of making payment of POC as per the decision dated 01.06.2011. In para 8.14 of the Shaifali Rolls decision itself, the Commission has noted the validity of the levy of POC with effect from 01.06.2011. The undertaking in the present case being consistent with the order dated 01.06.2011, there is no question of undertaking being illegal and invalid.

10.32 Thus, the reliance placed by the Petitioner on Shaifali Rolls case is misplaced and in fact the decision in Shaifali Rolls case supports the claim for POC for the period from 01.06.2011, which is the subject matter of present petition.

Decision in Saurashtra Cement Case (dated 03.04.2012 in Petition No. 1141 of 2011):

10.33 The Respondent No. 2 submitted that, the decision of the Commission in the above case of Saurashtra Cement is fully applicable to the case of the Petitioner. The Petitioner is wrongly distinguishing the case only for the reason that the Settlement Agreement in Saurashtra Cement case referred to the capacity of 34.5 MW. The absence of any reference to the specific capacity in the settlement Agreement dated 11.12.2009 executed by the Petitioner does not make any difference whatsoever, particularly in the context of the 77 MW capacity being specifically referred to in the contemporaneous letter dated 11.12.2009 and the settlement agreement also referring to the generating unit in operation. The principles laid down in Saurashtra Cement case would equally apply to the present case.

Inconsistent stand taken by the Petitioner:

10.34 The Respondent No. 2 submitted that, the Petitioner has been taking totally inconsistent and contradictory stand. In the present petition the Petitioner is claiming that the settlement agreement dated 11.12.2009 would cover the capacities of 220.48 MW and 302.8 MW in respect of the POC for the period 01.06.2011 onwards. Whereas in Petition being No. 1429 of 2014, the Petitioner had challenged the levy of POC and claimed refund of the POC paid under the settlement agreement for the prior period namely 01.06.2011. This is a classic case of blowing hot and cold. If the Settlement Agreement dated 11.12.2009, as stated by the Petitioner is illegal for the period till 01.06.2011, it cannot said to be valid for the subsequent period from 01.06.2011

onwards in respect of capacities of 220.48 MW & 302.8 MW. On this limited ground itself, the present petition is liable to be dismissed.

Challenge to the Levy of POC:

10.35 It is submitted that the Petitioner has stated the it is not challenging the Order dated 01.06.2011 passed by the Commission on the levy of POC. This submission is based on alleged peculiarity in the operation of a refinery. The Petitioner cannot indirectly challenge the scope of the order dated 01.06.2011 in the present proceedings. The order dated 01.06.2011 is clear and specific, it does not make any distinction on the basis of the nature of the operation, as in the case of refinery. The submission made in regard to the above are liable to be rejected as being outside the scope of present petition where the issue involved is limited to the applicability of the Settlement Agreement for the capacity of 220.48 MW & 302.8 MW for the period of 01.06.2011 onwards.

10.36 The Respondents submitted that it is settled by the Hon'ble Supreme Court in the context of the provisions of the Electricity Act and in relation to a petition under section 86 (1) (f) that the provisions of the Limitation Act, 1963 would be applicable, as held by the Hon'ble Supreme Court ***in Andhra Pradesh Power Coordination Committee and Others -v- Lanco Kondapalli Power Limited and Others (2016) 3 SCC 468***.

10.37 The Respondents submitted that the Petitioner consciously and specifically stipulated that the applicability of parallel operation charges in respect of the 220.48 MW capacity was to be as per the decision of the Commission. It is submitted that the Petitioner cannot take an inconsistent stand after the decision dated 01.06.2011 passed by the Commission that for the 220.48 MW capacity the applicable charges will continue to be as per the undertaking.

In so far as the capacity of 302.8 MW is concerned it was established after the order dated 01.06.2011. The subsequent Undertaking dated 08.06.2012 for 302.8 MW which was given subsequent to the Order dated 01.06.2011 in respect of further additional CPPs clearly stipulates that the POC shall be payable as per the Order dated 01.06.2011.

10.38 It is submitted that the POC are payable as per the Order of the Commission dated 01.06.2011. The Order dated 01.06.2011 is a statutory Order determining the POC payable by the CPP for Grid Support. After the said order it was in any event legally not permissible for the Petitioner being allowed the specialised terms agreed to in the Settlement Agreement for any additional capacity.

10.39 It is submitted that the Petitioner has contended that the POC in respect of the entire captive generation capacities of 220.48 MW and 302.8 MW should be charged only at the rate and on the terms and conditions contained in the Settlement Agreement dated 11.12.2009 whereas, it is the case of the Respondents that the said Settlement Agreement covers only the specified capacity of 77 MW which was existing at the

relevant time of settlement and does not cover the additional 220.48 MW and 302.8 MW subsequently established.

10.40 The matter in issue before the Commission is therefore in regard to the scope of the Settlement Agreement dated 11.12.2009 namely whether it also covers the two subsequent capacities of 220.48 MW and 302.8 MW established by the Petitioner.

10.41 The Respondents submitted that the Petitioner had voluntarily and willingly agreed to pay the POC for the capacity of 220.48 MW and 302.8 MW as per the rates determined by the Commission and on the basis of which the permission was granted by GETCO and the units were synchronised by the Petitioner to the grid and parallel operation facility availed.

10.42 It is submitted that the POC levied and collected from the Petitioner have already been accounted for in the Tariff Orders of the Respondents and any refund at this stage would have to be passed on to the consumers.

10.43 It is submitted that the claim made is barred under the Limitation Act, 1963 as it is now settled that Limitation Act is applicable to the adjudication proceedings under the Electricity Act, 2003. It is a settled principle of law that the belated or stale claims are not to be entertained.

10.44 The undertaking to pay the POC as per the Order dated 01.06.2011 passed by the Commission in respect of 220.48 MW was given in the year 2010 - the undertaking given on 21.09.2010 and accepted on 14.10.2010. The claim now made is that the undertaking was forcefully taken. The cause of action, if any, therefore accrued in the year 2010. The petition is filed on 09.10.2014 and is therefore beyond three years of the agreement and therefore the Petition cannot seek to set aside the terms of the contract / agreement. There is no dispute on the fact that the Petitioner had agreed to pay POC as per the Order of the Commission in the undertaking on which basis the connectivity was granted to the Petitioner. The Petitioner cannot now claim that there is no agreement. There was offer, acceptance and consideration. Since the terms of the contract cannot be set aside, the relief sought by the Petitioner being contrary to the contract, the same cannot be entertained.

10.45 Further, it is submitted that the order was passed by the Commission on 01.06.2011 and thereafter the POC was levied and collected as per the order dated 01.06.2011. The same was duly paid by the Petitioner without any reservation or protest. The claim for change in the payment of parallel operation charges as per settlement agreement was made only on 09.10.2014, when the petition No. 1456 of 2014 was filed. Such a claim being much beyond the period of 3 years from the cause of action and even beyond 3 years from the date when the order was passed on 01.06.2011. Accordingly taking the principles of time barred claim with reference to the Limitation Act as per the decision of the Hon'ble Supreme Court, the present petition should be rejected *in limine*. Even if it is considered that the cause of action arose on 01.06.2011, it has been more than three years.

10.46 The Petitioner has sought to contend that the bills for POC were raised in 2012. There is no question or dispute that the bills were raised as agreed by the Petitioner in the undertaking dated 21.09.2010. The Petitioner has not raised any dispute in the computation or otherwise in the bill or claimed that the bills are contrary to the undertaking / agreement in 2010. The only issue is that the bills have been raised as per the charges determined under Order dated 01.06.2011 even though the same had already been agreed to by both parties and specifically by the Petitioner in 2010. When the terms of the agreement cannot be set aside due to limitation, the bills irrespective of when they are raised cannot be challenged when they are raised as per the agreement.

10.47 The nature of the present petition is clearly adjudication of the disputes within the scope of section 86 (1) of the Act. The title to the petition states 'Petition u/s 86 (1) (f) of the Electricity Act, 2003 read with Clause 6 of the Settlement Agreement dated 11.12.2009 executed between Essar Oil Limited and Gujarat Energy Transmission Corporation Ltd'. Further the issue relates to interpretation of the agreement which is also adjudicatory in nature.

10.48 Moreover, it is also relevant that following the decision of the Hon'ble Supreme Court in ***Lanco Kondapalli's*** case (supra), the Hon'ble Appellate Tribunal for Electricity has held that limitation would apply to adjudicatory proceedings in the following cases:

A. ***Kalani Industries Pvt. Ltd. vs. Rajasthan Electricity Regulatory Commission (RERC) and Ors. Appeal No. 185 of 2015 (25.10. 2018 - APTEL) (Para 67-68)***

B. ***Maharashtra State Electricity Distribution Co. Ltd. vs. Maharashtra Electricity Regulatory Commission (MERC) and Ors. Appeal No. 75 of 2017 (24.04 .2018 - APTEL) (Para 10 c)***

C. ***Corporation Bank v. Navin J.Shah AIR 2000 SC 761***

D. ***State of Orissa v. Mamata Mohanty (2011) 3 SCC 436***

E. ***Dr.Avtar Singh v. Guru Nanak Public School Order dt. 16.5.2015 of Hon'ble Delhi High Court in Writ Petition No. 4107 of 2013.***

F. ***Amol Pharmaceuticals v. Rajasthan Electricity Regulatory Commission Order dt. 23.11.2006 of Hon;ble APTEL in Appeals 180 to 197 to 2006.***

10.49 It is submitted that the reliance placed by the Petitioner on the judgements is misplaced. In the PPN Judgement (Supra), the Hon'ble Supreme Court dealing with the aspect of the application of Limitation Act, 1963 to the Electricity Act, 2003 was on 04.04.2014. In the subsequent case of ***Lanco Kondapalli*** (supra), the Hon'ble Supreme Court had specifically referred to the decision in ***the PPN case*** in Paras 14, 15, 16, 22, 23, 28 and

29 and has proceeded to hold that in matters relating to adjudication of disputes under Section 86 (1) (f) of the Electricity Act, 2003 the Limitation Act, 1963 would apply. The decision considered the issue in PPN case on limitation and has held that the Limitation Act, 1963 by itself would not apply to proceedings before State Commission but has proceeded to hold that the Limitation Act, 1963 would apply for matters covered under the adjudicatory powers of the State Commission i.e. powers exercises under section 86 (1) (f) of the Electricity Act, 2003 as claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceedings on account of law of limitation. This was also considered necessary to avoid injustice as well as possibility of discrimination (Para 31).

10.50 The Petitioner has in effect sought to claim that the decision in Lanco Kondapalli should be ignored on the basis that PPN judgment is earlier. Such contention is misconceived. The subsequent decision of the Hon'ble Supreme Court in the matter of Lanco Kondapalli (Supra) has considered the issue in PPN case on limitation and has held that the Limitation Act, 1963 by itself would not apply to proceedings before State Commission but has proceeded to hold that the Limitation Act, 1963 would apply for matters covered under the adjudicatory powers of the State Commission i.e. powers exercises under section 86 (1) (f) of the Electricity Act, 2003 as claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceedings on account of law of limitation. This was also considered necessary to avoid injustice as well as possibility of discrimination (Para 31).

10.51 It has been clarified that the Limitation Act, 1963 will not apply to regulatory powers i.e. other than the adjudicatory powers. Thus, the Hon'ble Supreme Court in Lanco Kondapalli's case has clarified the position after duly taking into consideration the PPN case. It is, therefore, no longer right on the part of the Petitioner to submit that either there is a conflict between the PPN decision and Lanco Kondapalli decision or that in view of the PPN decision holding that the Limitation Act will not apply, Lanco Kondapalli's decision should not be given effect to. It is not permissible for the Petitioner to argue that the decision of the Hon'ble Supreme Court in Lanco Kondapalli's is contrary to the decision in the PPN case when the Lanco Kondapalli's case specifically deals with the PPN case.

10.52 The consideration that the provisions of Limitation Act have been imported into the Electricity Act, 2003 was considered in the context of status of the Commission as a Court in ***State of Gujarat -v- Utility Users' Welfare Assn., (2018) 6 SCC 21*** wherein both Lanco Kondapalli Judgment and PPN Judgment was referred (Para 103). It was also observed therein that there is no restriction in Section 86(1)(f) of the nature of the dispute that may be adjudicated.

10.53 In fact the Hon'ble Supreme Court in ***B.K. Educational Services (P) Ltd. -v- Parag Gupta & Associates, (2019) 11 SCC 633*** had relied on the decision in Lanco Kondapalli

Case in context of Insolvency and Bankruptcy Code and held that Limitation Act is applicable to the applications filed under Section 7 and 9 of the Code.

10.54 In the case of ***Maharashtra State Electricity Distribution Co. Ltd. -V- Maharashtra Electricity Regulatory Commission (MERC) and Ors. Appeal No. 75 of 2017,*** the specific issue raised was on applicability of limitation in light of the judgment in PPN Case. The Hon'ble Tribunal has held that the decision in Lanco case has settled the issue that Limitation Act applies to the proceedings under Section 86(1)(f) and upheld the reliance of the State Commission on the Limitation Act.

10.55 As regards the reliance placed by the Petitioner the decision in ***Ganesan -v- Commissioner, Tamil Nadu Hindu Religious and Charitable Endowment Board 2019 SCC OnLine SC 651*** is concerned, it is a case of exercise of statutory powers of plenary nature to decide all issues and not an adjudicatory power as in the case of Section 86 (1) (f) of the Electricity Act, 2003. The determination of entitlement of Ambalan rights and to receive first receipt as an Ambalan in the village is by the Joint Commissioner of Hindu Religious and Charitable Endowment Board in exercise of the statutory powers. It is not an exercise of power to adjudicate as a dispute between two persons. The fact that the statutory authority is required to follow a procedure will not take away the exercise of statutory powers and make exercise of power as akin to a decision by a Court. Whereas as noted in the Lanco Kondapalli case, the exercise of adjudicatory powers by the Regulatory Commission is akin to the exercise of arbitration or other civil court powers to decide the dispute between the parties.

10.56 Accordingly, there is no basis for the Petitioner to claim that exercise of powers under Section 86 (1) (f) of the Electricity Act, 2003 by the Commission to adjudicate upon the dispute between two parties, would not be covered under the provisions of the Limitation Act, 1963.

10.57 The Respondents submitted that the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755 as referred to in State of Gujarat -v- Utility Users' Welfare Assn., (2018) 6 SCC 21 had observed that there is no restriction in Section 86(1)(f) of the nature of the dispute that may be adjudicated. Therefore, merely because the issue is POC does not change the fact that the issue is of adjudication of dispute under Section 86(1)(f). 29.

10.58 In fact in the specific case of POC, the Hon'ble Tribunal in the Full Bench Decision in ***Appeal No. 120 of 2009 in Chhattisgarh State Power Distribution Co Ltd v. Godawari Power & Ispat Ltd dated 18.02.2011*** has recognized that the jurisdiction for dispute regarding the POC levied and collected by the licensee is under Section 86(1)(f):

> *"20.....It is a dispute between the Generator and the Licensee with regard to the levy of parallel operation charges. Therefore, in respect of the 1st issue, we hold that the State Commission has got jurisdiction to inquire into the dispute raised in the Petition filed by the 1st Respondent before the State Commission*

and as such, the finding rendered by the State Commission on the issue of jurisdiction is upheld.

26. (1) The 1st Respondent, Godawari Power & Ispat Ltd. is the Captive Power Plant. This plant is being operated in parallel with the grid. The relationship in regard to the parallel operation with the grid is between the Captive Power Plant, the 1st Respondent herein and the Appellant, the Distribution Licensee. This is not a dispute between the Appellant a Distribution Licensee and the Respondent No. 1 as a consumer of the electricity. ***This is a dispute regarding the levy of parallel operation charges to be levied and collected by the Appellant being a Distribution Licensee from the 1st Respondent, Captive Power Plant which is a generator. Therefore, the State Commission has got the jurisdiction to entertain and adjudicate upon this dispute under S. 86(1)(f) of the Electricity Act, 2003***.

10.59 Therefore, the dispute in the present case which is also related to levy and collection of POC is also under Section 86(1)(f) and therefore adjudicatory in nature.

10.60 The Petitions filed by generators in regard to bills raised for POC before Chhattisgarh Commission were filed under Section 86(1)(f) as can be seen from the cases in Appeal No. 49 of 2015 and batch dated 04.11.2015 and Appeal No. 44 of 2015 and batch dated 27.09.2017. Even in the present case, the Petitioner has filed the Petition under Section 86(1)(f). 32. The Petitioner has also sought to rely on the impleadment of consumer representatives to claim that this is not adjudicatory function. However, the Petitioner itself in the Written Submissions has raised the issue that there is no need for impleadment of consumer representative for adjudication of the instant *lis*. Clearly therefore, this is an adjudicatory petition. The Petitioner has sought to misdirect the issue by claiming that intervenors have no technical knowledge which is not relevant to decide on whether the consumer representatives are to be allowed to participate in the proceedings or not. The Electricity Act, 2003 under Section 94(3) allows for consumer representatives to be present and there is no qualification requirement for the same.

10.61 Even otherwise, it is submitted that the impleadment of consumer representatives would not alter the basis of the petition. Section 94(3) allows for consumer representatives to be present and the said section does not exclude the adjudicatory jurisdiction and therefore even in adjudicatory function, the consumer representatives are allowed to participate.

10.62 Such an issue on the impleading of consumer representative has been considered by the Hon'ble Tribunal in an adjudicatory petition under Section 86(1)(f) of the Electricity Act, 2003 in ***Order dated 30.11.2016 in Appeal No. 173 of 2016 in the matter of Mr. Ramashankar Awasthi v. Lanco Anpara Power Limited*** [Relevant paras 10, 12, 14, 16 20 and 24]. The specific issue had been raised that a consumer representative has no role in petition under Section 86(1)(f) and this was rejected by the Hon'ble Tribunal:

"20. Now to examine this submission one has to first go to the Preamble of the said Act. It clearly states that the said Act is enacted inter alia to protect interest of consumers. That the consumer is a major stakeholder in the power sector can hardly be disputed. In this connection it is necessary to refer to Section 94(3) of the said Act. It reads as under:

> *"The Appropriate Commission may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it."*

In our opinion this provision will apply to Section 86(1)(f) of the said Act as well. When Section 94(3) or any other provision of the said Act does not exclude proceedings under Section 86(1)(f) from the purview of Section 94(3) we cannot infer such exclusion. Besides it is not unlikely that a dispute which may ostensibly be described as contractual dispute may have wide ramifications and decision of the State Commission may have an adverse impact on the consumer interest. It is precisely for this reason that the legislature has made a provision for consumer participation in Section 94(3)."

10.63 Further, the Commission in Order dated 17.11.2016 did not hold that the present Petition is not under Section 86(1)(f) or the Petition is not adjudicatory in nature. The consumers generally are affected by the result of the disputes involving licensees and this is why Electricity Act, 2003 under Section 94(3) allows for consumer representatives to be present. This is because consumers are affected by any decision involving the licensees. The consumer representatives have been allowed to participate in various petitions both by the Commission as well as other Commissions. If the contention of the Appellant is accepted, the law of limitation can never be applied to any proceeding before the Commission.

10.64 Further, the law of limitation has been applied in variety of cases which would involve recovery of dues which inter alia would have an effect on consumers:

(a) In ***Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Others Civil Appeal No. 1843 of 2021 dated 08.10.2021,*** the Hon'ble Supreme Court held as under:

> *"197. Even assuming that the burden of interest would have to be passed on to the consumers, that cannot be the ground for the Appellant to resile from its contractual commitment to the Power Generating Companies. The Appellant cannot pass on the burden for delay in making payment to the Power Generating Companies. In any case the claims as argued by Mr. Singhvi pertains to a period of three years before filing of the petition before the MERC on 2nd December, 2016 and therefore barred by limitation."*

(b) Punjab State Power Corporation Limited v. Rajasthan Rajya Vidyut Prasaran Nigam Limited v. Punjab State Power Corporation Limited in Appeal No. 358 of 2022 dated 30.05.2023

The issue involved recovery of outstanding dues in relation to sale of energy and O&M charges and the law of limitation was applied by the Hon'ble Tribunal after referring to the decision of the Hon'ble Supreme Court in Lanco case held that the claim by the first Respondent therein was barred by limitation.

(c) Gujarat Urja Vikas Nigam Limited v. CLP India Pvt Ltd in Civil Appeal 2969 of 2010 dated 06.05.2020

The issue related to issues of tariff arising out of the PPA between the parties and claims of GUVNL for certain period was held to be barred by law of limitation in the Order dated 19.01.2010 of the Hon'ble Tribunal and this was upheld in the Appeal by Hon'ble Supreme Court.

(d) M/s Bhilanga Hydro Power Ltd. -v- Uttarakhand Electricity Regulatory Commission Appeal No. 144 of 2015:

The issue involved the claim for compensation for energy loss for delayed COD and it was held inter alia that claim was barred by limitation.

(e) Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission and Another in Appeal No. 2 of 2015 dated 07.04.2022

The Law of limitation was raised by the Appellant in regard to the claim by generators in relation to the tariff under the PPA. The law of limitation was applied though in the said case, Section 14 of the Limitation Act, 2003 was applied to hold that the claim was not time barred.

The Appeal by the Appellant therein on other issues before the Hon'ble Supreme Court is pending.

Estoppel / Acquiescence / Party cannot Approbate and Reprobate:

10.65 The Respondents submitted that the claim made by the Petitioner in the present case is also hit by the principles of estoppel and acquiescence. The Petitioner cannot approbate and reprobate.

10.66 The Petitioner by conduct had acknowledged, accepted and acquiesced the payment of POC as per the order dated 01.06.2011. The Petitioner was allowed the Parallel Operation facility at the instance of the Petitioner and on the basis of the Petitioner agreeing to pay the charges. This is clear from the fact that the Petitioner not only had agreed to pay POC but had consistently paid the POC as per the order dated 01.06.2011

for the period from 01.06.2011 onwards, without raising any issue. The Petitioner did not raise any issue at the time of seeking connectivity, at time of synchronisation and even at the time of raising of invoices and payment of POC. It is not open to the Petitioner to change the stand in October 2014.

10.67 In the facts and circumstances, the Petitioner is clearly estopped by his conduct to claim that the levy of POC as per the Order dated 01.06.2011. The petition filed is, therefore, not maintainable and is liable to be dismissed by application of the principles of estoppel.

10.68 In fact in the present case, what has been agreed to by undertaking and conduct is the liability to pay POC as determined by the Commission in Order dated 01.06.2011. There cannot be any dispute that the Commission is the appropriate authority to determine the POC and further such determination has not been challenged. Thus, the Petitioner is clearly estopped by the principles of estoppel.

Waiver:

10.69 The Respondents have submitted that the conduct of the Petitioner in claiming that 220 MW and 302.8 MW are also covered by the Settlement Agreement dated 11.12.2009 constitutes a waiver. Even if the Petitioner had a right to claim the application of the POC as per Settlement Agreement dated 11.12.2009, though this is not correct, the Petitioner can be held to have waived such right. Therefore, even assuming but not admitting that the Settlement Agreement can be interpreted to include the subsequent units of 220 MW and 302.8 MW, the Petitioner has waived such rights and accepted the applicability of POC as per Order dated 01.06.2011 for the 220 MW and 302.8 MW.

10.70 It is submitted that the waiver is a voluntary relinquishment or abandonment of a legal right or advantage in such a way that the other party is entitled to plead the abandonment if the right is thereafter asserted. This is also specifically recognised under Section 63 of the Contract Act, 1872 wherein a party may dispense with or remit any performance, which as applied to the present case means the Petitioner could agree that the subsequent capacity would not be covered under Settlement Agreement and the Settlement Agreement is only for 77 MW.

10.71 The Petitioner was well aware of the Settlement Agreement when it had agreed to pay the POC as per the charges determined by the Commission in the Undertaking dated 21.09.2010 and 08.06.2012 and therefore voluntarily abandoned or relinquished right if any for the POC as provided in the Settlement Agreement for the period after the determination by the Commission.

10.72 In this regard reference has been made to the judgment of the Hon'ble Supreme Court in ***All India Power Engineers Federation -v- Sasan Power Limited (2017) 1 SCC 487*** {"Sasan Power Case"} :

"18. It is thus clear that if on facts there is a waiver of a provision of the PPA by one of the parties to the PPA, then Section 63 of the Contract Act will operate in order to give effect to such waiver.

19. At this juncture, it is important to understand what exactly is meant by waiver. In Jagad Bandhu Chatterjee v. Nilima Rani, (1969) 3 SCC 445, this Court held:

> *"5. In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in Waman Shriniwas Kini v. Ratilal Bhagwandas & Co.[1959 Supp 2 SCR 217, 226] that waiver is the abandonment of a right which normally everybody is at liberty to waive.*
>
> > *"13.... A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right"*
>
> *It is well-known that in the law of pre-emption the general principle which can be said to have been uniformly adopted by the Indian courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of the forfeiture of such a right. So far as the law of pre-emption is concerned the principle of waiver is based mainly on Mohammedan Jurisprudence. The contention that the waiver of the appellant's right under Section 26-F of the Bengal Tenancy Act must be founded on contract or agreement cannot be acceded to and must be rejected."*

20. In P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 SCC 725, this Court held:

> *"13....Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The*

voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."

21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Indian Contract Act governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities."

10.73 It is submitted that the issue involved in the above case was related to a Power Purchase Agreement which had been approved by the Central Commission and whose draft was based on the Competitive Bidding Guidelines issued under Section 63 of the Electricity Act, 2003. The Hon'ble Supreme Court had in Sasan Power Case {supra} considered the applicability of waiver in PPAs but in the facts of the said case held that there is no waiver and even that since the case involves public interest as tariff is affected, there could have been no waiver contrary to consumer interest without permission of the Commission. In the present case however, there is no element of consumer interest to disallow the waiver by the Petitioner. The POC as determined by the Commission is what was determined to be appropriate for the use of services by Captive Power plants and there can be nothing contrary to public interest for the Petitioner to agree to pay such amounts. In fact, the effect of the waiver is for the Petitioner to be liable to pay POC as determined by the Commission which is in fact in public interest and interest of consumers at large.

10.74 In ***Arce Polymers (P) Ltd. -v- Alphine Pharmaceuticals (P) Ltd., (2022) 2 SCC 221***, the Hon'ble Supreme Court recognised that waiver can be contractual or by conduct (express or implied) and the fact that the other side has acted on it is sufficient consideration.

"16. Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also

be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other side has acted on it, is sufficient consideration.

20. Reference in this regard can be also made to the ratio in Krishan Lal v. State of J&K [Krishan Lal v. State of J&K, (1994) 4 SCC 422 : 1994 SCC (L&S) 885] and Martin & Harris Ltd. v. Addl. District Judge [Martin & Harris Ltd. v. Addl. District Judge, (1998) 1 SCC 732]. In Bank of India v. O.P. Swarnakar [Bank of India v. O.P. Swarnakar, (2003) 2 SCC 721 : 2003 SCC (L&S) 200] and in Lachoo Mal v. Radhey Shyam [Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619] , this Court elucidated the general principle that everyone has a right to waive and to agree to renounce an advantage of law or rule made solely for the benefit and protection of the person in private capacity. If a party gives up the advantage that could be taken of a particular position in law, it cannot later be permitted to change and turn around so as to avail of that advantage. However, this rule will not apply when there is a prohibition against contracting out of the statute, which prohibition would have its consequences or in case the waiver would be contrary to public policy. Further, a person cannot waive a right of a third person.

21. This principle has been subsequently followed in Pravesh Kumar Sachdeva v. State of U.P. [Pravesh Kumar Sachdeva v. State of U.P., (2018) 10 SCC 628 : (2019) 1 SCC (Civ) 80], to hold that waiver is abandonment of a right which normally everybody is at liberty to waive. Waiver is nothing unless it amounts to release, albeit it can be adduced from acquiescence or may be implied. The essence of waiver is an estoppel and they are questions of conduct and, therefore, necessarily determined on the facts of each case. As a rule and judicial policy, the courts of law do not allow a litigant to take inconsistent position to gain advantage through the aid of judicial proceedings."

10.75 The Respondents have submitted that the Petitioner has sought to contend that there cannot be any waiver of the statutory contract. Firstly, the effect of the waiver is that that the Petitioner is governed by the charges as determined under Order dated 01.06.2011 and therefore it is not contrary to any statute / statutory contract and is in fact consistent with the same.

10.76 In any case, there is no statutory contract. The Settlement Agreement entered into between the Petitioner and GETCO is not a statutory contract as has been held by the Hon'ble Supreme Court in India Thermal Power Corporation v. State of Madhya Pradesh (2000) 3 SCC 379 wherein the Hon'ble Courts had held that the PPAs were not statutory contract though such PPAs may have some incorporation of terms as per the Statute. The Petitioner has vaguely made a reference to the statute without referring to any provision. Further it is submitted that the Hon'ble High Court had recognised the broad consensus arrived at between parties and further allowed other parties to accept or reject the same. This is only an enabling provision. The Commission had only taken on record the agreement as entered into between the parties and in fact the Commission

had also recognised in Order dated 13.11.2009 that it is a voluntary and mutual agreement:

> *"6.4 M/s Reliance Industries Ltd has vide their letter dated 24.07.2009 expressed their willingness to sign an agreement and opt for the option directed by the Hon'ble High Court. However, they desire to modify/remove some clauses of the draft agreement suggested by GETCO which according to them are not in accordance with the order of the High Court. On this issue, the GETCO (petitioner) and the respondent have not agreed. Moreover, GETCO is not inclined to sign the modified agreement as proposed by the respondent No. 20.* ***A voluntary agreement is a contract between two individual parties, and if any party to the agreement does not agree to the proposed terms of the agreement, the Commission cannot force the other party to accept the terms.*** *Hence, it is between the parties to decide whether to enter into mutual agreement or not. They are, therefore, directed to file reply within 15 days of issue of this order."*

10.77 It is submitted that neither the Hon'ble High Court nor the Commission had made it mandatory to include future capacity in the Settlement Agreement and in fact as is clear from the Orders and the proceedings, the offer was only made to the existing CPPs and not to persons who intend to set up CPPs in future. Therefore, to what extent the capacity is included in the Settlement Agreement is not dictated by Hon'ble High Court or Commission. Further, the ordinary rule was that the person availing the parallel operation facility will pay as per the charges determined by the Commission and only a limited deviation was made when the Hon'ble High Court initiated a settlement process. Therefore, the Petitioner agreeing to 77 MW being under Settlement Agreement and 220 MW and 302.8 MW under the Order dated 01.06.2011 is not contrary to the decision of the Hon'ble High Court or Commission.

10.78 It is well settled that a statutory right can be waived. When there can be waiver of statutory rights, there cannot be any dispute that there can be waiver of contractual rights, even assuming that they are statutory contracts. Further, when the Hon'ble Supreme Court has considered the principle of waiver in case of PPA (which are approved by the Regulatory Commission) in Sasan Power Case (Supra), there is no reason why the principle of waiver cannot be applied waiver of rights under Settlement Agreement.

10.79 ***In Ramdev Food Products Pvt. Ltd. -v- Arvindbhai Rambhai Patel and Ors,*** the Hon'ble Supreme Court has recognised that there can be waiver of contract or statutory provision.

10.80 In ***Lachoo Mal -v- Radhey Shyam, (1971) 1 SCC 619,*** the Hon'ble Supreme Court recognised that everyone has a right to agree to waive the advantage of a law or rule.

10.81 The Hon'ble Supreme Court in ***Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229***, recognised that a right provided by statute can be waived.

10.82 In ***Commissioner of Customs -v- Virgo Steels, (2002) 4 SCC 316,*** the Hon'ble Supreme Court has recognised that mandatory requirements under a statute can be waived.

Interpretation of the Undertaking:

10.83 It is submitted that the terms of the Undertaking are clear, and the Petitioner had voluntarily and willingly agreed to pay POC as per the Order dated 01.06.2011 and based on such offer by the Petitioner, GETCO had permitted the connectivity for the additional capacity and the units of the Petitioner were synchronised with the grid and further availed the facility of parallel operation. Thus, there is enforceable agreement and it is not open to the Petitioner to now resile from the terms.

10.84 It cannot be disputed that such permission from GETCO was required for the capacity of 220 MW and 302.8 MW. Thus, it is clear that the said capacity was not covered already under the Settlement Agreement which was obviously only for the capacity already in operation i.e. 77 MW.

10.85 The Respondents have submitted that the Petitioner has specifically agreed as under:

a. Undertaking dated 21.09.2010 for 220 MW (Page 718-720):

The Petitioner had agreed to pay the POC as stipulated in Para 1 and further agreed that if the Commission decides these charges in future, the same would be applicable from prospective date and till date the charges as stipulated in para 1 would apply. Since the Commission determined the POC on 01.06.2011, from such date, the POC has been billed as per Order dated 01.06.2011.

"WHEREAS the Obliger has approached the Gujarat Energy Transmission Corporation Limited (GETCO) a company registered under Companies Act, 1956 having its registered office at Vidut Bhavan Baroda (hereinafter referred to as "the Obligee" which expression shall unless excluded or repugnant to the context include its successors and permitted assigns) with a request for grant of permission of paralleling / Wheeling from its Captive Power Plant (CPP) having rated capacity of 220 MW (Total Installed Capacity of CPP is 297 MW {220 MW+77MW}. Undertaking for 77 MW existing CPP had been already given in past) in parallel with the grid of the Obligee.

WHEREAS petition No. 867/2006 filed by the Obligee and all the distribution companies of the erstwhile GEB for levy of Parallel Operation Charges (POC) from the Captive Power Plants (CPPs) have been pending for adjudication before the Gujarat Electricity Regulatory Commission (GERC). The GERC has made it known that the Parallel Operation Charges are leviable under the provision of the Gujarat Electricity Industry (Reorganization and Regulation)

Act, 2003 - (Gujarat Act 24 of 2003) and the Electricity Act, 2003 and that the aforesaid petition are legally maintainable.

WHEREAS on due consideration of the request made by the obliger for grant of permission of wheeling of its aforesaid CPP, the Obligee has agreed to accede the same.

AND WHEREAS in consideration for request by the obligee to grant permission for operating CPP in parallel with the grid of the obligee. We the obligator hereby:

1. *Agree and undertake to pay the Parallel Operation Charges (POC) to the obligee as stipulated here under immediately from the date of connectivity of our CPP in parallel with the GRID of the Obligee. Such payment of POC will be made by the Obliger to the Obligee within 10 days from the date of billing to be recovered through DISCOM Bill.*

Capacity of CPP	***Rate of Recovery of POC***
Up to 1000 kVA	*10% of the demand charges corresponding to the CPP capacity.*
1001 kVA to 10000 kVA	*7.5% of the demand charges corresponding to the CPP capacity OR Rs. 8,900/- per month whichever is higher.*
10001 kVA to 50000 kVA	*5% of the demand charges corresponding to the CPP capacity OR Rs. 1,25,363/- per month whichever is higher.*
50001 kVA and above	*2.5% of the demand charges corresponding to the CPP capacity OR Rs. 4,43,575/- per month whichever is higher with a further provision of the ceiling of Rs. 8,00,000/-.*

2. *If the GERC decides these charges in future, the charges so decided by GERC will be applicable from prospective date and till that date above charges will be paid by obliger.*

……

The obliger hereby acknowledges and declares that it has willingly and voluntarily agreed to make the payment of parallel operation charges against the GRID support services rendered by the Obligee and the Obliger has consented to the same in its best interest as a mutually agreeable, commercial transaction with the Obligee. The Obliger hereby further undertakes that it will not challenge or dispute the levy of parallel operation charges by the obligee as agreed upon herein above, before any forum / court in future."

(Emphasis Supplied)

b. Undertaking dated 08.06.2012 for 302.8 MW (Page 792-794):

The Petitioner had agreed to pay the POC as per the Order dated 01.06.2011 and further agreed that in case the Commission decides the charges in future, the charges so decided would apply from the prospective date. Thus, it is clear that the POC applicable would be the POC as determined by the Commission from time to time.

"The GERC has made it known that the parallel operation charges are leviable under the provision of central act and Gujarat Act and issued the order for levy of parallel operation charges in the petition No. 256/2003 and 86712006 dtd. 01-06-2011.

WHEREAS on due consideration of the request made by the obliger for grant of permission of parallel operation with the GRID of the Obligee, we, the Obliger hereby:

Agree and undertake to pay the Monthly parallel operation charges (POC) of the installed capacity to the oblige of Rs. 10030250 (378.5 MVA (2X131.25 + 1X116) X 100 X 26.5 as per present GERC Order on POC dated 01-06-2011 and stipulated here under immediately from the date of connectivity of the CPP in parallel with the GRID of the Obligee. Such payment of POC will be made by the obliger to oblige within 10 day from the date of billing to be recovered through DISCOM BILL.

1. *If GERC decides these charges in future, the charges so decided by GERC will be applicable from prospective date and till that date above charges will be paid by obliger.*

……..

The obliger hereby acknowledges and declares that it has willingly and voluntarily agreed to make the payment operation charges against the GRID support services rendered by the oblige and obliger has consented to the same in its best interest as a mutually agreeable, commercial transaction with the oblige. The obliger hereby further undertakes that it will not challenge or dispute the levy of parallel operation charges by the oblige as agreed upon hereinabove, before any forum/court, In future."

10.86 The above undertaking was made with witnesses and before a notary.

10.87 The Petitioner had agreed to pay the POC as determined by the Commission and there is no dispute or challenge that the POC as levied by the Respondents was as per the Order dated 01.06.2011.

Undertaking for 220.48 MW and 302.8 MW was obtained by GETCO forcibly, illegally and there was no regulatory approval:

10.88 The Respondents have submitted that the undertakings were given in the year 2010 and 2012. There was not even a whisper of such undertaking having been taken forcibly at any time till the filing of the present proceeding in the year 2014. It is preposterous on the part of the Petitioner to rake up the issue of undertaking being forcefully taken after so many years of availing grid support and duly paying the applicable parallel operation charges.

10.89 Even otherwise there cannot be a bare allegation of force to set aside the terms agreed by the Petitioner. The Petitioner has not provided any statutory basis for setting aside the terms agreed to by the Petitioner. The Petitioner has not provided any details of coercion or duress or force. It is well settled principle that coercion etc have to be specifically pleaded and proved. The Petitioner had willingly agreed to pay the POC as per the Orders of the Commission for the period after such determination and had not protested or objected at any time either in 2010/2012 or even soon thereafter. Not a single communication is produced by the Petitioner. In fact, since the proceedings were still pending before the Commission in 2010 and wherein the Settlement Agreement had already been recorded, the Petitioner had not raised any issue that it had been compelled to agree to such terms.

10.90 On the other hand, in the Undertaking, the Petitioner has specifically stated that it has willingly and voluntarily agreed to make the payment of POC and further agreed not to challenge.

10.91 In this regard, the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited v. Renew Wind Energy (Rajkot) (P) Ltd 2023 SCC OnLine SC 411*** has held as under:

> *"71. In Transmission Corporation of Andhra Pradesh Ltd (supra), this court observed, in the context of a contention of coercion, as follows:*
> *"42. [..] To frustrate a contract on the ground of duress or coercion there have to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically.[..]"*
>
> *72. In Shanti Budhiya Vesta Patel & Ors. v. Nirmala Jayprakash Tiwari & Ors. (2010) 4 SCR 58, this court held that to establish fraud or coercion, there should be"(a) an express allegation of coercion or fraud, and (b) all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars." The court had cited and applied the principle enunciated in Bishundeo Narain v. Seogeni Rai (1951) 1 SCR 548 where it was held that:*
> *" [...] Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid.*

There can be no departure from them evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. [See Order 6 Rule 4 of the Civil Procedure Code.]"

73. In New Indian Assurance Co. Ltd v Genus Power Infrastructure Ltd 2014 (12) SCR 360 this court dealt with the standard of pleadings and evidence, needed in cases, where coercion or duress is alleged:
"8. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prime facie establish the same by placing material before the Chief Justice/ his designate."

74. In the present case, this salutary rule was thrown to the wind, by the State Commission. In this court's opinion, APTEL, in the most cavalier fashion, virtually rubber stamped the State Commission's findings on coercion, in regard to the entering into the PPA by the parties. There was no shred of evidence, nor any particularity of pleadings, beyond a bare allegation of coercion, alleged against Gujarat Urja. It is incomprehensible how such an allegation could have been entertained and incorporated as a finding, given that the respondents are established companies, who enter into negotiations and have the support of experts, including legal advisers, when contracts are finalized. The findings regarding coercion are, therefore, wholly untenable. This court is also of the opinion that the casual approach of APTEL, in not reasoning how such findings could be rendered, cannot be countenanced. As a judicial tribunal, dealing with contracts and bargains, which are entered into by parties with equal bargaining power, APTEL is not expected to casually render findings of coercion, or fraud, without proper pleadings or proof, or without probing into evidence. The findings of coercion are therefore, set aside."

10.92 Reference is also made to the decision of the Hon'ble Supreme Court in ***Transmission Corporation of Andhra Pradesh Limited v Sai Renewables Power Private Limited and Ors (2011) 11 SCC 34***, as under:

"36. On the basis of this factual matrix, the respondents claimed that the State Government and the Regulatory Commission both were bound to continue the incentives as were provided to them in furtherance to the letters and orders of Central as well as the State Governments discussed above. They have a legitimate right to expect that these incentives were to be continued indefinitely in the same manner and the authorities concerned are estopped from altering the rates and/or imposing the condition of no sale to third parties. We are unable to find any merit in this contention. In our view, the Tribunal has erred in law in treating these inter-se letters and guidelines between the Government of India, State Government and the Commission/ the State Electricity Board unequivocal commitments to the respondent purchasers/ generators/ developers so as to bind the State for all times

to come. For the principle of estoppel to be attracted, there has to be a definite and unambiguous representation to a party which then should act thereupon and then alone the consequences in law can follow. In the present case, the policy guidelines issued by the Central Government were the proposals sent to the State Government, which the State Government accepted to consider, amend or alter as per their needs and conditions and then make efforts to achieve the objects of encouraging Non-conventional Energy Generator and Purchasers to enter into this field. These are the matters, which will squarely fall within the competence of the Regulatory Commission/the State Electricity Board at the relevant points of time. Besides that, there was no definite and clear promise made by the authorities to the developers that would invoke the principle of promissory estoppel. Undoubtedly, to encourage participation in the field of generation of energy through non-conventional methods, some incentives were provided but these incentives under the guidelines as well as under the PPAs signed between the parties from time to time were subject to review. In any case, the matter was completely put at rest by the order of 20th June, 2001 and the PPAs voluntarily signed by the parties at that time, which had also provided such stipulations. If such stipulations were not acceptable to the parties they ought to have raised objections at that time or at least within a reasonable time thereafter. The agreements have not only been signed by the parties but they have been fully acted upon for a substantial period. We have already referred to various statutory provisions where the Regulatory Commission is entitled to determine the tariff. In this situation we are unable to agree with the view taken by the Tribunal that Regulatory Commission had no jurisdiction and that fixation of tariff does not include purchase price for buy back of the generated power.

……….

39. Another very important dictum of the Court in this judgment was that the power of the Board to fix general tariff as well as discharge of other related functions was held to be quasi-judicial in character. This power of the Board is exercised under the statute as a power-cum-duty and is independent of granting or declining any rebate. In the present case the order dated 20th June, 2001 was fully accepted by the parties without any reservation. After the lapse of more than reasonable time of their own accord they voluntarily signed the PPA which contained a specific stipulation prohibiting sale of generated power by them to third parties. The agreement also had renewal clause empowering TRANSCO/APTRANSCO/Board to revise the tariff. Thus, the documents executed by these parties and their conduct of acting upon such agreements over a long period, in our view, bind them to the rights and obligations stated in the contract. The parties can hardly deny the facts as they existed at the relevant time, just because it may not be convenient now to adhere to those terms. Conditions of a contract cannot be altered /avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage. They would have to abide by the existing facts, correctness of which, they can hardly deny. Such conduct, would be hit by alleganscontraria non estaudiendus.

……

42. Now, we will proceed to examine the merits or otherwise of the findings recorded by the Tribunal that the PPAs executed by the parties were result of some duress and thus, it will not vest the authorities with the power to review the tariff and other granted incentives. PPAs were executed prior and subsequent to the issuance of the order dated 20th June, 2001. Different persons executed the contracts at different times in full awareness of the terms and conditions of such PPA. To frustrate a contract on the ground of duress or coercion, there has to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically. From the record before us, nothing was brought to our notice to state the plea of duress and to prove the alleged facts which constituted duress, so as to vitiate and/or even partially reduce, the effect of the PPAs. On the one hand, the Tribunal appears to have doubted the binding nature of the contracts stating that it contained unilateral conditions introduced by virtue of Order and approval of the Regulatory Commission, while on the other hand, in para 53 of the Order, it proceeded on the presumption that PPAs are final and binding and still drew the conclusion that the Regulatory Commission could not revise the tariff. Even in the order, no facts have been pointed out which, in the opinion of the Tribunal, constituted duress within the meaning of the Contract Act so as to render the contract voidable. Another aspect of the entire controversy is that none of the generators had challenged the agreements and in fact, except in arguments before the Tribunal no case was made out for the purposes of vitality of the contract or any part thereof. On the contrary, all the generators under all the branches of Non-Conventional Energies, have accepted the contract and proceeded on the basis that the said contracts are binding and still the Regulatory Commission does not have any power or jurisdiction to revise the tariff or deal with the concessions. If the contracts are a result of duress and cannot be given effect, the results could be disastrous for both the sides. If a contract suffers from the defect of undue influence or duress, as the case may be then the consequences in law should follow. It is a settled canon of law that when the consent to agreement is caused by undue influence the agreement is a contract voidable at the option of the parties whose consent was so caused. Even if such party had received any benefit under the terms of the contract the Court could still pass orders as to the voidability or otherwise of the contract but upon such terms and conditions as the Court may deem just. Undue influence or duress is said to be subtle of the fraud whereby mysteries burden over the mind of a victim by insidious approaches. Firstly, there are no facts on record, much less, supported by any documentary or any other evidence to sustain the plea that the contracts (PPAs) are a result of undue influence or duress by the State or its agencies upon the generators. Secondly, the generators have already taken benefit of that contract which was based on the policy of the State as well as the order of the Regulatory Commission. Having attained those benefits, it will hardly be of any help to the appellants,

particularly, in the facts and circumstances of the case, to substantiate, justify or argue the plea of duress.

10.93 The Respondents have submitted that the Petitioner has referred to Para 24 of the Order dated 01.06.2011. Para 24(i) of the Order dated 01.06.2011 covers only the CPP units which are covered by the Settlement Agreement as the Commission has taken on record the agreement. It may be noted that during the proceedings before the Commission, the details of the CPPs who have signed the Settlement Agreement was placed on record and in case of the Petitioner, the same was only 77 MW (Order dated 08.02.2010). At no time, the Petitioner sought to modify the said recording and therefore Para 24(i) of Order dated 01.06.2011 could apply only to 77 MW. The other CPPs including new CPPs would be covered under Para 24(iii). The intention of the Order could not be to include new generating units under the Settlement Agreement.

10.94 There is no basis for the Petitioner to claim any illegality when it is being levied the POC as determined by the Commission. It is not clear how an agreement by the Petitioner to pay the POC as determined by the Commission can be contended to be illegal. There cannot be any contention on requirement of regulatory approval when the charges to be applied are the charges determined / approved by the Commission.

10.95 The Petitioner has sought to claim that the undertaking is contrary to the decisions of the Orders of the Hon'ble High Court and the Commission. It is submitted that the said Orders did not compel the parties to accept the POC at Commercial Circular No. 706. The Order dated 28.04.2009 only enabled the parties to enter into the Settlement Agreement and it was also open for a person to refuse to enter into the agreement and the situation was recognised by the Hon'ble Court as well as by the Commission and such persons would be bound by the charges determined under Order dated 01.06.2011. Thus there is nothing illegal in the Petitioner agreeing to be bound by the charges determined under 01.06.2011 and not Commercial Circular No. 706. In fact in terms of the Order dated 28.04.2009 of the Hon'ble High Courts and the Record of Proceedings of the Commission for implementing the Orders, it is clear that the settlement was offered only to existing CPPs. There was no general provision to all parties who may establish CPP in future to be allowed the same charges.

10.96 The Petitioner has sought to claim that if the 302.8 MW was commissioned prior to 01.06.2011, it would be covered under Settlement Agreement and merely because it was commissioned subsequently, it cannot be denied. Firstly, it is submitted that even if it was commissioned prior to 01.06.2011, it would be levied POC as per Order dated 01.06.2011, for period after 01.06.2011 similar to 220 MW. However, even otherwise, the contention is frivolous, misconceived and misconstrued. There is no reason why this capacity should be treated differently for POC than other persons who had synchronised with the grid/commissioned at the same time. The Settlement Agreement was an exception and was meant to be offered only to existing CPPs i.e. units existing at the time. As already submitted, it would be discriminatory to allow the Petitioner to claim

the lower POC for 220 MW and 302.8 MW when other CPPs who had installed the capacity at the same time would be liable to pay POC as per Order dated 01.06.2011.

10.97 Further there cannot in any case be any claim that the capacity of 302.8 MW which was synchronised after 01.06.2011 should be covered by Settlement Agreement. Once the POC has been determined by the Commission, there is no lacuna and there cannot be any charges other than what has been determined by the Commission which has to be applied.

Interpretation of Settlement Agreement:

10.98 The Respondents have submitted that, the Settlement Agreement dated 11.12.2009 has to be interpreted contextually and taking in to account the surrounding circumstances. Admittedly the draft of settlement agreement was forwarded by GETCO to the Petitioner as well as to others. The draft to the Petitioner was forwarded on 09.06.2009. Since, it was to be uniform, the capacity was not specifically mentioned and there is reference to the CPPs in plural. The Settlement Agreement however contains sufficient language to apply to an operating and existing unit. The wordings of the Settlement Agreement are not in the nature to extend to subsequent capacity that may be added / expanded.

10.99 The Petitioner has sought to emphasize that Settlement Agreement was with the Party and the capacity is not relevant. This is incorrect and misconceived. The Agreements are always between parties, but terms of the Agreement provide the details and intention of the parties.

10.100 In the present case, the Settlement Agreement was with reference to the generating unit which the CPP is operating (Page 712):

> *"WHERAS the CPP is operating a generating unit at VADINAR, REFINERY SITE 40th KM on Jamnagar - Ohka Highway (SH-25) Dist-Jamnagar and the said generating unit is connected to the Grid and has the facility of the Parallel Operation with the Grid deriving grid support for generating units"*

10.101 Clearly the Settlement Agreement was for the units currently operational and connected to the grid and which has the facility of parallel operation. CPP in the present case was 77 MW unit which was operating at the time of the Agreement. Therefore, when Clause 1 of the Agreement refers to "so long the CPP is connected to GETCO's grid", it is with reference to the CPP which is currently connected to the grid as referred hereinabove and which in the case of the Petitioner is 77 MW. The subsequent capacity of 220 MW and 302 MW is different units being 2X110 MW and 2X105 MW and 1X92.8 MW. Therefore, these are clearly not units as referred to in the Agreement.

10.102 It is submitted that the Settlement Agreement also refers to the discussions between GETCO and some of the CPPs in the Recitals, which discussions were held with the CPPs who were currently operating the units.

10.103 The Settlement Agreement cannot have intended to resolve the issue for units which were not in existence. This is also clear from the fact that the period of Settlement was 10 years from 11.12.2009 and thereafter such units were also covered under Order dated 01.06.2011. The period of 10 years can only to the existing units.

10.104 There was also no purpose in providing the settlement for capacity which may or may not come in the future. At such time, there was no indication by the Petitioner that it intended to set up further units. The Respondents could not possibly have envisaged that such units would be set up and therefore could not have agreed to cover such future units in the Settlement Agreement dated 11.12.2009. There is no reference or provision in the Settlement Agreement for any future capacity.

10.105 Above all the surrounding circumstances namely the letter dated 11.12.2009 referring to 77 MW which was the existing capacity; the list of CPPs with capacities taken note of by the Commission in the Order dated 08.02.2010; the wordings of the undertaking given in the year 2010 and 2012 being different from Settlement Agreement dated 11.12.2009 and referring to parallel operation charges payable as per the decision of the Commission unequivocally establishes that the parties (more specifically the Petitioner) never intended the settlement agreement to cover the 220.48 MW and 302.8 MW.

10.106 The above is further fortified by the conduct of the Petitioner paying the POC as per Order dated 01.06.2011 for the period till October, 2014 without any reservation, condition or protest. In the circumstances, there is no basis what so ever for the Petitioner to claim the applicability of the Settlement Agreement as covering the capacities of 220.48 MW and 302.8 MW.

10.107 The Petitioner has sought to rely on the principles of contra proferentem for interpretation of the Settlement Agreement. Firstly, as submitted hereinabove, there is no ambiguity in the agreement and it is clear from the terms of the Agreement and the surrounding circumstances that the parties intended to cover the existing capacity of 77 MW only.

10.108 Even otherwise, it is submitted that the doctrine of contra proferentem does not apply in the present case when it is a commercial transaction. The agreement is a commercial contract and principle of contra proferentem does not apply. In this regard, the Respondents referred to the following:

a. ***Rashtriya Ispat Nigam Ltd vs M/S Dewan Chand Ram Saran (2012) 5 SCC 306***

b. ***Export Credit Guarantee Corpn. of India Ltd. v. Garg Sons International, (2014) 1 SCC 686*:**

10.109 The Respondents submitted that the Petitioner has relied on two judgments:

a. ***Industrial Promotion and Investment Corporation of Orissa Ltd. vs. New India Assurance Company Ltd. and Ors. (2016) 15 SCC 315*** hereinafter referred to as New India Assurance Case)

b. ***Manmohan Nanda vs. United India Assurance Co. Ltd. and Ors. (2022) 4 SCC 582*** (hereinafter referred to as United India Assurance Case)

10.110 It is submitted that the above judgments are in relation to insurance contracts. These are special contracts and have higher standard of good faith as held in United India Assurance Case:

> *"31. It is observed that insurance contracts are special contracts based on the general principles of full disclosure inasmuch as a person seeking insurance is bound to disclose all material facts relating to the risk involved. Law demands a higher standard of good faith in matters of insurance contracts which is expressed in the legal maxim uberrimae fidei."*

10.111 It is submitted that even in the decision referred to by the Petitioner, it is clear that the Hon'ble Supreme Court has in ***New India Assurance*** Case recognised that the principle of contra proferentem is an exception which applies to the insurance contracts and are one of the ways in which insurance contract differ from other contracts.

10.112 Even otherwise and even if the rule is to be applied to documents other than insurance policy, the applicability of the above rule is not on commercial transactions and contracts as already submitted hereinabove. The contentions on standard form contract is not applicable here. While the terms of the agreement were kept uniform so that the same is applicable to all parties, it does not fall within the scope of the standard form contracts. In fact in the similar case, M/s Saurashtra Cement had in fact added capacity to the Settlement Agreement and therefore the contentions of the Petitioner to claim similarity to standard form contracts is not correct.

10.113 In the decision referred to by the Petitioner itself ***United India Assurance Company Limited and Another (2022) 4 SCC 582,*** the rule in relation to standard form contracts are provided:

> *"45. The Contra Proferentem Rule has an ancient genesis. When words are to be construed, resulting in two alternative interpretations then, the interpretation which is against the person using or drafting the words or expressions which have given rise to the difficulty in construction, applies. This Rule is often invoked while interpreting standard form contracts. Such contracts heavily comprise of forms with printed terms which are invariably used for the same kind of contracts. Also, such contracts are harshly worded against individuals and not read and understood most often, resulting in grave legal implications. When such standard form*

contracts ordinarily contain exception clauses, they are invariably construed contra proferentem Rule against the person who has drafted the same."

10.114 It is submitted that the present case does not fall within the scope of printed terms or forms. These are not harshly worded contract. There is no reason why the parties cannot read or understand the contract particularly when the party involved are commercial parties with legal advisors etc. It is also not the case where the party could not seek clarification. In fact, the terms of the agreement were based on mutual discussions and consensus arrived at between the parties which was presented before the Hon'ble High Court and thereafter the Commission. At no time did the Petitioner raise any aspect on capacity despite being well aware that the Respondents and the Commission are proceeding on the basis that the capacity covered under the settlement agreement is 77 MW. The Respondents had not even been aware that there would be any future capacity by the Petitioner.

10.115 The above concept of standard form contract and contra proferentem has reference to the unequal bargaining power of the parties. It has been well settled that the principles of unequal bargaining power does not apply to cases of commercial contracts.

S.K. Jain v. State of Haryana, (2009) 4 SCC 357, it was held:

"8. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] . The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts."

ICOMM Tele Ltd. -v- Punjab State Water Supply and Sewerage Board, (2019) 4 SCC 401

"11. As has correctly been argued by learned counsel appearing on behalf of the respondents, this Court's judgment in Central Inland Water Transport Corpn. [Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 : 1986 SCC (L&S) 429], which lays down that contracts of adhesion i.e. contracts in which there is unequal bargaining power, between private persons and the State, are liable to be set aside on the ground that they are unconscionable, does not apply where both parties are businessmen and the contract is a commercial transaction (see para 89 of the said judgment). In this view of the matter, the argument of the appellant based on this judgment must fail."

10.116 Without prejudice to the submission that the principle of contra proferentem does not apply at all to the contracts such as settlement agreement, it is submitted that even otherwise, the principle cannot be applied to facts of the present case. The principle of contra proferentem cannot be used to create ambiguity as the Petitioner has attempted

to do. Even in cases of insurance law where the rule is considered, it is well recognised that the rule can be applied only when the Court is unable to decide by ordinary principles of interpretation which of the two meanings is the right one and only when it is uncertain what the parties meant. The Petitioner had referred to two decisions in support of the principle and even from the said cases, it is clear that the rule need not be applied in the present case. Both judgments have relied on the principle from MacGillivray on Insurance Law (Para 10 of New India Assurance Case (Supra) and Para 48 of the United India Assurance Case (supra) as under:

> *"The contra proferentem Rule of construction arises only where there is a wording employed by those drafting the Clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. 'One must not use the Rule to create the ambiguity - one must find the ambiguity first.' The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances."*

10.117 Further in Para 11 of ***New India Assurance Case (Supra), in Colinvaux Law of Insurance*** referred, it is quoted:

> *".... But a Clause is only to be contra proferentem in cases of real ambiguity. One must not use the Rule to create an ambiguity. On must find the ambiguity first. Even where a Clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly."*

10.118 In the present case, by considering the contract as a whole (references to the unit in operation and the period of 10 years), and particularly considering the surrounding circumstances of background of settlement agreement as mentioned hereinabove and the offer being made to existing CPPs only and specifically the Letter dated 11.12.2009 by the Petitioner referred to 77 MW, the submission by Respondent to the Commission on affidavit of Settlement Agreement dated 11.12.2009 covering 77 MW which was not opposed or objected to by the Petitioner and further which was taken on record and noted in Order dated 08.02.2010, the Petitioner itself agreeing that the subsequent units would be covered by the determination of POC by the Commission (undertaking dated 21.09.2010 and 08.06.2012); the billing by Respondents and payment of invoices by the Petitioner for POC based on the Order dated 01.06.2011, it is clear that the parties intended to cover only 77 MW by the Settlement Agreement. The Petitioner cannot any ambiguity or confusion at this belated stage to go contrary to the intention of the parties.

10.119 Without prejudice to the above submissions, even assuming but not admitting that the Settlement Agreement did not refer to any specific capacity, the parties have by agreement and conduct limited the agreement to 77 MW only. The Petitioner in regard

to 220 MW and 302.8 MW has accepted POC as per the Order dated 01.06.2011. As already submitted, such conduct would constitute waiver.

10.120 Even otherwise, such conduct may be considered as a subsequent agreement for clarification on the capacity not to be covered under Settlement Agreement or even novation so that the Settlement Agreement is limited to 77 MW.

10.121 Such novation does not need any approval of the Commission. As already submitted, the Commission had not directed any capacity to be included and it was entirely left to the parties and in fact as per the records submitted to the Commission, on basis of which the Order dated 01.06.2011 was passed, the capacity of the Petitioner was 77 MW. Therefore, the agreement by the parties to limit the capacity of Settlement Agreement to 77 MW does not need any approval.

10.122 The Respondents have submitted that the Petitioner has also referred to decision in ***Gallant.*** It is submitted that the issue related to levy of POC prior to 01.06.2011 and Gallant had sought for 3-minute integration under Settlement Agreement. The said issue is not relevant at all to the present case.

Challenge to the levy of Parallel Operation Charges:

10.123 Though in the written submission the Petitioner has stated that it is not challenging the order dated 01.06.2011 passed by the Commission on the levy of POC, submissions have been made on the admissibility of POC in the written submission dated 05.06.2015. Further, issue of capacity less than installed to be considered has been raised in the Written Submissions dated 17.08.2020.

10.124 These submissions are based on alleged peculiarity in the operation of a refinery. The Petitioner cannot indirectly challenge the scope of the order dated 01.06.2011 in the present proceedings. The order 01.06.2011 is clear and specific, it does not make any distinction on the basis of the nature of the operation, as in the case of refinery. This was not challenged by the Petitioner and therefore the POC as per the Order dated 01.06.2011 would apply which is on installed capacity.

10.125 The submission made in regard to the above are liable to be rejected as being outside the scope of present petition where the issue involved is limited to the applicability of the Settlement Agreement for the capacity of 220.48 MW and 302.8 MW for the period of 01.06.2011 onwards.

10.126 The reasons and aspects related to the requirement and capacity of the CPPs of the Petitioner referred by the Petitioner are not relevant. The issue is that the Petitioner has CPPs which are connected to the grid and enjoying the parallel operation facility therefore the Petitioner is liable to pay the POC for such capacity of CPPs connected. So long as the CPPs are connected, the POC is payable irrespective of how much capacity the Petitioner requires in the consuming units.

10.127 Even otherwise, the decision of the Hon'ble Appellate Tribunal in ***Chhattisgarh State Power Distribution Company Limited v. Godawari Power Limited in Appeal No. 120 of 2009 dated 18.02.2011*** has recognised that the POC is on installed capacity. The attempt of the Petitioner to distinguish the said case is erroneous and misconceived when the said case has been referred to by the Commission in the Order dated 01.06.2011 itself. Even otherwise, there is no merit in the contention of the Petitioner - the facts of the case or system and load study do not change the finding that the POC is on installed capacity.

10.128 Even otherwise, the Commission in Order dated 01.06.2011 had referred to the above decision and had also provided for POC on installed capacity. The alleged meeting of FOR dated 18.01.2006 and the Order dated 31.12.2008 by Chhattisgarh Commission or Order dated 23.07.2010 by Andhra Pradesh Commission referred to by the Petitioner was also prior to Order dated 01.06.2011 and therefore cannot be the basis to seek any amendment of Order dated 01.06.2011 which in any case is not permissible. Further, the Orders are of no assistance to the Petitioner.

10.129 The Order dated 01.06.2011 had not provided any exemption for the Petitioner and the Petitioner had not challenged the Order dated 01.06.2011 at the relevant time and had not raised any issue on differences in the industries or refineries. The Order dated 01.06.2011 had been passed after detailed hearings and consideration and the Petitioner cannot now seek to amend or modify the order or seek an exemption at this belated stage.

10.130 The Petitioner cannot claim to challenge the basis of levy of POC in the present proceedings and at this belated stage. The Order dated 01.06.2011 was not challenged at the relevant time and therefore the Petitioner cannot now challenge the same. The present proceedings is not for determination of POC which already stands determined and therefore the alleged specific characteristics of the Petitioner are not relevant in the present case.

11 **THE FOLLOWING ISSUES ARISE FOR DETERMINATION OF THE PETITION:**

1) **Whether the Petitioner proves that pursuant to the judgment dated 01.06.2011, it is liable to pay POC only as per the Settlement Agreement for its entire CPP capacity, as claimed in the Petition?**

2) **Whether the Petitioner proves that it is entitled for refund of POC of Rs. 47.14 crore, as alleged and claimed in the Petition?**

3) **Whether the Petition is time barred and also suffers from delay, laches, and acquiescence?**

4) **What's the final order?**

ALTERNATIVELY-

1) **Whether the Petitioner proves that, in the peculiar facts of the present case, it is not liable to pay POC at the rate of Rs. 26.50/kVA/month corresponding to its installed capacity?**

2) **Whether the alternative prayer of the Petitioner to evolve a mechanism to calculate the POC payable by the Petitioner, considering the peculiar facts and circumstances of the present case, and to direct PGVCL to refund the sums wrongfully recovered as POC from the Petitioner in excess of the sums so arrived at by the Commission, along with interest at the rate of 15% from 01.06.2011 till such sums are due and payable by the Respondents to the Petitioner is required to be allowed ? If so, in what manner?**

12 **ARGUMENTS OF THE PARTIES:**

Petitioner's Arguments:

12.1 Learned Advocates appearing on behalf of the Petitioner and the Respondents argued as per the pleadings and submissions and also on the authorities produced by both the sides.

Learned Senior Advocate Shri Sanjay Sen on behalf of the Petitioner submitted that the Petitioner has filed the present Petition for non-applicability of POC on the additional capacity of CPP set up after the date of agreement signed between the Petitioner and the Respondent and Order dated 01.06.2011 passed by the Commission in Petition No. 256 of 2003 and allied matters. The Commission has also passed an Order in Petition No. 1339 of 2013 in case of Gallant Metals vs. GETCO holding that the levy of POC prior to 01.06.2011 on the basis of undertaking is illegal and directed the Respondent to refund the same. However, the Respondent has filed a Review Petition against the Order of the Commission in Petition No. 1339 of 2013 being Petition No. 1530 of 2015. The issue involved in the present Petition is related to enhancement of capacity of the CPP by the Petitioner after the Order passed by the Commission dated 01.06.2011 in Petition No. 256 of 2003 and allied matters. It is the contention of the Petitioner that the enhanced capacity of CPP is governed by the provisions of earlier Settlement arrived at between the Petitioner and the Respondent based on the Settlement arrived at between the parties before the Hon'ble Gujarat High Court.

12.2 Ld. Sr. Advocate Shri Saurabh Soparkar, appearing on behalf of the Petitioner, submitted that the Petitioner is liable to pay POC only in terms of the Settlement Agreement irrespective of the fact that on the date of the Settlement Agreement, the Petitioner had only one operating Unit of 77 MW. Later, two additional units have come

up at the same location. The Settlement Agreement, read with Commercial Circular No. 706, envisages a ceiling of Rs. 8,00,000/- per month on the quantum of POC payable. The Petitioner has 600.28 MW (i.e., 77 MW + 220.48 MW + 302.8 MW) installed capacity, which constitutes one CPP and cannot be treated as different CPPs as alleged by the Respondents as they are located at the same premises although came up at different times and is only the expansion of the capacity. The Settlement Agreement does not expressly specify or relate to any capacity of the Petitioner's CPP or make any reference to any of its Units *per se*. In light of the above, it is argued on behalf of the Petitioner that the entire MW capacity constitutes one CPP only and cannot be construed as different CPPs. Since the Settlement Agreement was qua the parties and not capacity of the CPP, it does not make any difference if the CPP capacity was in existence on that date or was added / expanded subsequently. The expansion of CPP capacity (by adding additional units) at the same location and having a common point of connection to the GETCO Grid cannot constitute new CPPs for the purposes of the Settlement Agreement between the parties. The POC was levied vide GEB Commercial Circular No. 687 dated 21.12.1998, which was further amended and issued as Commercial Circular No. 706 dated 28.01.2000. The above CC No. 706 was then set aside by the Commission's Order dated 31.08.2000. The Commission further issued Order dated 25.06.2004 on the petition filed by GEB in which it was held that POC is leviable under the Central Act and Gujarat Act for the support extended by the grid. It was also directed to carry out a study covering all aspects and put up before the Commission. This was further challenged by a Writ Petition before the Hon'ble High Court of Gujarat. The Hon'ble High Court directed to see if any mutually agreeable solution can be carved out while the case is pending. Meanwhile, the Petitioner entered into an agreement with PGVCL for 28000 kVA load. Thereafter, the Petitioner was called to file an undertaking on 26.06.2006 (First Undertaking) for CPP - 77 MW. It is submitted that GETCO had sent draft agreement on 09.06.2009. The Petitioner's letter of December, 2009 and the list of 18 CPPs as submitted by GETCO records Petitioner's CPP capacity as 77 MW, as it was the only existing Unit of the Petitioner's CPP at that point of time. The Petitioner had applied for first expansion for 270 MW on 27.04.2010 (77 MW + 270 MW). By then the Commission had not adjudicated on POC as per Order of the Hon'ble High Court. Hence, the Petitioner could not have mentioned about any expansion capacity. Meanwhile, the agreement for connectivity was signed. In any event, neither the Settlement Agreement nor the Commission's Order dated 01.06.2011, read with CC No. 706, restrict / cap the applicability of the Settlement Agreement only to the Petitioner's 77 MW Base Plant. It is argued that a covering letter (such as the Petitioner's letter of December, 2009) does not form part of an agreement. The covering letter is a mere statement of fact that the Petitioner as on that particular date had only 77 MW operational capacity. The Hon'ble High Court then issued Order dated 26.08.2008 in which it was to be deliberated further by the Commission and so the whole thing travelled back to the Commission. The Commission then issued Order based on the Petition filed by GETCO based on the necessary detailed report / study on 01.06.2011, in which POC was leviable as per three different categories. The rate for the third category was decided as Rs. 26.50 / kVA / month. Learned Counsel for the Petitioner further submitted that the Undertakings obtained by GETCO for granting connectivity

to its Grid was illegal for want of prior regulatory approval as categorically held by the Commission. When the subject-matter is regulated by statute or regulation, there is no jurisdiction / power with GETCO to unilaterally and without approval of the Commission to seek any Undertaking. Such Undertakings are in violation of the Orders of the Commission and have been expressly rejected. The Petitioner submitted that the Commission alone has the authority and jurisdiction to determine POC and the Licensees and/or consumers are not free to decide anything without the consent and approval of the Commission. He further submitted that the Petitioner is entitled to refund of POC wrongfully / illegally recovered by the Respondents. In the alternative, the Petitioner is not liable to pay POC at the rate of Rs. 26.50 / kVA / month corresponding to its installed capacity. The POC regime envisaged under the Commission's Order dated 01.06.2011 does not factor the special facts applicable to the Petitioner's case where the CPP capacity has been expanded due to interchangeability of fuels favouring economy of coal versus gas. He submitted that the Petitioner does not fall under the categories of CPPs which are liable to pay POC at the rate of Rs. 26.50 / kVA / month corresponding to its installed capacity, since the Petitioner has executed the Settlement Agreement with GETCO which is valid for a period of 10 years.

12.3 It is submitted on behalf of the Petitioner that if it is to be interpreted that the Settlement Agreement does not apply to the entire capacity of Petitioner, then that itself nullifies the premise and the intent of the parties pursuant to which the Hon'ble Gujarat High Court and the Commission passed Orders dated 28.04.2009 and 01.06.2011 respectively. Reading the Settlement Agreement to restrict its applicability to Petitioner's 77 MW alone would amount to adding words to the Agreement which is not permissible. It is the duty of the Court to interpret the contract as was understood between the parties. It is not for the Court to make a new Contract howsoever reasonable, if the parties have not made it themselves. Therefore, the terms of the contract have to be construed strictly without altering the nature of the contract as it may adversely affect the interest of the parties. He further submitted that at the time of seeking permission to operate the CPP in parallel with GETCO's Grid, GETCO as a mandatory pre-condition, constrained the Petitioner and other similarly placed CPPs to sign and submit undertakings for grant of connectivity to its Grid. Without signing such undertakings, GETCO did not permit synchronisation of any CPP to its Grid. As a result, the Petitioner had provided the (1) Undertaking dated 21.06.2006 and Settlement Agreement dated 11.12.2009, (2) Undertaking dated 21.09.2010 and (3) Undertaking dated 08.06.2012 to GETCO by which the Petitioner was made to pay POC as per CC No. 706 and/or as may be revised/decided by the Commission from time to time. It is submitted that the Respondents by raising issues in terms of Undertaking No. (1) and (2) have sought to mislead the Commission by mixing up two distinct issues as sought to be referred by the Petitioner in its Petitions (Case No. 1429 of 2014 and Case No. 1456 of 2014). Petition No. 1429 of 2014 filed by the Petitioner deals with the issue of refund of POC wrongfully recovered by the Respondent prior to the Commission's Order dated 01.06.2011. Whereas Petition No. 1456 of 2014 (i.e. the present Petition) deals with the issue of payment of POC post 01.06.2011 in terms of the Settlement Agreement read with Review Order dated 28.04.2009 of the Hon'ble High Court of

Gujarat and the Commission's Order dated 01.06.2011. The issues raised by the Respondents in terms of Undertaking Nos. (1) and (2) pertain to Case No. 1429 of 2014 (since both these Undertakings were taken by the Respondents prior to the Commission's Order dated 01.06.2011) and do not form part of the present proceedings. He submitted that, as set out by the Commission in its Order dated 31.08.2000 in Case No. 24 of 2000, POC is in the nature of Tariff. The said Order dated 31.08.2000 has not been challenged by any party and has attained finality. If it is tariff, there is no need for an Undertaking. Neither the Regulation nor the Commission's Order dated 01.06.2011 determining POC recognizes or requires issuance of Undertakings. In a regulated regime, there is no legal basis for an Undertaking. In terms of the provisions of the Electricity Act, the law laid down by the Commission and the Hon'ble Tribunal provides that the Commission has the exclusive power to determine POC. The POC approved by the Commission is final and binding and it is not permissible for the licensees, utilities or anybody else to charge different POC. Any POC levied and or recovered, which is in variance to the POC approved by the Commission, is *per se* illegal. It is evident from the Commission's Orders dated 01.06.2011 in Petitions No. 256 of 2013 and No. 867 of 2006 and dated 19.01.2013 in Petition No. 1222 of 2012 (**Shaifali Rolls Ltd. vs. PGVCL**), the Hon'ble Tribunal's Order dated 04.04.2014 in Appel No. 74 of 2013 (*PGVCL vs. Shaifali Rolls Ltd.*) that no POC was payable from 01.09.2000 till 01.06.2011. Therefore, the Undertakings taken during such period were illegal and void *ab initio* and no POC could have been recovered by PGVCL / GETCO in terms of any such Undertakings.

12.4 It is submitted that the present Petition is not barred by Limitation as the invoice under challenge is raised in the year 2012 and the Petition is filed in the year 2014. The Petitioner is paying Rs. 26.50 / kVA / month as per the Commission's Order. However, the Petitioner has demanded refund of the amount paid up to the year 2011, since it is governed by undertaking, and post 2011 limitation does not apply. The issue of limitation has been raised by the Respondents, keeping in view the judgment dated 16.10.2015 of the Hon'ble Supreme Court ***in A.P. Power Coordination Committee & Ors. vs. Lanco Kondapalli Power Ltd. & Ors. reported as 2015 ELR (SC) 1123***. In this regard, it is submitted that while the Hon'ble Supreme Court has taken a view in the aforesaid case that Limitation Act will apply to adjudicatory proceedings initiated under the Electricity Act, the Hon'ble Supreme Court is of the view that the Limitation Act will not apply to regulatory and administrative proceedings. The Petitioner has referred to and relied upon the following observations of the Hon'ble Supreme Court in case of Insurance proceedings in support of his arguments:

(a) ***Industrial Promotion & Investment Corpn. of Orissa Ltd. vs. New India Assurance Co. Ltd. reported as (2016) 15 SCC 315***

(b) ***Manmohan Nanda vs. United India Assurance Co. Ltd. reported as (2022) 4 SCC 582***

It is submitted that the Commission has to decide whether recovery of a wrongful demand / payment of POC is a regulatory matter or would it be purely an adjudicatory

function under Section 86(1)(f) of the Electricity Act. It is submitted that the Petitioner's cause of action is continuous and there is no delay on account of the Petitioner in filing the present Petition. In fact, the Respondents, till date, continues to levy / recover POC at the rate of Rs. 26.50 / kVA / month for the Petitioner's 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units, in contravention to the Settlement Agreement. There cannot be an estoppel against statute. POC levied / recovered by the Respondents is not in accordance with the charge (Settlement Agreement) adopted by the Commission. He requested the Commission to hold that pursuant to the Commission's Order dated 01.06.2011, the Petitioner's CPP is governed by the Settlement Agreement and is therefore liable to pay POC for its entire CPP capacity, connected to the GETCO grid in terms thereof. He requested the Commission to direct the Respondent to refund the amount illegally / wrongfully recovered as POC from the Petitioner.

Respondents' Arguments:

12.5 Ld. Advocate Ms. Ranjitha Ramchandran, appearing on behalf of Respondent No. 1 - PGVCL, and Respondent No. 2 - GETCO, submitted that the terms of the Settlement Agreement are applicable / limited only to the Petitioner's 77 MW Base Plant, as it was the only Unit in existence at the time of execution of the Settlement Agreement. She submitted that the Petitioner's 220.48 MW Phase-1 and 302.8 MW Phase-2A Expansion Units were synchronized with the GETCO Grid after the decision on POC was made applicable by the Commission on 01.06.2011. She further submitted that the covering letter dated December, 2009 to the Settlement Agreement refers to the Petitioner's CPP as having 77 MW capacity. Moreover, the list of 18 CPPs which was submitted by GETCO to the Commission also referred to the Petitioner's CPP as having 77 MW capacity, which is at Sr. No. 7. 4.3. The Settlement Agreement dated 11.12.2009 has to be read along with the letter dated 11.12.2009. In this context and with specific reference to the contents of letter dated 11.12.2009 of the Petitioner having 77 MW Captive Power Plant and running in parallel with the Grid, the reference in the Settlement Agreement namely, to the generating units at Vadinar both in the Recital and in the operative part, can only be with reference to the said 77 MW. The Settlement Agreement cannot be read as extending to all the capacities that may be established from time to time by the Petitioner at subsequent dates. She submitted that the Petitioner has not provided any explanation as to why the covering letter dated 11.12.2009 and the Settlement Agreement dated 11.12.2009 refer to 77 MW. Further, the recital in the Settlement Agreement dated 11.12.2009 refers to "Captive Power Plant is operating a Generating Unit". This clearly refers to the existing operating unit which is of 77 MW capacity. Further, in the operative part in Clause 1, the agreement refers to "so long the Captive Power Plant is connected to GETCO's Grid". This also refers to the existing unit. The Petitioner duly paid the charges as per Order dated 01.06.2011 during the years 2011, 2012, 2013 and 2014 without raising any issue. Further, it is submitted that the Petitioner had availed the Grid Support from 01.06.2011 onwards till October, 2014 without any objection on payment of the charges for 220.48 MW and 302.8 MW based on the Commission's Order dated 01.06.2011. The Petition filed in the year 2014 is clearly an afterthought. There is no explanation whatsoever which has been offered by

the Petitioner as to why it had paid the charges as per Order dated 01.06.2011 during the period from 01.06.2011 till October 2014, if according to the Petitioner there was a Settlement Agreement in respect of 220.48 MW and 302.8 MW also. The Petitioner is estopped, by its conduct of payment of the charges as per Order dated 01.06.2011, from now claiming that the charges were to be paid as per the Settlement Agreement. It is well settled principle that where a party by his words or conduct made a promise or assurance to other party who has acted on that basis, the Party is estopped from claiming to the contrary.

12.6 She further submitted that the Petitioner's claim is barred under the Limitation Act, 1963 as it is now settled that Limitation Act is applicable to the adjudication proceedings under the Electricity Act, 2003. The undertaking to pay the parallel operation charges as per the Order passed by the Commission in respect of 220.48 MW was given in the year 2010. The claim now made is that the undertaking was forcefully taken. The cause of action, if any, therefore accrued in the year 2010. Further, the Order was passed by the Commission on 01.06.2011 and thereafter the POC was levied and collected as per the Order dated 01.06.2011. The same was paid by the Petitioner without any reservation or protest. The claim for change in the payment of parallel operation charges as per settlement agreement was made on 09.10.2014, when the present Petition was filed. Such a claim being much beyond the period of 3 years and taking the principles of time-barred claim with reference to the Limitation Act as per the decision of the Hon'ble Supreme Court, the present petition should be rejected *in limine*. Further, the Judgement of Hon'ble Supreme Court relied upon by the Petitioner's counsel is in relation to the insurance policy which contracts are complicated and not easily understood and are for insurance agreements. This is an exception for insurance and hence would not apply uniformly to other agreements.

12.7 It is further argued that the case of ***Shaifali Rolls*** and the present matter are distinct. In *Shaifali Rolls* case, they were covered under second category and there was issue of limitation as GETCO had raised bills much later and hence limitation case was against the Respondent. The Commission had dealt with the collection of POC beyond a period of limitation. In that case, the parallel operation was availed between the period from 16.07.2006 to September, 2008. It was held that the Distribution licensee remained silent till 25.07.2011. In the above decision, the Commission was not dealing with levy of POC for the period after 01.06.2011 in terms of the Order dated 01.06.2011 passed by the Commission. In the present case, the relevant period is after 01.06.2011.

13 **CONCLUSION**:

Issues No. 1 and 2:

13.1 The Petitioner's case is that the entire capacity of its CPP (77MW + subsequently added 220.48 MW and 302.8 MW in different years) constitutes one single CPP and cannot be treated as different CPPs, as alleged by the Respondents. In order to fortify this contention, the Petitioner has drawn attention of the Commission to the fact that all the

three units along with the 220 kV double circuit lines are connected to the GETCO Grid at the Petitioner's premise at one specific point. All the three units are located on the same part and parcel of land and also have common facilities/sources in relation to their cooling system, fuel etc. The 220.8 MW Phase-I and the 302.8 MW Phase 2A Expansion Units are only expansions of the existing 77 MW Base Point. This expansion was done to ensure fuel price-economy and higher degree of reliability in operation.

13.2 It is the further case of the Petitioner that Respondent - GETCO, while granting permission to connect its 220.48 MW Phase-I and 302.8 MW Phase-2A Expansion Units to the GETCO Grid, has considered the entire capacity as part of one CPP. So long as the Petitioner has not sought for additional connection points and all the Units are connected to the GETCO Grid at one specific point, the Expansion Units of the CPP cannot be construed to be new and different CPPs.

13.3 The Settlement Agreement dated 11.12.2009 does not expressly specify or relate to any capacity of the CPP or make any reference to any of its Units per se. The Settlement Agreement refers to the Petitioner as the "CPP". As such, the Petitioner has executed the Settlement Agreement as an entity and cannot be read to be restrictive to any specific capacity. Therefore, any expansion of Units within the same premises, by the same entity, connected through one interconnection point, would constitute as one CPP and not multiple CPPs. As long as the Settlement Agreement is applicable to the Petitioner, it is applicable to all its Units. Therefore, the Petitioner vehemently contended that it is liable to pay POC for its CPP as a whole only as per the methodology provided in the Settlement Agreement for a period of ten years.

13.4 The Petitioner took the Commission through the Undertakings No. 2 and 3 procured by GETCO at the time of synchronizing various Units with the GETCO Grid, which specifically and distinctly refers to all Units as part of one CPP.

> Undertaking No. 2: "*….with a request for grant of permission of paralleling/wheeling from its Captive Power Plant having rated capacity of 220 MW (total installed capacity of CPP is 297 MW (220 MW + 77 MW)…"*
>
> Undertaking No. 3: "*….with a request for grant of permission of paralleling/wheeling from its Captive Power Plant having rated capacity of 302 MW (total installed capacity of CPP is 599.8 MW (3022.8 MW + 220 MW + 77 MW)…"*

13.5 As against the above arguments, the Respondents argued that the Settlement Agreement dated 11.12.2009 was confined to 77 MW only and in respect of further additional CPPs POC shall be payable as per Order dated 01.06.2011. The Petitioner had paid charges as per Order dated 01.06.2011 in respect of 220.48 MW and 302.8 MW CPPs also.

13.6 It appears from record that when the Settlement Agreement was executed on 11.12.2009, only 77 MW CPP was in existence and for that reason the rate of POC

prescribed in the said Settlement Agreement can only be with reference to 77 MW CPP. The Settlement Agreement executed in the year 2009, while incorporating the rate of POC, cannot be read as extending to all the Units that may be established from time to time spread over to ten years. It is true that 77 MW CPP was synchronized in the year 2006 which would be covered under the Settlement Agreement. 220.48 MW and 302.8 MW CPPs were synchronized during the years 2010, 2011 and 2012, i.e. after execution of the Settlement Agreement and issuance of Order dated 01.6.2011. It is pertinent to note that the aspect of POC was considered only in regard to the existing capacity of various Companies, the details of which were placed before the Commission. Insofar as the Petitioner is concerned, the capacity was 77 MW. Therefore, there is no escape from the conclusion that the Settlement Agreement would cover 77MW CPP only. The terms of the Settlement Agreement are applicable / limited only to the Petitioner's 77 MW Base Plant, as it was the only Unit in existence at the time of execution of the Settlement Agreement. The Petitioner's 220.48 MW (2 Units) were synchronized in October 2010 and January 2011, whereas 302.8 MW (3 Units) were synchronized in June, September & December 2012. The covering letter dated December, 2009 to the Settlement Agreement refers to the Petitioner's CPP as having 77 MW capacity only. Moreover, the list of 18 CPPs which was submitted by GETCO to the Commission also referred to the Petitioner's CPP as having 77 MW capacity. The Settlement Agreement dated 11.12.2009 has to be read along with the letter dated 11.12.2009. In this context and with specific reference to the contents of letter dated 11.12.2009 of the Petitioner having 77 MW Captive Power Plant and running in parallel with the Grid, the reference in the Settlement Agreement namely, to the generating units at Vadinar both in the Recital and in the operative part, can only be with reference to the said 77 MW. We do not accept the contention of the Petitioner that all the three CPPs constitute one CPP. The Settlement Agreement cannot be read as extending to the entire capacity that may be established from time to time by the Petitioner at subsequent dates, merely because no capacity was mentioned in the settlement agreement. The Petitioner has argued that the covering letter dated 11.12.2009 refers to 77 MW, but the same cannot be considered as a part of contract .We cannot accept this argument for the simple reason that settlement agreement was executed pursuant to the proceedings and directions before the Commission and the Hon'ble High Court, and in the proceedings before the Commission the capacity of the CPP was shown as 77 MW for which settlement was executed and produced before the Commission. Further, the recital in the Settlement Agreement dated 11.12.2009 referred to "Captive Power Plant is operating a Generating Unit". This clearly refers to the existing operating unit which is of 77 MW capacity. Further, in the operative part in Clause 1, the agreement refers to "so long the Captive Power Plant is connected to GETCO's Grid". This also referred to the then existing unit. We make it clear that the decision in Saurashtra Cement case (supra) will not be of any help to the Petitioner. Moreover, after more than three years of paying POC as per the Order dated 01.06.2011 and only because capacity was not mentioned in the settlement agreement, the Petitioner has raised this issue now but against this it may be noted that in addition to the continuous payment as above, the covering letter / permission / undertaking exchanged between the Petitioner and the Respondent GETCO refers to 77 MW only. In the Petition before the Commission in the list of CPPs, the capacity of the

CPP has been shown as 77 MW. There is no mention in the agreement about inclusion of any addition of capacity in future. The Petitioner had duly paid the charges as per Order dated 01.06.2011 during the years 2011, 2012, 2013 and 2014 without raising any issue till the present Petition was filed. Further, the Petitioner had availed the Grid Support from 01.06.2011 onwards till October 2014 without any objection on payment of the charges for 220.48 MW and 302.8 MW based on the Commission's Order dated 01.06.2011. There is no explanation whatsoever by the Petitioner as to why it had paid the POC charges as per Order dated 01.06.2011 during the period from 01.06.2011 till October 2014, if according to the Petitioner the Settlement Agreement was also in respect of 220.48 MW and 302.8 MW. By producing and relying upon the covering letter / permission letter of 77 MW, the Respondent has cleared the meaning of the settlement agreement with reference to the then existing facts, i.e. existence of 77 MW. In this connection, a reference may be made to Sec. 95 of the Indian Evidence Act which provides that, when language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. Thus, though the settlement agreement does not show the actual capacity, the permission / covering letter clearly shows and establishes that the undertaking was executed for 77 MW capacity only.

13.7 The Petitioner has claimed refund of Rs. 47.14 crores from Respondent No. 1 - PGVCL for the period from 01.06.2011 to 31.07.2014 which was alleged to have been wrongfully recovered as POC in excess of the rate specified under the Settlement Agreement.

13.8 It is the case of the Petitioner that on 11.12.2009 the Petitioner entered into the Settlement Agreement with GETCO pursuant to the Hon'ble Gujarat High Court's Order dated 28.04.2009, selecting "Option-(b)" provided therein being, "Adoption of Commercial Circular No. 706, with condition No. 2, being substituted by the following: "Whenever the power will be sold to GUVNL the parallel operation charges to be paid shall be compensated as a part of the cost of generation and rate of sale of power shall be accordingly adjusted" as the methodology for calculating the quantum of POC under the Settlement Agreement. The following provisions of the Settlement Agreement are noteworthy:

(a) So long as the CPP is connected to GETCO's grid, the CPP shall pay to GETCO, in addition to other charges payable as determined by the Commission from time to time, ***POC as per the methodology provided in the Hon'ble Gujarat High Court's Order dated 28.04.2009 and as mutually agreed between the parties***, as per the terms contained in the said Order dated 28.04.2009;

(b) The methodology and conditions as provided for the calculation of POC shall be in force for a period of 10 years from 28.04.2009, which shall not be amended or revised by either party during the period of the said Agreement;

(c) The CPP shall abide by all the prevailing norms / conditions / rules / regulations as applicable from time to time governing the parallel operation of the CPP; and

(d) Any dispute between GETCO and Petitioner with regard to the implementation of the terms mentioned in the Agreement shall be referred to the Commission for adjudication.

13.9 The Commission, in terms of the Hon'ble Gujarat High Court's Judgement dated 21.10.2008, decided Petitions No. 256 of 2003 and No. 867 of 2006 on 01.06.2011. The Commission while holding that POC was leviable for all CPPs operating in parallel with the State Grid also observed that, the Order of the Hon'ble Gujarat High Court dated 28.04.2009 assumed great significance, particularly because the Hon'ble Gujarat High Court, vide the said Order had put its seal of approval on the settlement reached between the parties and advised the CPPs to enter into agreement with the GETCO for a period of 10 years in order to enjoy the parallel operation facility. The Commission categorically stated that, ***it was only left with to decide the case on merits of levy of POC for the CPPs who had not agreed to the settlement as suggested by the Hon'ble Gujarat High Court***. The relevant extracts of the Commission's Judgment dated 01.06.2011 are provided hereunder:

> *"23.5 The judgement of the Hon'ble High Court assumes great significance in this case, particularly because the Hon'ble High Court, vide order dated 28th April, 2009 in MCA No. 2967/2008 has put its seal of approval on the settlement reached between the parties and advised the CPPs to enter into agreement with the petitioners for a period of 10 years in order to enjoy the parallel operation facility...."*
>
> *"23.6 From the above, the Commission is left with to decide the case on merits of levy of POC on the CPPs who do not agree to the above settlement."*

13.10 POC made applicable by the aforementioned judgment dated 01.06.2011 was to be paid by the CPPs operating in parallel to the grid only in terms of the said Judgment with prospective effect and all CPPs who had "***Executed the Agreement with GETCO*** were liable to ***pay POC as per the said settlement agreement for a period of 10 years"***.

13.11 The Settlement Agreement dated 11.12.2009 was executed between the Petitioner and Respondent No. 2 for payment of POC in terms of the directions of the Hon'ble Gujarat High Court in its Order dated 28.04.2009 in MCA No. 2834 of 2008 in SCA No. 14743 of 2004 in Ultra Tech Cement Ltd. and Ors. Vs. GETCO and Ors (MCA No. 2834 of 2008). As per the Settlement Agreement, the Petitioner was required to pay POC, for a period of 10 years from 28.04.2009, at the rate of 25% of Demand Charges corresponding to its CPP capacity or Rs. 4,43,575/- per month whichever was higher, subject to a ceiling of Rs. 8,00,000/- per month. The relevant extract of the Settlement Agreement is reproduced hereunder for ease of reference:

*"**AGREEMENT***

***THIS AGREEMENT** is entered into on this 11th day of December 2009 by and between:*

*Messrs **ESSAR OIL LIMITED**, a Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Khambhalia Post, Post Box -24, Dist - Jamnagar, PIN-361305, Gujarat, India (hereinafter referred to as the '**Captive Power Plant of CPP'**), which expression shall, unless repugnant to the context of meaning there of include its successors, legal representatives and assigns) of the ONE PART; and*

*Messrs **GUJARAT ENERGY TRANSMISSION CORPORATION LIMITED**, a Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Vidyut Bhawan, Baroda (hereinafter referred to as the 'GETCO),.....*

NOW THIS AGREEMENT WITNESSESTH AS UNDER:

1. *The parties agree that so long the CPP is connected to GETCO's grid, the CPP shall pay to GETCO, in addition to other charges payable as determined by GERC from time to time, parallel Operation Charges as per the methodology provided for in the Order dated 28.4.2009 passed by the High Court in MCA 2834 of 2008 in SCA 14743 of 2004 and other connected matter and as mutually agreed between the parties, as per the terms contained in the said Order dated 28.4.2009.*
2. *The methodology and conditions as provided above for the calculation of the parallel Operation Charges shall be in force for a period of 10 years from 28.4.2009, which methodology shall not be amended or revised by either party during the period of this Agreement.*
3. *The bill for the Parallel Operation Charges shall be raised by the Distribution Companies either along with the invoices that may be raised by the Distribution Companies on the CPPs for the connected load of the CPP with the Distribution Companies or otherwise in the same manners as the Distribution Companies would raise bills for supply of electricity. Such bills will be raised by the Distribution Companies both on behalf of the Distribution Companies and GETCO and the requisite adjustments shall be made inter-se between GETCO and the Distribution Companies. The Payment of the CPP towards Parallel Operation Charges shall be made by the CPP within 10days of the date of billing.*
4. *The CPP shall abide by all the prevailing norms/condition/rules/regulations as applicable from time to time governing the parallel operation of CPP.*
5. *The CPP shall indemnify and hold harmless GETCO against all claims/losses/damages/compensation, whatsoever nature that may at any time arise to GETCO on account of parallel operation of the CPP with GETCO's grid.*

6. *Any dispute between GETCO and the CPP in regard to the implementation of the terms mentioned in this agreement shall be referred to GERC for adjudication….."*

13.12 The Petitioner submitted that on perusal of the Settlement Agreement, the following is noteworthy:

1. *The Settlement Agreement does not expressly specify or relate to any capacity of the Petitioner's CPP or make any reference to any of its Units;*

2. *The Settlement Agreement refers to the Petitioner as the 'CPP'. As such, the Petitioner (as a CPP) has executed the Settlement Agreement as an entity per se and the same cannot by any stretch of imagination be read to be restrictive to any specific capacity, as sought to be done by the Respondents; and*

3. *The Settlement Agreement would apply to the Petitioner so long as it is connected to GETCO's grid and therefore the Petitioner is liable to pay POC for its CPP only as per the methodology provided in the said Settlement Agreement for the period of 10 years.*

13.13 According to the Petitioner, in terms of the Hon'ble Gujarat High Court's Order dated 28.04.2009, the Commission's judgment dated 01.06.2011 read with the Settlement Agreement dated 11.12.2009 executed between the Petitioner and the Respondent No. 2, as above, the Petitioner is not liable to pay POC at the rate of Rs. 26.50/kVA/month for its CPP, for a period of l0 years from 28.04.2009, as long as the Petitioner's CPP is connected to the GETCO grid. Further, the Petitioner's 77 MW Base Plant, 220.48 MW Phase-1 Expansion Units and 302.8 MW Phase-2 Expansion Units constitute one CPP, which is connected to the GETCO grid at a single point i.e. at the 220 kV busbar in the Petitioner's premises. Therefore, the treatment meted out by Respondent No. 1, i.e. raising POC at the rate of Rs. 26.50/kVA/month for the Petitioner's 220.48 MW Phase-l Expansion Units and 302.8 MW Phase-2A Expansion Unit is not only contrary to the Orders of the Hon'ble Gujarat High Court and the Commission but also contrary to the intent of entering into the Settlement Agreement.

13.14 In this connection, it is relevant to note that at the relevant time, i.e. when the settlement agreement was entered into, only the CPP of 77 MW (2 x 38.5 MW) was in existence and no other CPP of the Petitioner was there or about to be established immediately or in the near future. Both the parties were very clear that settlement agreement was only regarding the then existing CPP of 77 MW. The agreement was clearly regarding the CPP connected to the GETCO Grid and at that time only 77 MW was connected with the Grid. The expanded CPPs of 220 MW and 302.8 MW came to be established later on in the year 2010 and 2012 respectively for which undertakings were given and, in the meanwhile, i.e., in 2011, the Commission had already passed POC order in Petitions No. 256 of 2003 and 867 of 2006 governing the new CPPs which were not the subject matter of settlement agreement. The Petitioner has failed to show any documents from

which it could be culled out that any and every CPPs that may be established subsequently after the agreement but within the period of settlement agreement are part and parcel of the settlement agreement. Needless to say that after the Order dated 01.06.2011 of this Commission, the Petitioner has continuously paid POC as per the settlement agreement for 77 MW and as per the Order dated 01.06.2011 for its rest of the CPPs without any objection till this Petition which has been filed in the year 2014. The generating capacity of 220.48 MW described as Phase I Expansion Units and 302.8 MW described as Phase II A Expansion Units were not part of the Settlement Agreement. These were not governed by the charges as per the amount provided for in CC No. 706 for the period from 01.06.2011 onwards. Therefore, we find and hold that the Petitioner has failed to prove his case. Therefore, there is no question of granting any refund to the Petitioner. So far as the other CPPs of capacity of 220.48 MW and 302.8 MW are concerned, the Commission find and hold that the Respondents have rightly levied Rs. 26.50/kVA/month corresponding to its installed capacity.

13.15 The Petitioner submitted that the Respondents have relied upon the Commission's ***Order dated 03.04.2012 passed in Petition No. 1141 of 2011*** titled **as *M/s. Saurashtra Cement Ltd. vs. GETCO & Ors***. By this Order, the Commission had specifically held that the settlement agreement was executed for the existing capacity of the CPP (i.e., 34.5 MW), which was prior to 01.06.2011 and as such, any further capacity could not be included into the settlement agreement. In light of the above, it is contended by the Respondents that the said Order is squarely applicable to the facts of the present case. The said contention is wrong and misplaced. As is evident from the Saurashtra Cements matter, the settlement agreement executed between M/s. Saurashtra Cement Ltd. and the Respondent No. 2, specifically mentions the CPP capacity to which it is applicable (34.5 MW), unlike the Settlement Agreement executed with the Petitioner, which does not mention / restrict its applicability to any fixed capacity. In fact, the settlement agreement was executed by M/s. Saurashtra Cement Ltd. only on 10.12.2009, i.e. a day prior to the Settlement Agreement executed with the Petitioner. As is evident from the above, it is clear that the Respondent No. 2 specifically chose not to restrict the applicability of the Settlement Agreement to the Petitioner's 77 MW (unlike that of M/s. Saurashtra Cement Ltd. (34.5 MW)), since the Petitioner's CPP capacity fell under category 4 of the Settlement Agreement (i.e. 50001 kVA and above), whereby, the POC is limited to / capped at Rs. 8 Lakh / month, irrespective of the CPP capacity (i.e. above 50001 kVA).

13.16 It is settled that POC is a part of Tariff and only the Commission can determine the rate of POC. From the historical background as was then prevailing regarding POC, it appears that during pendency of various Petitions and till the decision of the Commission dated 01.06.2011, only stop-gap arrangement was undergoing as per undertakings / settlement agreements / Hon'ble High Court order which were never further challenged and, therefore, logically also it is clear that they relate, i.e. undertaking / settlement agreements etc., only to a particular situation as was then existing and till the final decision of the Commission. Thus, on the date of the settlement agreement only 77 MW was the capacity and by no stretch of imagination it can be said

that this settlement agreement shall govern all further capacities that may be added subsequently. We accordingly hold Issues No. 1 & 2 in negative and against the Petitioner.

Issue No. 3: Whether the Petition is also time barred and suffers from delay, laches, and acquiescence:

13.17 The Petitioner has claimed refund of POC amounting to Rs. 47.14 crore for the period from 01.06.2011 to 31.07.2014 by preferring the Petition on 09.10.2014. On this aspect, the Respondents have contended that the Petition filed on 09.10.2014 is belatedly time barred and otherwise also suffers from laches. The present Petition was filed on 09.10.2014. The period of the Petitioner's claim is from 01.06.2011 to 31.07.2014, when their claim had become time barred being beyond 3 years, except for two months and 8 days, i.e. for August, September and up to 08.10.2014. In support of this contention, the Respondents have relied upon the decision of the Hon'ble Supreme Court in ***Andhra Pradesh Power Coordination Committee and Others v. Lanco Kondapalli Power Limited and Others*** that in the context of the provisions of the Electricity Act and in relation to a petition under section 86 (1)(f) thereof, the provisions of the Limitation Act, 1963 would be applicable. In ***Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission*** the Hon'ble Appellate Tribunal has held that limitation would apply to adjudicatory proceedings. Similar view has also been taken in ***Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission*** by the Hon'ble APTEL. The Respondents have further sought reliance on the following decisions:

i. ***Corporation Bank v. Navin J. Shah AIR 2000 SC 761.***
ii. ***State of Orissa v. Mamata Mohanty (2011) 3 SCC 436***
iii. ***Dr. Avtar Singh v Guru Nanak Public School of Hon'ble High Court of Delhi in Writ Petition No. 4207 of 2013 by its Order dated 16.4.2015.***
iv. ***Amol Pharmaceuticals v. Rajasthan Electricity Regulatory Commission in Order dated 23.11.2006 passed by the Hon'ble APTEL.***
v. ***Punjab State Power Corporation Ltd. v. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. by Order dated 30.05.2023 in Appeal No. 358 of 2022***
vi. ***Bilanga Hydro Power Ltd. v. Uttarkhand Electricity Regulatory Commission Appeal No. 144 of 2015.***

13.18 On the other hand, the Petitioner has come with the plea that, the issue of limitation has been raised by the Respondents keeping in view the judgment dated 16.10.2015 of the Hon'ble Supreme Court in ***Lanco Kondapalli Power Ltd.*** (supra) holding that Limitation Act would apply to adjudicatory proceedings initiated under the Electricity Act, but would not apply to regulatory and administrative proceedings. In the facts of the present case, the Commission has to decide whether recovery of a wrongful

demand/payment of POC is a regulatory matter or would it be purely an adjudicatory function under section 86(1)(f) of the Electricity Act.

13.19 We note here that POC is levied every month, and the transaction thereof would be completed by issuance of bill and its payment. Therefore, it cannot be said to be a continued cause of action. Therefore, it is necessary to relook at the Order dated 01.06.2011 and, at the cost of repetition, para 24 of the said Order is reproduced hereinunder:

"24. Considering the above, the Commission orders as under:

(i) For the 37 CPPs which have executed agreement with the petitioners as per the directives of the High Court and selected out of the options allowed, the Commission is required to record the same and pass necessary orders in terms of the agreement between the parties. The Commission takes note of the agreement and records the same. The parties to the agreement shall follow the orders passed by the Hon'ble High Court.

(ii) As M/s Nirma Ltd. and M/s. Varasana Limited have agreed to execute agreement under the 3 minutes integration meter clause, the Commission records the same, and orders the petitioners to enter into the agreement accordingly and proceed as ordered in case of 36 CPPs in (i) above.

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

13.20 From a bare reading of the above Order, it appears that the Commission has classified CPPs in three categories. Clause (i) above applies to 37 CPPs, including the Petitioner, who have executed Settlement Agreement as per the Order dated 28.04.2009 of the Hon'ble High Court of Gujarat in MCA No. 2967 of 2008. Clause (iii) clearly states that POC under the above Order applies to those CPPs who have not executed any agreement with the present Respondent as per the Order dated 28.04.2009 of the Hon'ble High Court of Gujarat in MCA No. 2967 of 2008. Moreover, the charges decided in this Order at the rate of Rs. 26.50/KVA shall also apply to the new CPPs, operating in parallel with State transmission utilities (Transmission licensee) and/or distribution licensee network with the grid.

13.21 Thus, the Commission in the above Order also took on record the settlement agreement entered by several CPPs including the present Petitioner who also executed settlement agreement dated 11.12.2009 which was for a period of 10 years. This means that the Commission has endorsed the settlement agreement effective from 11.12.2009. From the above, it is clear that the 10-year settlement agreement was made effective from 11.12.2009 and not from the date of the Order of the Commission i.e. 01.06.2011. Even from the conduct of the Petitioner, it is clear that the Petitioner had voluntarily entered into the settlement agreement to pay POC on the methodology as per the Hon'ble High Court order, as noted in the above paragraph. Even prior to the settlement agreement, the Petitioner was paying POC as per the undertaking without questioning the same. The Petitioner had not challenged any Order of the Hon'ble High court. The Petitioner has argued that their rights and contentions were kept open by the Hon'ble High Court and payment of POC was made without prejudice and the law became crystal clear on 01.06.2011, therefore, the Petition is within the period of limitation. In this context, it is relevant to look at the observations made by the Hon'ble High Court in its judgment dated 28.04.2009 in MCA No. 2967 of 2008 in SCA No. 14742 of 2004 filed by some CPPs, as under:

> *5. Petitioners who agree to the above settlement terms may sign the settlement agreement and place the same before the GERC who will pass orders in terms of the settlement in respect of such parties while offering the same terms to all other similarly situated parties. GERC is directed to issue notice to all the CPPs informing them about the settlement proposal above-referred and call upon each of them to indicate, within a period of 8 weeks, if they wish to accept the proposal, for the term of 10 years or not, without prejudice to the rights and contentions of the CPPs and power utilities.*
>
> *6……. …….*
>
> *7. The proceedings before the GERC shall then continue only with respect to the parties who positively refuse to accept the proposal. However, it is clarified that the parties who have settled the dispute would also be entitled to participate in the hearing before GERC."*

13.22 The Hon'ble High Court while remanding the matter to GERC for deciding legality, validity, propriety and justifiability regarding levy of such grid support charges, the Petitioner were permitted to assail all this including the vires of the Regulations. The Petitioners were also directed to continue to pay charges @ 7.5% which payment was to be treated ass made without prejudice to the rights and contentions of the Petitioners. Thus, stay was not granted by the Hon'ble High Court, but the Petitioners were given liberty to challenge it before the Commission. The Commission has neither given stay order nor ordered refund, which order has remained unchallenged. The Petitioner could have contested all his rights and contentions before the Commission in Petitions No. 256 of 2003 with No. 867 of 2006, which was not done by it.

13.23 It is an undisputed fact that the Petitioner set up its CPPs for which erstwhile GEB granted permission (for 77 MW synchronized on 13.09.2006) (which was subsequently enhanced phase-wise, as stated in the Petition) and since then it has been paying and continued to pay charges for the parallel operation facility provided by the Respondents and availed by the Petitioner. Once the Petitioner has availed the services of parallel operation facility and without raising any dispute continuously paid under the settlement agreement voluntarily and though CPPs were given liberty to agitate the issue by Hon'ble High Court, it had not challenged such undertaking/agreement at the relevant time or within the period of limitation.

13.24 The Petitioner has also argued that in ***Shaifali Rolls*** case, the Commission in its Order dated 19.01.2013 has held that levy of POC by the licensee on the strength of undertakings was illegal, therefore, the period of limitation in terms of the aforesaid settled law should also be reckoned from 19.01.2013, In that case, POC recovered for the period July 2006 to September 2008 were held as illegal and ordered to be refunded. It is also argued by the Petitioner that in its Order dated 19.01.2013 the Commission has held that money recovered by the licensee on the strength of undertakings was illegal. Therefore, the period of limitation in terms of the settled law should also be reckoned from 19.01.2013 where the Commission declared that the POC collected by the Respondents were illegal and void. In that case, the Respondents had sought to recover the amount after a period of three years and therefore the claim of the Respondents was held as time barred. In the present case, the claim has been raised by the Petitioner after almost three years and is therefore time-barred. It is pertinent to note here that the Commission has not passed any order in general in similar other cases for refund of POC levied on the basis of undertaking. Therefore, the decision of the Hon'ble APTEL as well as the decision of the Commission in *Shaifali Rolls* case would rather support the case of the present Respondents so far as the issue of limitation is concerned. Therefore, the Petitioner would not get any benefit from the decision in *Shaifali Rolls case* and this argument is rejected.

13.25 The Petitioner has argued that POC is a part of tariff, and the Commission is a Regulatory Forum and not adjudicating the issue. Hence, the provision of Limitation Act would not be applicable for which the Petitioner has relied upon the judgements of the Hon'ble Supreme Court in ***Andhra Pradesh Power Co-ordination Committee v. Lanco Kondapalli Power Ltd.*** and ***Ganesan v. Commissioner, the Tamil Nadu Hindu Religion and Charitable Endowments & Ors.*** The Petitioner has further argued that the principles laid down in the Lanco Kondapalli judgment (supra) is in conflict with other judgments of the Hon'ble Supreme Court. In this context a reference was made to the Hon'ble Supreme Court's Judgment ***dated 04.04.2014 in TANGEDCO vs. PPN Power Generating Company Ltd.,*** *reported in* ***(2014) 11 SCC 53.***

13.26 It is settled principle of law that an earlier judgment will prevail over a later judgment, more so when it is of a co-ordinate bench and not of a larger bench. Apart from the PPN Judgment (Supra), ***the Hon'ble Supreme Court in Ganesan vs. Commissioner, The***

Tamil Nadu Hindu Religious and Charitable Endowments & Ors. reported in ***2019 SCC OnLine 651*** has also held that Limitation Act would not apply.

13.27 It is further argued that it will not be correct for the Respondents to submit that the principle laid down in the ***Lanco Kondapalli*** case (supra) is the only operating principle on the subject and as such the other judgments have to be considered while determining the applicability of the Limitation Act to proceedings before the Commission, more so when there is a case for refund of tariff wrongfully charged by a Licensee. Under the Electricity Act, Tariff can only be determined by the Commission. There can be no levy of tariff which has not been determined by the Commission.

13.28 The Petitioner has also submitted that this Petition has been filed for implementation of the Commission's Order dated 01.06.2011 in Petitions No. 256 of 2003 and 867 of 2006 and therefore cannot be considered as a claim Petition of adjudicating nature but is a matter of regulatory nature, and as such the law of limitation would not be applicable. The Petitioner has, in this connection, relied upon the Commission's Daily Orders allowing the Objectors to be impleaded as such as the outcome of the matter may touch or affect the tariff ultimately. The Respondents have also strongly opposed this argument and contended that the title of the Petition is under Section 86(1)(f) of the Electricity Act. We reject the argument of both the sides. Mere order of allowing Objectors as Parties to the Petition on their plea of possibility of ultimate effect on tariff would not determine the nature of Petition. Similarly, by entitling the Petition under a particular Section would also not determine the nature of Petition; what is to be seen is the substance and not the form of the Petition. The Petition has been filed claiming refund of POC alleged to have been illegally levied on the Petitioner by the Respondents.

13.29 Here the Commission is deciding the dispute under section 86 (1)(f) of the Electricity Act, 2003 on legality of POC levied and already paid and its refund. In the present Petition, there is no determination of POC. The determination of tariff by the Commission is purely a regulatory matter. Merely because in case of refund of the POC there would be an effect on the tariff and consumer groups are impleaded it would not make the Petition a regulatory matter. The Petitioner has disputed the payment made towards POC claiming it to be unlawful. Therefore, without slightest hesitation, it is very clear that this Commission is not exercising its regulatory power but deciding a commercial dispute raised by the Petitioner in this matter. The Respondents have relied upon following judgments which are relevant and required to be referred to for applicability of the Law of Limitation:

i) In ***Andhra Pradesh Power Corporation Committee and others Vs. Lanco Kondapalli Power Limited and others (2016) 3 SCC 468,*** the Hon'ble Supreme Court held as under:

> ***"****Coming back to the issues relating to limitation, in view of law noticed above and for the reasons noted in M.P.Steel Corporation (supra), we respectfully*

concur and hold that by itself the Limitation Act will not be applicable to the Commission under the Indian Limitation Act 2003 as the Commission is not a Court stricto sensu. Further stand of the respondents that the Commission being a statutory tribunal, cannot act beyond the four walls of the Electricity Act also does not brook any exception. In the case of PPN Power Generating Co. Pvt. Ltd. (supra) this Court examined the issue of limitation in a very summary manner and without referring to the relevant provisions of the Electricity Act 2003, at the end of para 64 it was observed in a single sentence that the Limitation Act is inapplicable to proceeding before the State Commission. But in view of detailed discussion in the case of M.P.Steel Corporation (supra), we have held above that by itself the Limitation Act is inapplicable to proceeding or action brought before the State Commission. However, the Electricity Act 2003 requires a further scrutiny to find out whether by virtue of S.175 of the Electricity Act or otherwise it can be inferred that the provisions of Limitation Act will govern or curtail the powers of the Commission in entertaining a claim under Section 86(1)(f) of the Electricity Act. Section 175 reads thus:

> *"175. Provisions of this Act to be in addition to and not in derogation of other laws. – The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."*

A plain reading of this Section leads to a conclusion that unless the provisions of the Electricity Act are in conflict with any other law when this Act will have over-riding effect as per Section 174, the provisions of Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in the Section the provisions of the Electricity Act will be additional provisions without adversely affecting or subtracting anything from any other law which may be in force. Such provision cannot be stretched to infer adoption of the Limitation Act for the purpose of regulating the varied and numerous powers and functions of authorities under Electricity Acct 2003. In this context it is relevant to keep in view that the State Commission or the Central Commission have been entrusted with large number of diverse functions, many being administrative or regulatory and such powers do not invite the rigours of the Limitation Act. Only for controlling the quasi-judicial functions of the Commission under Section 86(1)(f), it will not be possible to accept the contention of the appellant that by S.175 the Electricity Act, 2003 adopts the Limitation Act either explicitly or by necessary implication.

29. The only other weighty contention of Mr. Giri that there is nothing in the Electricity Act 2003 to create a right in a suitor before the Commission to seek claims which are barred by law of limitation merits a serious consideration. There is no possibility of any difference of opinion in accepting that on account of judgment of this Court in Gujarat Urja (supra) the Commission has been elevated to the status of a substitute for the Civil Court in respect of all disputes between the licencees and generating companies. Such dispute need not arise

from the exercise of powers under Electricity Act. Even claims or disputes arising purely out of contract like in the present case have to be either adjudicated by the Commission or the Commission itself has the discretion to refer the dispute for arbitration after exercising its power to nominate the arbitrator. It is in view of such far reaching judicial powers vested in the Commission that in the case of PPN Power Generating Co. (supra) this Court advised the State to exercise enabling power under Section 84(2) to appoint a person who is/has been a Judge of a High Court as Chairperson of the State Commission.

30. In such a situation it falls for consideration whether the principle of law enunciated in State of Kerala v. V.R.Kalliyanikutty (supra) and in the case ofNew Delhi Municipal Committee v Kalu Ram (supra) is attracted so as to bar entertainment of claims which are legally not recoverable in a suit or other legal proceeding on account of bar created by the Limitation Act. On behalf of respondents those judgments were explained by pointing out that in the first case the peculiar words in the statute – "amount due" and in the second case "arrears of rent payable" fell for interpretation in the context of powers of concerned tribunal and on account of aforesaid particular words of the statute this Court held that the duty cast upon the authority to determine what is recoverable or payable implies a duty to determine such claims in accordance with law. In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus S.174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time barred claims, there is no conflict between the provisions of the Electricity Act and Limitation Act to attract the provisions of S.174 of the Electricity Act. In such a situation on account of provisions in S.175 of the Electricity Act or even otherwise the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike Labour laws and Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.

....

31. In the light of above there can be no difficulty in appreciating that M/s. LANCO rightly appreciated the hurdle of limitation in its way when such an objection was taken by the appellant and it rightly chose to seek exclusion of the period it was pursuing arbitration proceeding before the High Court, on the basis of principles underlying S.14 of the Limitation Act".

ii) In ***Kalani Industries Pvt. Ltd. Vs. Rajasthan Electricity Regulatory Commission (RERC) and Ors. Appeal No. 185 of 2015 dated 25.10.2018,*** Hon'ble APTEL held as under:

"*68. After careful preposition of law envisaged in the aforementioned paragraphs, we are persuaded to hold that in the light nature of judicial power conferred on the State Regulatory Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding. Hence, we hold that the claim coming before the State Regulatory Commission cannot be entertained or allowed as contended by the learned counsel appearing for the Appellant. We do not find any good ground for the reasons that it is not in dispute that earlier the Appellant herein has filed a petition No. 326/12 before the State Regulatory Commission wherein he has not raised the claim of interest, therefore, the said claim of the Appellant is barred by Order II, Rule 2 of CPC. Therefore, we are of the considered view Judgment in Appeal No. 185 of 2015 Page 38 of 39 that the impugned Order passed by the first Respondent/State Regulatory Commission is strictly inconsonance with relevant provisions of the Electricity Act and Regulations. Therefore, interference by this Tribunal does not call for."*

iii) In ***Maharashtra State Electricity Distribution Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission and Ors. Appeal No. 75 of 2017 dated 24.04.2018,*** the Hon'ble APTEL held that:

"68. After careful consideration of the submissions of the learned counsel appearing for the Appellant and the Respondent No. 2 on various issues raised in the present Appeal, our observations are as follows:-

……

ii. The Appellant has relied on the judgement dated 4.4.2014 of the Hon'ble Supreme Court in case of TANGEDCO v. PPN Power Generating Co. Pvt. Ltd. 2014 (11) SCC 53, on the issue that Limitation Act, 1963 is not applicable in the present case. The Respondent No. 2 on the issue of the applicability of the Limitation Act, 1963 has relied on the judgement dated 16.10.2015 of the Hon'ble Supreme Court which is at a later date in case of A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd. (2016) 3 SCC468 and stated that the provisions of the Limitations Act, 1963 applies to the proceedings under Section 86 (1) (f) of the Act and the same has been settled by the Hon'ble Supreme Court vide the said judgement. We have gone through the said judgement of the Hon'ble Supreme Court. We find that the Hon'ble Supreme

Court while dealing the case has also Appeal No. 75 of 2017 Page 19 of 20 discussed the PPN case (relied by the Appellant) and other cases. While referring to the PPN case the Hon'ble Court has observed that this Court has examined the issue of limitation in a summary manner and without referring to the relevant provisions of the Act, at the end of para 64 it was observed in a single sentence that the Limitation Act is inapplicable to proceeding before the State Commission. The Hon'ble Supreme Court in Lanco case (relied by the Respondent No. 2) has held that the provisions of the Act will be additional provisions without adversely affecting or subtracting anything from any other law including Limitations Act, 1963 which may be in force. Accordingly, the reliance of the State Commission on the Limitations Act, 1963 is not out of context.

iii. In view of our discussions as above, this issue is decided against the Appellant."

13.30 Thus, it is settled by the Hon'ble Supreme Court in ***Andhra Pradesh Power Coordination Committee and Others v. Lanco Kondapalli Power Limited and Others*** that in the context of the provisions of the Electricity Act and in relation to a petition under section 86 (1)(f) thereof, the provisions of the Limitation Act, 1963 would be applicable. In ***Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission*** the Hon'ble Appellate Tribunal has held that limitation would apply to adjudicatory proceedings. Similar view has also been taken in ***Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission*** by the Hon'ble APTEL.

13.31 So far as reliance placed by the Petitioner on the decision of ***Ganesan Vs. Commissioner, Tamil Nadu Hindu religious and charitable endowment board 2019 SCC online SC 651*** is concerned, upon perusal it is clear that it is a case of exercise of statutory powers of plenary nature and not an adjudicatory power as in the case of section 86 (1) (f) of the Act which is not applicable in the facts of the present case.

Other aspects:

13.32 Further, the Respondents have argued that the Petitioner is also estopped by its conduct to claim that the POC collected during period from 01.06.2011 as illegal or otherwise seeking refund of the amount at this stage. All the charges collected by the licensee (GETCO) including the POC charges are considered while deciding the Annual Revenue Requirement (ARR) of the Licensees and its due effect is incorporated in the Tariff for the respective years. On one hand the Petitioner has not challenged paying of POC, but also voluntarily entered into settlement agreement after availing the services of connectivity with the grid for number of years, and now it is contending that POC was wrongly levied during the period.

13.33 The Petitioner by its conduct had acknowledged, accepted and acquiesced the payment of POC as per Order dated 01.06.2011. The Petitioner was allowed parallel operation facility at the instance of the Petitioner and on the basis of the Petitioner agreeing to pay the charges. This is clear from the fact that the Petitioner not only had agreed to pay but had consistently paid the POC from 01.06.2011 till 31.07.2014 at the rate of Rs. 26.50/kVA/month without raising any issue. The Petitioner did not raise any issue at the time of seeking connectivity, at the time of synchronization and even at the time of raising of invoices and payment of POC. Therefore, it was not open to the Petitioner to change the stand in October 2014. The Petitioner is thus clearly estopped by its conduct to claim any refund. Further, the Petitioner cannot approbate and reprobate. We have perused the decisions relied upon by the Respondents in ***Suresh Jindal –v- BSES Rajdhani Power Limited and Ors (2008) 1 SCC 341*** and ***Bhubaneshwar Development Authority –v- Susanta Kumar Mishra (2009) 4 SCC 684,*** which can also be considered as an additional ground of defense in support of the Respondent.

13.34 Moreover, it appears to us that by adopting a particular course of action and by not challenging any of the Orders prior to this Petition, the Petitioner has by its conduct also waived its right. In this context, we find favour in support of the Respondents who have relied upon the decisions in ***Arce Polymers (P) Ltd. -v- Alphine Pharmaceuticals (P) Ltd***., ***Ramdev Food Products Pvt. Ltd. -v- Arvindbhai Rambhai Patel and Ors, Lachoo Mal -v- Radhey Shyam, Krishna Bahadur v. Purna Theatre, Commissioner of Customs -v- Virgo Steels,*** and ***All India Power Engineers Federation -vs- Sasan Power Limited.***

13.35 The Petitioner has all throughout tried to approbate and reprobate by agreeing to pay POC and paid POC, availed POC facility and now after a long delay wrongly claimed refund. The Respondents' case is also supported by the principle laid down by the Hon'ble Supreme Court in ***Mumbai International airport (P) Ltd. v. Golden Chariot Airport reported in (2010) 10 SCC 422***.

14. In view of the above discussion, we are of the considered view that the Petitioner has failed to prove that it is liable to pay the POC for its entire CPP capacity, connected to the GETCO Grid as per the settlement agreement and that it is entitled for any refund. The Petition was filed on 09.10.2014 challenging POC levied post 01.06.2011. The Petition is time-barred as the POC bills/invoices are raised on monthly basis and the Petitioner has been paying POC accordingly till this date. So far as Issue No. 3 regarding other aspects of laches, waiver and acquiescence etc. are concerned, we decide the same in favour of the Respondents, as per the above discussion.

15. **Now, we are on the alternative prayers. The Petitioner has made the following alternative prayers:**

(1) To hold that the Petitioner, in the peculiar facts of the present case, is not liable to pay POC at the rate of Rs. 26.50/kVA/month corresponding to its installed capacity;

(2) In the alternative and without prejudice to the prayer clause above, the Commission may devise an appropriate mechanism to calculate the POC payable by the Petitioner, if any, considering the peculiar facts and circumstances of the present case, and direct PGVCL to refund the sums wrongfully recovered as POC from the Petitioner, in excess of the sums so arrived at by the Commission, along with interest at the rate of 15% from 01.06.2011 till such sums are due and payable by the Respondents to the Petitioner.

For determining the above issues, we shall again look at the facts of the Petition and the relevant law.

15.1 The Petitioner has installed and synchronized its different CPPs at various stages, as elaborated in the Petition itself.

15.2 The Petitioner has pleaded in the Petition that on 23.06.2014 it had informed the Respondent - GETCO that, upon evaluation of the power requirement of its Oil Refinery it was concluded that, at any point in time, only one 110.24 MW Phase-1 Expansion Unit was required as hot stand-by for the Oil Refinery's emergency requirement. In view of the above, the Petitioner requested Respondent No. 2 to accord approval / sanction for de-synchronization and withdraw the Parallel Operation Permission of one machine of Phase-1 Expansion Unit (i.e. 110.24 MW Generator Sr. No. 1642 and Turbine Sr. No. GT-183).

15.3 The Petitioner submitted that the POC is being wrongfully levied by the Respondents corresponding to the installed capacity of the Petitioner's CPP. Without prejudice to the submissions of the Petitioner made hereinabove, in the alternative, it is submitted that, in any event, POC levied by the Respondents cannot be levied on the installed capacity of the Petitioner's CPP. In this regard the Petitioner made its alternate submissions as below.

15.4 It is submitted that parallel operation is an electrical activity where one electrical system is allowed to connect and operate to another electrical system at similar operating conditions. In this process, the power systems operate in tandem with all the connected generators for better operational efficiency and stability. The grid is an electrical system to which other electrical systems such as generating companies belonging to the Central Government, State Governments, body corporates, persons and CPPs are connected. The Commission by its Judgment dated 01.06.2011 has directed levy of POC only on CPPs operating in parallel with the grid, in lieu of the advantages received / exchanged by it, in the form of system stability, reliability of supply, economy of scale for meeting its emergency requirements, uninterrupted power supply, etc.

15.5 The support / advantages received by the CPPs on operating in parallel with the grid, in the nature of systems stability, reliability of support, uninterrupted power supply are supports / factors which are already factored in while deciding the quantum of the

Contract Demand. As regards meeting its emergency requirements, the support received from the grid should be considered keeping in mind the probability of loss of partial / entire CPP capacity, corresponding to the load for the purpose of calculating POC. Even in that case, any excess drawal from the grid by the CPP (as a consumer) over and above the Contract Demand is accounted for and attracts severe penal consequences in terms of tariff formulated for respective categories.

15.6 The total installed capacity of the Petitioner's CPP is 600.28 MW. However, on 23.07.2014, the Petitioner de-synchronised one Unit (i.e. 110.24 MW) of the 220.48 MW Phase-1 Expansion Units of its CPP. Currently, the Petitioner's 490.04 MW CPP capacity is synchronised with the GETCO grid. The entire load of the Petitioner's Oil Refinery including the CPP's auxiliary load is approximately 165 MW. The expansion of the CPP, in terms of capacity is much higher than the total requirement of the Petitioner's Oil Refinery. Thus, the Petitioner has sufficient Spinning Reserve to cater to its load requirement in case of any loss in its CPP capacity. Therefore, reliance of the Petitioner for any support received from the grid is minimal / marginal and is compensated by the Contract Demand charges paid by the Petitioner for 40 MVA (i.e. approximately Rs. 14.07 Crores per annum). This is also evident from the historical maximum demand recorded from the GETCO grid, whereby the Petitioner has breached its Contract Demand (i.e. 40 MVA) only on 14 occasions from the year 2009 i.e. a period of five years. Even otherwise, these breaches in the Contract Demand are minor and have lasted for only a few minutes, thereby causing minimal impact on the GETCO grid.

15.7 The Petitioner has a Contract Demand of 40 MVA, which is met through the 220 kV transmission line designed as per the Respondents requirements. The demand from the grid is only of stand-by nature. Further, in the past 12 months the Petitioner has been billed for 1.5 million units at 0.5% load factor based on its Contract Demand, which is evident from the past 12 months bills (FY 2013-14) issued by the utility. It is submitted that the Petitioner has also installed load shedding systems to restrict demand in case of exigencies.

15.8 In view of the above, it is submitted that POC, if any, to be charged from the CPP, should be reflective of the actual support utilised / received / contracted by it on being connected in parallel to the grid. It is submitted that, these charges ought to be levied only in cases where such support charges have not been accounted for. The levy of POC on the basis of the installed capacity of the CPP is not in consonance with the universally accepted fact that, POC are charges payable for compensating the benefits received by the CPP from generating capacity of transmission Licensee.

15.9 Without prejudice to the submissions made hereinabove with regard to the fact that POC are charges to be recovered for the actual benefit received from the grid which has not been accounted for by any other charges / levies, it is submitted that, in the extreme situation (wherein the CPP decides to either shed its load on its CPP capacity), POC can only be charged corresponding to the actual load requirement of the consumer (CPP)

and not on the installed capacity of the CPP itself. In any event, there should be no duplication of charges / levies on the CPP in the form of Grid Support Charges (GSC).

15.10 It is submitted that, like any other generator connected to the grid, the CPP when connected to the grid also provides or contributes to the pool of service to the grid and helps in reducing the voltage and frequency excursions in the grid which has all other consumers connected to it. The grid support, if it is so termed, is being availed by all the consumers connected to the grid and not by generators who provide support to grid. The CPPs near to the industrial units play much larger role in maintaining quality of supply to industry in comparison to the utility generators located faraway.

15.11 The Commission during the proceedings in Petition Nos. 256 of 2003 and 867 of 2006 had requested the CEA to analyse and study the report submitted by the Respondent No. 2 on levy of POC. The Commission in its Judgement dated 01.06.2011 has categorically recorded CEA's opinion that, the amount of POC, if any, should only be of nominal nature, as there seems no strong technical justification for levying the same. Further, Shri Bhanu Bhushan, Member, CERC, during the meeting of the FOR dated 18.01.2006 has also stated that there was little justification for levy of POC and GSC. The State Electricity Regulatory Commission should, therefore, ensure that such charges are as low as possible. The cost can be measured by the expenditure incurred in providing access to the grid. It has been submitted by CEA and M/s Feedback Ventures (I) Pvt. Ltd. that, there is no additional cost incurred by the grid for connecting CPPs in parallel to it. The cost of the network set up by utilities is recovered from the consumers over a period of time through components of tariff like demand charges and fixed charges. It is submitted that, the utilities have not created any additional infrastructure for evacuation of power from the CPPs or to withstand the CPPs parallel operation with the grid. Protection systems to negotiate grid disturbance, if any, to protect the CPP (over current and earth fault protections, reverse power relays, dead line charging protection, neutral displacement relays, which are paid for by the industry as per the specification of the utility) and the grid have been installed at the cost of the CPP / industry. It is clear from the above that the basic purpose of POC is to compensate the Respondent No. 1 and/or the Respondent No. 2 for providing emergency power and certain other occasional benefits from the grid system and not for recovering the normal capital cost of the licensees.

15.12 It is submitted by the Petitioner that the methodology adopted by the Commission in its judgement dated 01.06.2011 is contrary to the above, wherein the Commission has directed levy of POC based on the installed capacity of the CPP. This is not only contrary to the universally accepted concept that POC are charges payable for the actual support received from the grid but is also contrary to its own intent as recorded in the said Judgement. As is evident from the Judgement dated 01.06.2011, the Commission has recognized the fact that POC is leviable on the support received from the grid with regard to the load of the CPP consumer and not on the installed capacity of the CPP itself. Only on this understanding and intent, the Commission has come to a conclusion that POC is leviable on CPPs. However, contrary to this understanding and intent, the

Commission has formulated POC based on the fixed cost of transmission and distribution network and connected load in the system. The Commission, without any further justification and reasoning has arrived at the conclusion that the POC should be levied at Rs. 26.50/kVA/month for the installed capacity of the CPP. It is submitted that, the same is not only contrary to the intent of levying POC, but also has no technical, scientific, commercial merit and has no nexus with the intent of levying POC.

15.13 The Petitioner further submitted that, POC levied should reflect the intent (of levying POC) as recorded in the said Judgment. In other words, POC should be levied on the benefits received from the grid, with regard to the load of the CPP consumer and not on the installed capacity of the CPP itself. For implementing the Commission's Judgement dated 01.06.2011, in its true spirit, the particular facts and circumstances of each case has to be taken into account before levying POC uniformly across the board.

15.14 According to the Petitioner, the following is noteworthy:

(a) In the year 2006, the power and steam requirement to operate the 9 MMTPA Oil Refinery was 63 MW and 185 TPH respectively. For this requirement, the Petitioner set up 77 MW (2 x 38.5 MW) STG with 3 x 175 TPH HFO based boiler. It is submitted that the cost of Heavy Fuel Oil was very low as the same was available from the Oil Refinery operation as a by-product. Thereafter, in lieu of the expansion of the Oil Refinery from 9 MMTPA to l4 MMTPA, the Petitioner enhanced its CPP capacity by adding 220.48 MW (2 x 110.24 MW) GTGs with 2 x 315 TPH HRSG. This was done due to the fact that Heavy Fuel Oil was no longer economical / commercially viable. The Gas based turbines set up as the natural gas prices were economical / reasonable at that given point in time. Further, for the refinery operations, gas turbines were more efficient and were capable of black-start operations. The lower capital cost of Gas based plants made it more economical for the Petitioner vis-à-vis the coal-based plants. In the year 2012, the Oil Refinery capacity was expanded from 14 MMTPA to 20 MMTPA. During the said period, the Petitioner's CPP capacity was also expanded with addition of 302.8 MW (2 x 105 MW + 1 x 92.8 MW) with Coal fired boiler (2 x 750 TPH). This was so done as the cost of natural gas had gone up from $ 4/mmbtu to $ 15/mmbtu during the year 2010. At that given point in time, the cost of coal was cheaper and more easily available vis-à-vis natural gas. The cost of generation using coal as a fuel at that point in time was much cheaper as compared to other fuels like natural gas, Heavy Fuel Oil, naptha, etc.

(b) Modern day refinery operations require extremely high energy supply in the form of electricity and steam. Any interruption in such supply for even a small duration of time has huge cost implications (in the nature of refinery restart, plants stability, product rejection, safety of equipment, etc,). In this context, the Petitioner has set up a CPP of 600.28 MW consisting of 7 Units based on different technologies (i.e. 2 x 38.5 MW based on Heavy Fuel Oil, 2 x 110.24 MW based on Gas / Naptha, and 2 x 105 + 1 x 92.8 MW based on Coal) for supplying power and steam to its Oil

Refinery. Although the total installed capacity of the Petitioner's CPP is 600.28 MW, the Oil Refinery's entire load including, the CPP's auxiliary consumption is only approx. 165 MW. It is submitted that, the CPPs' expansion in terms of its capacity is much higher than the load requirement of the Oil Refinery due to:

- Volatility in fuel prices and flexibility available to the Petitioner to operate its Units in any combination for optimal utilisation of resources.
- High degree of reliability of operation which aides in competing in the dynamic market.

15.15 It is submitted that a consumer may have a Contract Demand / Plant Load depending upon its requirement of redundancy and reliability. However, the same does not affect the requirement on the grid, which is based on usage only. For example, in an Oil Refinery, where the redundancy required is very high (e.g. N+1 or N+2 depending upon the Consumer perception and design philosophy criticality and safety of the process and equipment), does not affect the capital investment made by the licensee in the grid. Capacity and configuration of a CPP is decided on the requirement of the industrial process in terms of reliability, redundancy and spatial requirement. For example, a refinery's requirement of 100 MW could be met by machine configuration of 2 x 100 MW, 3 x 50 MW, 4 x 35 MW, 5 x 25 MW for N+1 basis. For N+2 basis, it could be 3 x 100 MW, 4 x 50 MW, 5 x 35 MW, 6 x 25 MW. Each of these configurations will have implication in terms of capital cost and running cost in the form of fuel economy and operational flexibility. It is evident from the above that, configuring decision is independent of the licensee's investment in the system and would impose no additional burden on it.

15.16 Different types of load mandate different support from the grid. The support required by an Oil Refinery is way different than the support required by an arc furnace or heavy rolling mill or metallurgical industry, etc. The support required, by Arc furnaces and rolling mills is of continuous nature, while that of refinery's is of contingent nature. In its Judgement dated 01.06.2011, the Commission has relied upon the study conducted by Electrical Research and Development Association, Vadodara (ERDA) for the Chhattisgarh State Electricity Regulatory Commission in Petition No. 20 of 2009 (M). Unlike, arc furnaces or heavy rolling mill or metallurgical industry, Oil Refineries (like that of the Petitioner) have a steady load with no violent fluctuations, harmonics and where no wave chopping is involved.

15.17 The installed capacity of Petitioner's CPP far exceeds the capacity of the connected 220 kV transmission line. The said 220 kV transmission line has been set up as per specification approved by the Respondent No. 2 to meet the demand of 40 MVA in terms of Supply Code. The transmission line has a capacity on single circuit basis of 300 MVA. Transmission line capacity is seven times the Contract Demand and twice the load requirement of the Oil Refinery. The said 220 kV transmission line / network

has a maximum capacity to carry 300 MVA power in terms of the statutory mandates. Therefore, the support received / receivable from the grid by the Petitioner:

i. Cannot exceed the actual load requirement; and
ii. In any event cannot exceed the capacity of the transmission line.

15.18 Therefore, charging POC on the installed capacity of the CPP has no basis or reasoning. At no given point of time the Petitioner can receive support, from the grid, corresponding to the installed capacity of the CPP. Hence, it cannot be inferred that the transmission system starting from Petitioner's premises in the upstream manner is capable of meeting the full capacity of CPP in any way.

15.19 In every power system, the utility installs controlling and protective equipment. The controlling / protective equipment have the characteristics that the power flow in either way is limited by the parameters set in the upstream and downstream. Should the 'set-point' in either stream be breached, the protective / controlling equipment automatically isolate the consumer from the grid. In the Petitioner's case, the protective / controlling equipment are designed and set to isolate the system in a time graded manner, at a fraction of the CPP capacity. Thus, the installed capacity of the CPP cannot be considered for levying POC on the Petitioner.

15.20 POC is payable for the benefits received by the CPP from the grid. This has also been appreciated in the Commission's Judgement dated 01.06.2011. The benefits received by the CPP from the grid, if any, are received for import of power from the grid as a result of interconnection exchange (perturbation in the system) or in certain events as a consumer and not during export of power as a generator. As demonstrated above, there are certain limitations for import of power from the grid and as a result, limitations on the benefits received, if any, which in no event can extend to the installed capacity of the CPP. Historically, from 24.04.2006 (since inception / date of connection) till date, the maximum power recorded in the Petitioner's tariff meter is 94 MVA.

15.21 Therefore, in the peculiar facts and circumstances of the present case, as demonstrated hereinabove, POC cannot be levied and/or recovered from the Petitioner on the installed capacity of its CPP.

15.22 It is submitted that the Electricity Act was enacted for taking measures conducive to development of the electricity industry, promoting competition, protecting interest of consumers, rationalisation of electricity tariff, and promotion of efficient and environmentally benign policies. Section 86 of the Electricity Act provides for certain mandatory and discretionary functions to be carried out by the State Commission while discharging its duties as a regulatory body. One of the important mandatory functions prescribed under Section 86 of the Electricity Act is to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. The State Commission shall ensure transparency while exercising its power and discharging its

functions. In discharge of its functions, the State Commission shall be guided by the National Electricity Policy and the Tariff Policy as published by the Central Government. As per Clause 5.2.24 of the National Electricity Policy (NEP) dated 12.02.2005, provision regarding CPP was introduced in the Electricity Act with respect to not only securing reliable, quality and cost-effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry. Further, Clause 5.12.3 of the NEP provides that, industries in which both process heat and electricity are needed, are well suited for co-generation of electricity. A significant potential for co-generation exists in the country. Co-generation system needs to be encouraged in the overall interest of the energy efficiency and also grid stability. Further, Clause 6.3 of the Tariff Policy dated 06.01.2006 provides that captive generation is an important means to making competitive power available. Appropriate Commission should create an enabling environment that encourages CPPs to be connected to the grid. The Judgement dated 01.06.2011 of the Commission is not only contrary to the intent of levying POC but also contrary to the provisions / intent as set operation and grid connectivity of CPPs. The order also defeats the provisions of Sections 60 and 66 of the Electricity Act.

15.23 In light of the above, it is submitted that levy of POC based on the installed capacity of the CPP is totally unscientific, inequitable and unfair. It would be perverse and a travesty of justice if the installed capacity of a CPP is continued to be the basis of calculating the quantum of POC.

15.24 It is submitted that the Open Access Consumers are not required to pay POC / GSC as is evident from:

(a) Regulation 20(6) of the CERC (Open Access in Inter-State Transmission) Regulations, 2008, prior to its amendment dated 29.05.2009, in terms of which POC was specifically not payable by Open Access customers. The relevant extract of Regulation 20(6) is provided hereunder:

> *"(6) In an interconnection (integrated A.C. grid), since MW deviations from schedule of an entity are met from the entire grid, and the local utility is not solely responsible for absorbing these deviations, restrictions regarding magnitude of deviations (except on account of over-stressing of concerned transmission or distribution system), and charges other than those applicable in accordance with these regulation (such as standby charges, grid support charges, parallel operation charges) shall not be imposed by the State Utilities on the customers of inter-State open access." [Emphasis supplied]*

(b) Regulation 20(6) of the CERC (Open Access in Inter-State Transmission) (Amendment) Regulations, 2009 dated 29.05.2009 ('Open Access Regulations, 2009'), which provides as under:

"No charges, other than those specified under these regulations shall be payable by any person granted short-term open access under these regulations."

(c) The Statement of Reasons of the Open Access Regulations, 2009, wherein the Northern Region Load Despatch Centre had suggested that in order to have clarity on the issue amendment of Regulation 20(6), charges such as GSC and POC be specifically stated therein. However, the Hon'ble CERC while considering the suggestions received, was of the view that the intention required to be conveyed had been adequately conveyed in the proposed amendment regulations and no further change was required.

15.25 Therefore, if GSC and POC cannot be levied on Open Access consumers, it cannot be levied on consumers who are operating captive generating plants in parallel with the grid. In this regard, the observations of the Andhra Pradesh Electricity Regulatory Commission in its Order dated 23.07.2010 in R.P. No. 9 of 2010 in O.P. No. 20 of 2008, in the matter filed by Eastern Power Distribution Company of Andhra Pradesh Limited are noteworthy.

15.26 As against the afore-mentioned submission of the Petitioner, the Respondents contended that the Petitioner is wrongly seeking to challenge the levy of POC itself and also the methodology of relating such charges to the installed capacity of the CPPs. These have been adjudicated by the Commission in the order dated 01.06.2011 and the said order has attained finality. Further, the levy of POC and the methodology of relating it to the installed capacity has been settled by binding judicial precedents by Full Bench of the Hon'ble APTEL in the case of ***Chhattisgarh State Power Distribution Company Ltd Vs. Godawari Power Limited dated 18.02.2011 passed in Appeal No. 120 of 2009*** wherein it has been held has under:

"SUMMARY OF OUR FINDINGS:

26. (1) The 1st Respondent, Godawari Power & Ispat Ltd. is the Captive Power Plant. This plant is being operated in parallel with the grid. The relationship in regard to the parallel operation with the grid is between the Captive Power Plant, the 1st Respondent herein and the Appellant, the Distribution Licensee. This is not a dispute between the Appellant a Distribution Licensee and the Respondent No. 1 as a consumer of the electricity. This is a dispute regarding the levy of parallel operation charges to be levied and collected by the Appellant being a Distribution Licensee from the 1st Respondent, Captive Power Plant which is a generator. Therefore, the State Commission has got the jurisdiction to entertain and adjudicate upon this dispute under Section 86(1)(f) of the Electricity Act, 2003.

(2) ***The parallel operation charges are payable on the installed capacity of the Captive Power Plant.*** *The Captive Power Plant consists of a number of machines and equipments. Then capacity of Captive Power Plant cannot be considered in isolation of one or two equipments. MVA capacity of generating plant shall be*

worked out on the basis of designed power factor which is recorded in the nameplate of the generator. From the quantum of the steam generated by the three boilers installed in the premises of the 1st Respondent, only one 10 MW generating plant can run of a time along with the 30 MW power plant. Thus, the effective connectivity of generating plant with the grid is 40 MW and not 60 MW. Therefore, the 1st Respondent should be billed for parallel operation charges for 40 MW only and not for 60 MW."

(Emphasis supplied)

15.27 The Respondents denied that POC are not payable based on the installed capacity of the CPPs. It is submitted that the aspect of liability to pay the POC and the methodology of determination for computation of the POC, capacity to be considered etc. were decided by the Commission in the Orders dated 25.06.2004 and 01.06.2011. These Orders have become final and binding. These Orders have not been modified or reversed by the Appellate Court. The Petitioner herein did not challenge the above Orders. It is, therefore, not open to the Petitioner to raise basic issues on the liability to pay the POC qua the installed capacity of the power plant. Without prejudice to the above, the POC are with reference to the quantum of power that can be used from the CPPs for which support is taken from the Grid. The Grid support is for the entire installed capacity of the CPPs irrespective of the capacity that could be injected from the transmission line connected to the premise. It is wrong and denied that there are any peculiar circumstances of the case which leads to non-levy of POC on the Petitioner in respect of the premise where the CPPs have been installed. The POC levied on the Petitioner is consistent with the provisions of the Electricity Act, 2003. Levy of POC has been examined by the Full Bench of the Hon'ble APTEL, inter alia, in the case of ***Chhattisgarh State Power Distribution Company Ltd. Vs. Godawari Power Limited dated 18.02.2011 passed in Appeal No. 120 of 2009*** wherein it has held that POC are correctly leviable.

15.28 As against the above, the Petitioner denied that levy of POC and the methodology of relating the same to the installed capacity has been settled by binding judicial precedents.

15.29 The Petitioner submitted that the Order dated 18.02.2011 passed by the Hon'ble APTEL in Appeal No. 120 of 2009 titled ***Chhattisgarh State Power Distribution Company Limited Vs. Godawari Power Limited*** had been relied upon by the Commission in judgement dated 01.06.2011 only while determining the POC for the CPPs who had not signed the Settlement Agreement. The Hon'ble APTEL in its said Order dated 18.02.2011 had held that POC is payable on the installed capacity of the CPP based on the facts of that case and the study carried out which was specific to the system and load study for the State of Chhattisgarh, as such are distinct from the present case. The Hon'ble APTEL while dealing with the issue of POC, in the said Order dated 18.02.2011, was dealing with the industry mainly comprising of arc furnaces, rolling mills and metallurgical industries which primarily have CPPs in the State of Chhattisgarh. The nature of these industries is such that the same experiences

instantaneous surges and spikes while drawing power from the Grid. However, on the contrary majority of the CPPs in the State of Gujarat are co-generation plants and have negligible support that they received from the Grid. There are no surges and spikes noticed while drawing power from the Grid. It is submitted that each State has different investments and configurations of the power system. It is further submitted that different types of loads mandate different support from the Grid. The support required by an Oil Refinery is way different than the support required by an arc furnace or heavy rolling mill or metallurgical industry, etc. The support required by arc furnaces and heavy rolling mills are of continuous nature while that of Oil Refineries is of contingent nature.

15.30 The Petitioner further submitted that in the judgement dated 01.06.2011, the Commission has relied upon the study conducted by ERDA, Vadodara, for the Chhattisgarh State Electricity Regulatory Commission. It is submitted that, unlike arc furnaces or heavy rolling mill or metallurgical industry, Oil Refineries (like that of the Petitioner) co-generation plants have a steady load with no violent fluctuations, harmonies and where no wave chopping is involved. Further, unlike the State of Chhattisgarh, there are no industries in Gujarat that creates problems such as phase imbalance, load spikes, harmonics, etc. The Judgement of the Hon'ble APTEL will not be applicable to the facts of the present case. Even otherwise, the Commission in its Judgement dated 01.06.2011 has categorically stated that POC is to be paid as a compensation for the support received by the CPPs from the Grid. As explained above, the support received by co-generation plants are quite varied and distinct from the support received by the metallurgical industry, arc furnaces, rolling mills, etc. and hence no parity can be drawn between the two.

15.31 The Petitioner denied that the capacity and the quantum of captive consumption by the Petitioner's CPP vis-à-vis the quantum of sale of power generated from the Units of the Petitioner's CPP are irrelevant to the present issue. In the Petitioner's case there exist unique / specific facts / circumstances which necessitate why POC should not be leviable on the installed capacity of the Petitioner's CPP.

15.32 The Petitioner has stated in the Petition that in terms of the aforesaid alternative submissions if POC is considered on the monthly average load of the Petitioner vis-à-vis its installed capacity and charged at the rate of Rs. 26.50/kVA/month, the Petitioner shall be entitled to a refund of Rs. 102,03,88,112/-. In this regard, the Petitioner has submitted the following table:

POC Refund Amount as per Alternative Prayer
(Considering Monthly Avg. Load and POC @ Rs. 26.5/KVA)

PARTICULARS	AMOUNT (RS.)
Total POC amount paid by NAYARA from June-2011 to June-2023	2,02,94,56,170
POC required to be paid @ Avg. Load basis for 111 months	63,77,51,486
Refund Amount	1,39,17,04,684

15.33 In terms of the alternative submissions, if POC is considered with the cap of Rs. 8 lakhs per month, the Petitioner shall be entitled to a refund of Rs. 1,91,34,56,170. In this regard, the following table is noteworthy-

POC refund amount as per alternative prayer:

PARTICULARS	AMOUNT (RS.)
Total POC amount paid by NAYARA from June-2011 to June-2023	2,02,94,56,170
POC required to be paid @ Rs. 8 lakhs per month	11,60,00,000
Refund Amount	1,91,34,56,170

15.34 The Respondent has pointed out that the Petitioner has in its written submission stated that it is not challenging the order dated 01.06.2011 passed by the Commission on the levy of POC and submissions have been made on the admissibility of POC in the written submission dated 05.06.2015. Further, issue of capacity less than installed to be considered has been raised in the Written Submissions dated 17.08.2020.

15.35 It is opposed by the Respondents that the Petitioner has made submissions based on alleged peculiarity in the operation of a refinery. The Petitioner cannot indirectly challenge the scope of the order dated 01.06.2011 in the present proceedings. The order 01.06.2011 is clear and specific, it does not make any distinction on the basis of the nature of the operation, as in the case of refinery. This was not challenged by the Petitioner and therefore the POC as per the Order dated 01.06.2011 would apply which is on installed capacity. The submission made in regard to the above are liable to be rejected as being outside the scope of present petition where the issue involved is limited to the applicability of the Settlement Agreement for the capacity of 220.48 MW and 302.8 MW for the period of 01.06.2011 onwards. The reasons and aspects related to the requirement and capacity of the CPPs of the Petitioner referred by the Petitioner are not relevant. The issue is that the Petitioner has CPPs which are connected to the grid and enjoying the parallel operation facility therefore the Petitioner is liable to pay the POC for such capacity of connected CPPs. So long as the CPPs are connected, the POC is payable irrespective of how much capacity the Petitioner requires in the consuming units.

15.36 According to the Respondent, the decision of the Hon'ble Appellate Tribunal in ***Chhattisgarh State Power Distribution Company Limited v. Godawari Power Limited in Appeal No. 120 of 2009 dated 18.02.2011*** has recognised that the POC is on installed capacity. The attempt of the Petitioner to distinguish the said case is erroneous and misconceived when the said case has been referred to by the Commission in the Order dated 01.06.2011 itself. There is no merit in the contention of the Petitioner - the facts of the case or system and load study do not change the finding that the POC is on installed capacity.

15.37 The Commission in Order dated 01.06.2011 had referred to the above decision and had also provided for POC on installed capacity. The alleged meeting of FOR dated 18.01.2006 and the Order dated 31.12.2008 by Chhattisgarh Commission or Order dated 23.07.2010 by Andhra Pradesh Commission referred to by the Petitioner was also prior to Order dated 01.06.2011 and therefore cannot be the basis to seek any amendment of Order dated 01.06.2011 which in any case is not permissible. Further, the Orders are of no assistance to the Petitioner.

15.38 The Order dated 01.06.2011 had not provided any exemption for the Petitioner and the Petitioner had not challenged the Order dated 01.06.2011 at the relevant time and had not raised any issue on differences in the industries or refineries.

15.39 The Petitioner cannot claim to challenge the basis of levy of POC in the present proceedings and that too at this belated stage. The Order dated 01.06.2011 was not challenged at the relevant time and therefore the Petitioner cannot now challenge the same belatedly. The present proceeding is not for determination of POC which already stands determined and therefore the alleged specific characteristics of the Petitioner may not be relevant in the present case. We note that the Commission passed Order dated 01.06.2011 after hearing all the stakeholders and considering the expert body's report, which order governs the field.

16. From the above, it appears that the Petitioner has made a new prayer for consideration of some suitable method to levy POC, especially for the CPPs of the Petitioner considering the nature of the industry, peculiarity of requirement of the Petitioner and actual support received which is required to be quantified. This Petition can be divided into two parts: first part is relating to alleged wrongful levy of POC on the entire capacity in context of the settlement agreement and Order dated 01.06.2011, meaning thereby that, as per the interpretation of the Petitioner, not only the existing capacity of 77 MW at the time of settlement agreement but all subsequently added capacity i.e. CPPs established at different points of time should also be automatically considered as covered under the settlement agreement, which cannot be accepted.

16.1 The second part is relating to the methodology of POC. It appears from the Petition that the Petitioner has phase-wise at different point of time commissioned / established CPPs as under:

a. 77 MW: on 13.09.2006
b. 220.48 MW : Phase-I on 28.10.2010 and Phase-II on 27.01.2011
c. 302.8 MW : on 24.6.2012, 15.09.2013 and 15.12.2012

16.2 It is the case of the Petitioner that the support / advantages received by the CPPs on operating in parallel with the grid, in the nature of systems stability, reliability of support, uninterrupted power supply are supports / factors which are already factored in while deciding the quantum of the Contract Demand. For its emergency requirements, the support received from the grid should be considered keeping in mind the probability

of loss of partial / entire CPP capacity, corresponding to the load for the purpose of calculating POC. Any excess drawal from the grid by the CPP (as a consumer) over and above the Contract Demand is accounted for and attracts severe penal consequences in terms of tariff formulated for respective categories.

16.3 We note that the Petitioner has a Contract Demand of 40 MVA, which is met through the 220 kV transmission line designed as per the Respondents' requirements. The demand from the grid is only of stand-by nature. The Petitioner has claimed that in the past 12 months, the Petitioner has been billed for 1.5 million units at 0.5% load factor based on its Contract Demand, which is evident from the past 12 months bills (FY 2013-14) issued by the utility and the Petitioner has also installed load shedding systems to restrict demand in case of exigencies.

16.4 We also note the argument of the Petitioner that when connected to the grid, CPP also provides or contributes to the pool of service to the grid and helps in reducing the voltage and frequency excursions in the grid which has all other consumers connected to it.

16.5 The Petitioner has stated that different types of load mandate different support from the grid. The support required by an Oil Refinery is different from the support required by an arc furnace or heavy rolling mill or metallurgical industry, etc. The support required by Arc furnaces and rolling mills is of continuous nature, while that of refinery is of contingent nature. In its Judgement dated 01.06.2011, the Commission has relied upon the study conducted by Electrical Research and Development Association, Vadodara (ERDA) for the Chhattisgarh State Electricity Regulatory Commission in Petition No. 20 of 2009 (M). Unlike arc furnaces or heavy rolling mill or metallurgical industry, Oil Refineries (like that of the Petitioner) have a steady load with no violent fluctuations, harmonics and where no wave chopping is involved.

16.6 We note that the Petitioner commissioned its latest CPP in the year 2012, i.e. after the Order dated 01.06.2011 of the Commission in Petitions No. 256 of 2003 and No. 867 of 2006 and the POC has been levied according to this Order which has not been challenged till today. The Petitioner has though criticised the said Order but has specifically stated that it is not being challenged. It is required to look at the relevant paragraph of the said Order, which is reproduced as under:

> "*23.29 It is observed that parallel operation is beneficial to the CPP and at the same time, it is true that some benefit is also accrued to the grid. Considering the Pari passu it is proposed to levy 50% of the transmission and distribution related fixed costs on the CPP. Accordingly, the Commission decides that the POC should be levied at Rs. 26.50 per KVA per month for the installed capacity of the CPP."*

16.7 The above para clearly mentions that POC is to be levied on the installed capacity of the CPP which has been paid by the Petitioner up till now. The Respondents contended

that the Petitioner is wrongly seeking to challenge the levy of POC itself and also the methodology of relating such charges to the installed capacity of the CPPs. These have been adjudicated by the Commission in the order dated 01.06.2011 and the said order has attained finality. The Order has not been modified or reversed by the Appellate Court. The Petitioner herein did not challenge the above Order.

16.8 The Respondent has pointed out that the Petitioner has in its written submission stated that it is not challenging the order dated 01.06.2011 passed by the Commission on the levy of POC and submissions have been made on the admissibility of POC in the written submission dated 05.06.2015. The issue of capacity less than installed to be considered has been raised in the Written Submissions dated 17.08.2020. The present proceeding is not for determination of POC which already stands determined and therefore the alleged specific characteristics of the Petitioner are not relevant in the present case.

16.9 At the cost of repetition, we again note that the total installed capacity of the Petitioner's CPP is 600.28 MW. However, on 23.07.2014, the Petitioner de-synchronised one Unit (i.e. 110.24 MW) of the 220.48 MW Phase-1 Expansion Units of its CPP. Currently, the Petitioner's 490.04 MW CPP capacity is synchronised with the GETCO grid. The entire load of the Petitioner's Oil Refinery including the CPP's auxiliary load is approximately 165 MW. The expansion of the CPP, in terms of capacity is much higher than the total requirement of the Petitioner's Oil Refinery. Thus, the Petitioner has sufficient Spinning Reserve to cater to its load requirement in case of any loss in its CPP capacity. Therefore, reliance of the Petitioner for any support received from the grid is minimal / marginal and is compensated by the Contract Demand charges paid by the Petitioner for 40 MVA (i.e. approximately Rs. 14.07 Crores per annum). This is also evident from the historical maximum demand recorded from the GETCO grid, whereby the Petitioner has breached its Contract Demand (i.e. 40 MVA) only on 14 occasions from the year 2009 i.e. a period of five years. Even otherwise, these breaches in the Contract Demand are minor and have lasted for only a few minutes, thereby causing minimal impact on the GETCO grid.

16.10 The Petitioner has submitted that POC, if any, to be charged from the CPP, should be reflective of the actual support utilised / received / contracted by it on being connected in parallel to the grid. It is submitted that, these charges ought to be levied only in cases where such support charges have not been accounted for. The levy of POC on the basis of the installed capacity of the CPP is not in consonance with the universally accepted fact that, POC are charges payable for compensating the benefits received by the CPP from generating capacity of transmission Licensee.

16.11 In this connection, it is required to refer to the following observations of this Commission in its Order dated 01.06.2011 in Petitions No.256 of 2003 and 867 of 2006:

> *"23.18 Now we deal with the issue of methodology of computing parallel operation charges. As regards the rate of Parallel Operation Charges, the*

Commission finds that different methodologies have been suggested by the consultants, the CEA and the Chhattisgarh Electricity Regulatory Commission. The erstwhile GEB had also decided certain rates in its Commercial Circular No. 706, which were found acceptable to many CPPs, which is one of the two methods agreed between parties on the suggestion of the Hon'ble High Court. A broad consensus was reached between the parties, which has been endorsed by the Hon'ble High Court in its order dated 28.04.2009. We feel that the charges which are to be applied to parallel operation of CPP with grid must be fair and scientific.

23.19 There are served methodologies for computing the grid support charges
a. Based on the instantaneous demand recorded in the system connected to the CPPs.
b. Based on power quality parameters
c. Based on the size of the largest motor connected to the CPP or size of the interconnecting transformer between the grid and the CPP.
d. As a percentage of captive generating capacity as contracted demand.
e. Based on operating/Spinning reserve.
f. Based on minimum support availed from particular voltage level.

23.20 It is observed that the first and second methods are technically sound but would result in special measuring instruments. In this method, the transients in the system would also be recorded which is part of the inherent system design and would be very difficult to distinguish between the transients caused by the consumers and by the system. Hence this method is not considered for the basis for the determination of POC.

23.21 The third method based on largest motor installed in the consumer premises or size of interconnecting transformer appears to be easiest to implement. However, this method would not account for all the services availed by the consumer for parallel operation and also, it would call for inspection to verify the assets in the consumer premises which may lead to dispute.

23.22 The fourth method based on certain percentage of captive generation capacity, suffers from lack of technical justification and hence not considered.

23.23 The fifth method based on operating/spinning reserve hinges on the concept of reserve requirement of the industrial consumers who run their captive units on constant power mode and captive unit does not absorbing any demand variation. Though this method captures the major issue of reliability requirement of the CPP consumers in availing POC, it does not capture other supports availed from the Grid. Further, it is observed that any drawl from the grid is duly accounted and paid for by the consumers. In the context of Gujarat State, it is found that there is a gap between demand and supply and the same will vary from time to time. The GUVNL on behalf of distribution licensees has initiated competitive bidding

process for procurement of power to meet the requirement of power supply in the State. Therefore, there is no justification to grant parallel operation charges on spinning reserve basis.

23.24 The last i.e. the sixth method based on the minimum support availed from particular voltage level appears to be more reasonable on following accounts.

a. This method takes into consideration the Base MVA support taken from the grid by a CPP as well as Base MVA support given to the grid by it.

b. This method considers the advantages of parallel operation to both the captive power plant and to the utility. Thus, this method does justice, conceptually, to both the utility as well as CPP.

c. This method is based on the fault level support available at point of common coupling, i.e. the point at which the CPP is connected with the grid. It is observed that most of support services (ancillary services) provided to CPP consumers, such as voltage regulation, stability, reliability and absorbing load variation/fluctuation are dependent on the firmness of the grid. The firmness of the grid is characterized by the fault level of the system.

d. Due to higher fault level of the grid at the point of common coupling, the flow of pollutants like harmonics, negative phase sequence current, etc. are absorbed by the grid due to low impedance path of the grid as compared to that of CPP generator.

e. As the fault level of grid is higher, it results in better voltage regulation to CPP load.

f. Stability of a system is defined as P = E x V Sin _/X. The lower the impedance, higher will be the stability. Since grid is more stable, it provides stability to CPP.

23.25 Considering the above observations, we decide to adopt minimum support avail method for levy of parallel operation charges."

16.12 Thus, the Commission passed the above order after hearing all the parties and the Petitioner was one of the parties, which order has attained finality. We note that the Petitioner has urged regarding peculiar nature of operation and power requirement in its industry. Determination of POC or methodology of levy of POC afresh requires hearing of all stakeholders and detailed study. We note that the entire or all CPPs (units) of the Petitioner are connected with the grid for their simultaneous use at a particular point of time being the effective installed capacity and, therefore, in view of the above discussion, we cannot accept the alternative prayers of the Petitioner, though the entire load of the Petitioner's Oil Refinery including the CPP's auxiliary load is approximately 165 MW only, as against the Petitioner's entire 490.04 MW CPP capacity, i.e. installed capacity, synchronized with the GETCO grid. In case any revisional exercise regarding POC is undertaken in future, the Petitioner will be at liberty to approach the Commission.

16.13 After rejecting the prayers of the Petitioner in the foregoing paragraphs regarding illegal levy and refund of POC, we further note that the present Petition has been filed belatedly on 09.10.2014 though the Phase-3 CPP was lastly synchronised on 15.12.2012. Till date, the Petitioner has been paying the POC accordingly without raising any objection, and it has challenged the POC levied.

16.14 Having regard to the facts and circumstances as discussed above, we do not accept the alternative prayers of the Petitioner and hold Issues No. 3 and 4 in negative, and pass the following Order:

ORDER

17. This Petition is rejected. Interim Application, if any, shall also stand disposed of.

Sd/-	Sd/-
(Mehul M. Gandhi)	**(Anil Mukim)**
Member	Chairman

Place: Gandhinagar
Date: 29/05/2024