BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR

Petition No. 1740 of 2018

In the matter of:
Petition for issuing necessary direction to Gujarat State Load Despatch Centre (SLDC) in respect of recovery of transmission charges for Short Term Open Access availed for bilateral and collective transactions in accordance with Section 33 (4) read with Sections 33 (1) and 32 (3) of the Electricity Act, 2003 and invoking power under Regulation 45 of GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011.

Petitioner:	Torrent Power Limited (TPL) Samanvay, 600, Tapovan Ambawadi, Ahmedabad 380 015
Represented by:	Learned Advocate Ms. Deepa Chawan, Shri Chetan Bundela and Ms. Luna Pal
	V/s
Respondent:	Gujarat State Load Dispatch Centre, 132 KV Gotri Sub- Station Compound, Gotri Road, Vadodara-390021.
Represented by:	Learned Advocate Ms. Ranjitha Ramachandran with Shri M.G. Gadhvi and Shri N.N. Shaikh

CORAM:
Shri Anand Kumar, Chairman
Shri P. J. Thakkar, Member

Date: 22/07/2020

ORDER

1. This Petition has been filed by the Torrent Power Limited- Distribution Licensee for the Ahmedabad, Gandhinagar and Surat license areas seeking following prayers-

   1.1. To direct the Respondent to withdraw the supplementary invoices raised by the Respondent in respect of the short term transactions.

1.2. To direct the Respondent to adhere to the provisions of the OA Regulations and to rectify the methodology of granting standing clearance to ensure there is no duplication of charges for procurement of power from contingency market.

2. Facts provided in the Petition are as under-

2.1. As a distribution licensee, the Petitioner has been sourcing power from short-term bilateral sources and power exchange. In turn, the Respondent has been raising the invoices for short-term open access for bilateral and collective transactions in line with the provisions of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 read with its Amendments.

2.2. The Petitioner has been directed by the Respondent to pay additional amount of state transmission charges towards the short term transactions by way of raising supplementary bills for the past period i.e. April-2017 to Mar 2018 in the month of April 2018. Similarly, the Respondent has also raised supplementary invoices subsequently for the month of April, May and June 2018. The Petitioner humbly submits that these invoices are raised selectively contrary to the applicable Regulations and also against the principles of natural justice.

2.3. In connection with the supplementary invoices raised for past period, it is submitted that-

a. The Commission has in exercise of the powers conferred by Section 181 of the Electricity Act, 2003, notified the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 vide its notification no. 3 of 2011.

b. Thereafter, the Commission vide its notification no. 3 of 2014 dated 12th August, 2014 notified the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) (Second Amendment) Regulations, 2014. The Regulation 21 (2) (ii) provides as under:

"(ii) By Short-Term Open Access Customers:
Transmission Charges payable by a Short-Term Open Access customer shall be determined as under:
Transmission charges payable by Short-term open access customers
= TTC /(ACs× 8760) (In Rs./ MWh)

Where; TTC = Total Transmission Cost determined by the Commission for the transmission system for the relevant year (in Rs.) and ACs = Sum of capacities allocated to all long-term and medium-term open access customers in MW.

Provided that transmission charges for short-term open access shall be payable on the basis of the energy actually scheduled for Short-Term transactions."

c. Thus, the Commission, vide specific Regulation meant for Open Access in the State of Gujarat, has already specified the methodology for computation of transmission charges for all short term open access users i.e. on per unit basis.

d. Further, the CERC (Open Access in inter-State Transmission) Regulations and the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 provides for Short term Open Access charges on per unit basis.

e. The Petitioner would like to humbly submit that the Respondent has raised the supplementary invoices for the past period on the basis of Rs./MW/Day by interpreting the GERC MYT Regulations, 2016 in isolation, which is against the very intent of the Regulations.

f. Additionally, this amounts to a change in the practice (i.e. billing on basis of Maximum MW scheduled instead of per unit basis) with retrospective effect despite the approval given by the Respondent.

g. It is pertinent to mention the provision in the Procedure for Scheduling prescribed by CERC Short-Term Open Access in Inter-State Transmission (Bilateral Transaction).

"1.6 No retrospective adjustments for short-term open access charges shall be made for the already approved short-term open access bilateral transactions."

Thus, any commercial transactions concluded based on prevailing short term OA rates cannot be reviewed subsequently because the commercial decision is based on the prevailing charges. Accordingly, the short term transactions attained finality once concluded.

h. Further, if the interpretation of the Respondent is to be considered then the proviso to Regulation 21(2) (ii) of the GERC Open Access Regulations, 2011 read with Amendments will be rendered otiose.

i. It may kindly be noted that the supplementary invoices raised by the Respondent for the past periods by altering the implementation of STOA Regulations (i.e. Rs./MW/day instead of Rs./MWh) would ultimately burden the consumers of the Petitioner.

2.4. It is submitted that the Petitioner, being the distribution licensee, has universal service obligation to supply quality and reliable power to its consumers. Accordingly,

the Petitioner also sources power from contingency market of power exchanges in case of forced outage/non-availability of its supply sources and/ or abrupt demand surges. This is done to ensure reliable power to the consumers and grid compliance.

2.5. In connection with the duplication of charges for power sourced for part of the day from contingency market of Power Exchange, it is submitted that-

a. The Respondent used to issue the Concurrence for purchase of power from contingency market of power exchange. Subsequently, it has raised supplementary invoices for sourcing power from contingency market on Rs/MW/day basis by relying selectively on the GERC MYT Regulations, 2016 although the same falls within the jurisdiction of RLDC.

b. The Petitioner is mandated to pay for the entire day for sourcing of power from the contingency market for part of the day instead of per unit basis as per the provisions of OA Regulations. Further, in contingency market of power exchange, if power is arranged from different sellers, the Respondent is treating each transaction separately even for the same MW quantum and is raising multiple invoices for payment of charges. The Petitioner submits that these invoices are raised with retrospective effect for past period of FY 2017-18. This practice of raising supplementary invoices has impacted only the private distribution licensee like the Petitioner.

c. The GERC Open Access Regulations do not envisage any discrimination between the OA Customers and neither does it provide for any discrimination between short term transactions through power exchange and bilateral/other contracts.

2.6. It is also stated in the Petition that-

a. Supplementary Invoices raising demands / claims on the Petitioner for the past period is contrary to statutory Regulations.
b. The retrospective demand raised by the Respondent on the Petitioner is contrary to law.
c. The Respondent has ignored the statutory provisions as applicable to the present case.
d. The specific statutory provisions specifically and specially applicable to the transaction have been deliberately and intentionally ignored.
e. The invoices have been raised without affording any opportunity to the Petitioner to deal with the claims / demands by the Respondent.

2.7. The Petitioner further submitted that they have been aggrieved by the action of the Respondent, which has infringed and acted contrary to the obligations cast on it under Section 32 (3) of the Electricity Act, 2003 and this Commission has the

authority to consider the matter in accordance with Section 33 (4) read with 33 (1) and 32 (3) of the Electricity Act, 2003.

2.8. The Petitioner further submits that Regulation 45 of the GERC Open Access Regulations provides as under:
"If any difficulty arises in giving effect to any of the provisions of these regulations, the Commission may by general or special order, direct the State Transmission Utility, State Load Dispatch Centre, intra-State licensees and the open access customer, to take such action, as may appear to the Commission to be necessary or expedient for the purpose of removing difficulties."

3. Respondent Gujarat State Load Dispatch Centre in its reply dated 26.10.2018 submitted that-

3.1. The Respondent, State Load Dispatch Centre (hereinafter referred to as 'SLDC') has acted in accordance with the GERC (Multi-Year Tariff) Regulations 2016 (hereinafter referred to as "MYT Regulations") read with Tariff Orders dated 31.03.2017 and 31.03.2018 passed by the Commission determining the transmission charges in respect of Gujarat Energy Transmission Corporation Limited (hereinafter referred to as 'GETCO'). Commission to kindly condone the delay in filing the reply to the Petition.

3.2. There can be no dispute on the fact that the Commission is the appropriate Commission to determine the transmission charges for the transmission network of GETCO. There is also no dispute on the fact that the Petitioner has availed open access on the transmission network of GETCO and is therefore liable to pay the transmission charges for such availing of open access.

3.3. The Petitioner had sought the facility of Short Term Open Access on the state transmission system to procure electricity through bilateral transaction as well as collective transactions. The SLDC has granted consent for short term open access for bilateral transaction and for the collective transaction. The above consent was granted after considering the surplus capacity available after allotment to the Long and Medium Term Open Access and once granted, such capacity is accounted for and kept reserved for the Petitioner.

3.4. It is submitted that the MYT Regulations deal with the tariff determination for the transmission system and it is provided that:

"72 sharing of charges for Intra-State Transmission Network:

72.2 The short-term users of the transmission system shall pay transmission charges on Rs/MW/day basis, in accordance with the following formula:

TC (Rs/MW/day) = (Transmission ARR÷SCC) ÷365,
Where,

TC (Rs/MW/day) = transmission charges payable by the short-term user of the transmission system;

Transmission ARR = Aggregate Revenue Requirement of the Transmission Licensee, determined in accordance with Regulation 68 of these Regulations;
SCC = sum of capacities contracted in MW by all long-term users and medium-term users of the transmission system:

72.3 For short-term collective transactions through power exchanges, Transmission Charges shall be denominated in Rs/kWh terms, in accordance with the following formula:

TC (Rs/kWh) = Transmission ARR÷Total units wheeled,
Where,

TC (Rs/kWh) = Transmission Charges payable in the case of short-term collective transactions through power exchanges;

Transmission ARR = Aggregate Revenue Requirement of the Transmission Licensee, determined in accordance with Regulation 68 of these Regulations;

Total units wheeled = total energy units wheeled through the transmission system, which shall be equal to the total energy input into the intra-State transmission system during the financial year.
……

74.2 The charges for intra-State transmission usage shall be shared among various TSUs as specified in these Regulations.".

3.5. The collective transactions fall within Regulation 72.3 and bilateral transactions fall within Regulation 72.2. The Regulations recognize that the transmission charges for bilateral transactions are payable at Rs./MW/day i.e. capacity for which open access is granted and transmission charges for collective transactions are payable at Rs./kwh i.e. energy actually scheduled.

3.6. In keeping with the above, the Commission has passed Tariff Orders for GETCO dated 31.03.2017 and 31.03.2018. The Tariff Order recognizes the Transmission Tariff on Rs./MW/Day and only for collective transactions, the transmission charges

are on Ps/kwh basis. Therefore for bilateral transactions, the transmission charges are on Rs./MW/Day.

3.7. The Petitioner has not challenged the above Order and therefore the Petitioner cannot claim applicability of transmission charges contrary to the Tariff Order.

3.8. It is submitted that the above transmission charges are required to be paid by the open access customers such as the Petitioner. SLDC has only sought to recover such transmission charges as determined by the Commission and there is no excess recovery. The Supplementary Invoices raised by SLDC for the correct amount cannot be invalid merely because they were raised subsequently. There is no revision of transmission charges but merely a correction of the invoices. The original invoices were raised on the basis of schedule capacity (kwh) inadvertently. However once the error was realized, SLDC raised Supplementary Invoices for the differential transmission charges (on Rs/MW/day) for the period.

3.9. It is denied that the SLDC is seeking to retrospectively revise the transmission charges. There is no revision in the applicable transmission charges but SLDC is merely seeking to recover the applicable transmission charges. There had been an under-recovery of the transmission charges for the relevant period and the SLDC had sought to recover the said amount. SLDC cannot be prevented from recovery of legitimate dues. It is only a case of rectification of error made earlier in application of the Regulations and the Tariff Orders of the Commission. The principle of recovery through revised invoices has already been upheld by this Commission in Petition No. 1440 of 2014 dated 24.03.2015 and Petition No. 1558 of 2016 dated 08.09.2017. In the decision dated 08.09.2017, the Commission has rejected a similar contention by the Petitioner therein:

"7.26. Now we deal with the issue as to whether the Respondent is eligible to recover the dues for FY 2012-13 and FY 2013-14 as claimed in impugned invoice dated 16.4.2015 and 28.1.2015 retrospectively. We note that the transmission charges is recoverable from the Short Term Open Access consumers by the SLDC as per the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and amendment made in it. The aforesaid Regulations are a sub-legislation having statutory force. If the charges recoverable under the aforesaid Regulations were wrongly recovered by the SLDC, there is no restriction to correct the error and recover the correct amount. Further, the recovery of charges is counted in the ARR of the licensee and given effect in the Long-Term Open Access and Medium-Term Open Access customers charges. Hence, the plea of the Petitioner that the recovery of transmission charges retrospectively for FY 2012-13 and FY 2013-14 by the Respondent is not legal and is not acceptable and valid. Hence, the said prayer of the Petitioner is rejected."

3.10. It is submitted that the Petitioner has not referred to the MYT Regulations or the Tariff Orders and is only relying on the Open Access Regulations. The MYT Regulations, 2016 is a subsequent Regulations and the Commission being well aware of the Open Access Regulations has provided for transmission charges at Rs./MW/day. It is well settled principle that a later Act would prevail over an earlier Act. In this regard following judgments are referred:

Sarwan Singh and Another v. Shri Kasturi Lal (1977) 1 SCC 750
"21. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one……."

Solidaire India Ltd v. Fairgrowth Financial Services Ltd and Others (2001) 3 SCC 71
"9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd v. State Industrial & Investment Corpn of Maharashtra Ltd; Sarwan Singh v. Kasturi Lal; Allahabad Bank v. Canara Bank and Ram Narain v. Simla Banking & Industrial Co. Ltd"

This is particularly when Regulation 74.2 specifically provides as under:
"74.2 The charges for intra-State transmission usage shall be shared among various TSUs as specified in these Regulations."

3.11. It is stated that the Commission being aware of the Open Access Regulations, specifically provided for transmission charges for bilateral transaction on Rs./MW/day basis.

3.12. In fact the Commission, being aware of the Open Access Regulations and the MYT Regulations, has passed Tariff Orders dated 31.03.2017 and 31.03.2018 providing for transmission tariff at Rs. /MW/day. Once the tariff order has been passed interpreting the Regulations, there cannot be any contention contrary to the above Order. The Petitioner has not challenged the Tariff Order dated 31.03.2017 and therefore the said Order would apply to 2017-18.

3.13. It is further submitted that the CERC Open Access Regulations only provides that the transmission charges cannot be revised retrospectively. However, this does not prevent the recovery of the applicable transmission charges. In the present case, there has been no revision of transmission charges by the Commission. There had been an under-recovery of the transmission charges for the relevant period and the SLDC had sought to recover the said amount. This does not amount to revising the transmission charges retrospectively. The issue is not of retrospective effect but of correction of the invoices. The obligation of the Petitioner to ensure supply of power

cannot mean that the Petitioner is not liable to make payments for open access as determined by the Commission.

3.14. The Supplementary Invoices have been raised by SLDC in accordance with the same. It is denied that it is only the RLDC which has the jurisdiction in this regard. The Regulations framed by the Commission and Tariff Orders passed are to be implemented by SLDC. It is also submitted that though Petitioner has used the platform of power exchange for contingency requirement of power, but all the contingency applications/transactions were of bilateral in nature.

3.15. It is submitted that each bilateral transaction/application by Petitioner was separate. As per Regulations each bilateral transaction/application is to billed separately by Nodal RLDCs and SLDC has raised supplementary invoices for differential amount only as per Rs/MW/day transmission tariff. SLDC has raised the supplementary invoices per transaction/application and not multiple invoices for the same transaction/application. The Petitioner had entered into bilateral transactions and therefore each transaction is separate. RLDC had shown inability to collect the transmission charges in Rs/MW/Day and therefore SLDC raised Supplementary Invoices.

3.16. The SLDC has issued supplementary invoices to all such open access users who have scheduled power for the part of the day through bilateral transactions. There is no requirement of affording any opportunity to the Petitioner with regard to raising of invoices in accordance with the Tariff Orders and Regulations.

4. The Petitioner in its rejoinder reply dated 07.09.2019 submitted that-

4.1. The Respondent has contended that supplementary invoices raised by the SLDC for the correct amount cannot be invalid merely because they are raised subsequently. Further, there is no revision of transmission charges but merely a correction of the invoices. In this regard, the Petitioner would like to submit that the Respondent has raised the supplementary invoices for the past period on the basis of Rs./MW/Day by interpreting the GERC MYT Regulations, 2016 in isolation and in violation of the GERC Open Access Regulations, 2011; which is against the very intent of the Regulations. The billing on basis of Maximum MW scheduled as per GERC MYT Regulations, 2016 instead of per unit basis as per GERC Open Access Regulations, 2011 is contrary the provisions of the GERC OA Regulations. Therefore, this is not merely a correction of the invoices but revision of the invoices contrary to the Regulatory provisions.

4.2. Further, the reliance placed by the Respondent on the decisions of the Commission in petition no. 1440/2014 and 1558/2016 are not relevant and are clearly distinguishable from the present case. In the present case, the issue raised by the

Petitioner is in respect of violation of statutory Regulations i.e. GERC OA Regulations, 2011, which is in the nature of subordinate legislation. Accordingly, the judgment of the Hon'ble Tribunal upholding the Commission's order in Case no. 1558/2016 is not applicable in the present case.

4.3. Further, the Respondent has contended that MYT Regulations 2016 is a subsequent Regulation and Commission being well aware of the Open Access Regulations has provided for transmission charges at Rs/MW/day. The Respondent has further contended that it is a well-settled principle that a later Act would prevail over an earlier Act. In this regard, the Petitioner would like to submit that the contentions taken by the Appellant are fallacious and untenable since there is no inconsistency in the Regulations. The GERC Open Access Regulations provide as under:

"3. Definitions
(10) In case of inconsistency between any provisions of these regulations and any other regulations or order passed by the Commission the provisions of these regulations shall prevail"

Accordingly, in case of any inconsistency between these Regulations and any other Regulations/orders passed by the Commission, the Open Access Regulations will prevail. The bare perusal of the GERC MYT Regulations, 2016 also reveals that no such provision exists in the GERC MYT Regulations, 2016.

4.4. The Respondent has also contended that RLDC does not have the jurisdiction about contingency transactions. The Regulations framed by the Commission and tariff orders passed are to be implemented by SLDC. In this regard, it may kindly be noted that Hon'ble CERC has stipulated the Procedure for Scheduling of Short-Term Open Access (Bilateral Transaction) in accordance with the various provisions of the CERC (Open Access in inter-State Transmission) Regulations, 2008. The Procedure is applicable to the Applications made for scheduling of Bilateral Transactions by availing of Short-Term Open Access for use of the transmission lines or associated facilities with such lines on the inter-State transmission system. As per the procedure,

"13.1.4. The Transmission charges for the use of the State network shall be in Rs/MWh, as determined by the respective State Commission and the same shall be intimated to RLDCs by concerned STU. Provided that in case the State Commission has not determined the Transmission charges, the charges for use of the respective State network shall be payable at the rate of Rs.80/MWh for the energy approved."

Thus, the CERC (Open Access in inter-State Transmission) Regulations and the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 provides for Short term Open Access charges on per unit basis to be determined by the State Commission. Hence, there is no question of collection of transmission charges by RLDC/SLDC on Rs/MW/Day basis for usage of transmission network. Without prejudice to the above, regarding the GERC Open Access Regulations, it may kindly be noted that neither the Regulations envisage any discrimination between short term transactions through power exchange and bilateral/other contracts.

4.5. The Respondent has stated that all contingency applications/ transactions are bilateral in nature. Further, each bilateral transaction/ application is separate and as per Regulations, each bilateral transaction/ application is to be billed separately. The Respondent has also submitted that SLDC has raised supplementary invoices for differential amount only as per Rs/MW/day transmission tariff approved by Commission in the MYT Regulations and the tariff orders. Without prejudice to the submissions made hereinabove, the Petitioner would like to highlight the contradictory stands taken by the Respondent in its reply. The Respondent submits that SLDC granted consent for short-term open access for bilateral transaction and for collective transaction. The consent was granted after considering surplus capacity available, after allotment, to the Long and Medium Term Open Access and once granted, such capacity is accounted for, and kept reserved for the Petitioner. If the capacity is reserved for the Petitioner for the entire day, then multiple invoices for the same capacity cannot be raised for the power procured from contingency market on the same day since no surplus capacity is required to be made available. This itself proves the illegality in the actions taken by the Respondent.

4.6. Additionally, the Respondent has further claimed that the RLDC has shown inability to collect the transmission charges in Rs/MW/Day and therefore SLDC has raised supplementary invoices. In this regard, the Petitioner would like to submit that the Procedure for Scheduling prescribed by Hon'ble CERC Short-Term Open Access in Inter-State Transmission (Bilateral Transaction) provides that

"13.1.4. The Transmission charges for the use of the State network shall be in Rs/MWh, as determined by the respective State Commission and the same shall be intimated to RLDCs by concerned STU. Provided that in case the State Commission has not determined the Transmission charges, the charges for use of the respective State network shall be payable at the rate of Rs.80/MWh for the energy approved."

In this background, the Petitioner submits that the Commission has not determined the transmission charges in Rs/MWh in GETCOs tariff orders. Accordingly, the Respondent was required to approach the Hon'ble Commission for such

determination failing which the charges of Rs. 80/MWh would be applicable. Further, the clause 1.6 of the Procedure provides for as under:

"1.6 No retrospective adjustments for short-term open access charges shall be made for the already approved short-term open access bilateral transactions."

Thus, any commercial transactions concluded based on prevailing short term OA rates cannot be reviewed subsequently because the commercial decision is based on the prevailing charges. Accordingly, the short-term transactions attained finality once concluded.

4.7. The Petitioner would like to reiterate that if the interpretation of the Respondent is to be considered then the proviso to Regulation 21(2) (ii) of the GERC Open Access Regulations, 2011 read with Amendments will be rendered otiose.

5. The Respondent in its written submission dated 26.09.2019 reiterated earlier submission and further stated that-

5.1. The State Commission has to determine the transmission charges for the intra-state transmission system and same has been recognized by the Commission and further held by the Hon'ble Tribunal in Order dated 15.03.2019 in Ultratech Cement Limited v. Gujarat Electricity Regulatory Commission and Another in Appeal No. 83 of 2018:

"52……..The Appellant has claimed that it is selling power through Power Exchanges, a collective transaction regulated by the Central Commission and not by the State Commission. As per the Appellant, the open access is governed by only those regulations applicable to Inter State transactions notified by the Central Commission under Section 79 of the Electricity Act, 2003. Though, the Power Exchange transactions is an Inter State Transaction involving the use of the Inter State Transmission Network owned, operated and maintained by the CTU/Powergrid/Transmission Licensees of the Central Commission, it also involves the use of the Transmission Network of the State Transmission Utility (STU). Accordingly, the Transmission System involved are both the networks of the CTU/Powergrid/Inter State Transmission Licensees and also the network of the Intra State Transmission Licensee, as well as it may involve the network of the Distribution Licensees in the State. Therefore, the transmission charges and other related charges for the state transmission network are to be paid as per the Tariff Terms and Conditions decided by the first Respondent/GERC, in addition to any charges applicable to inter-state transmission network maintained by Power Grid Corporation of India Limited (Central Transmission Utility) or any transmission licensee of the Central Commission. The transmission charges are determined by the

State Commission in exercise of its powers under Sections 61, 62, 74 and 86 of the Electricity Act, 2003. Therefore, the transmission charges are to be determined by the State Commission is also specifically provided in the Regulations of the Central Commission……

…….

54….. The Appellant has contended that to claim in terms of the amended regulations (effective 11.09.2013) that the transmission charges determined even for State network by the State Commissions are to be in MWh. This is contrary to the basic scheme of the Electricity Act, 2003 where-under the State Commission determines the terms and conditions for tariff in relation to transmission network of the intra-state transmission licensees such as GETCO. The Appellant cannot seek to interpret the CERC Regulations in a manner to contradict or overrule the Regulations of the State Commission. As stated supra, the State Commission has jurisdiction over transmission charges of state networks and the Central Commission has jurisdiction over transmission charges of inter-state networks as rightly pointed out by the counsel for the second Respondent/SLDC. This Tribunal in the case of State Load Despatch Centre, Gujarat held that the Appellant cannot seek to contend to the contrary. The Central Commission does not mandate under Regulation 16(2) of CERC Regulation that the transmission charges to be determined by the State Commission have to be for energy scheduled. The proviso would only apply if the State Commission has not determined the transmission charges, which is not the present case……

5.2. The reliance on the 2(10) of the Open Access Regulations 2011 to contend that it has overriding effect is not correct as the said clause would only give overriding effect to regulations already existing at the time of notification of Open Access Regulations 2011 i.e. passed by the Commission at the time of notification in 2011 and would not apply to subsequent Regulations such as MYT Regulations 2016. A later statute would prevail over earlier statute even if the earlier statute has non-obstante clause. Reference is also made to the following decisions:

a. Ajay Dubey vs. State of M.P. and others 2010 (4) MPLJ 679 – High Court of Madhya Pradesh

"That apart, the Environment (Protection) Act, 1986 namely Act No. 29 of 1986 was enacted on 23rd of May, 1986 after receiving the assent of the President of India which came into force with effect from 19-11-1986 whereas section 15(1A) of the MMDR Act was enacted vide Act No. 37 of 1986 subsequent to the Act No. 29 of 1986 and came into force on 10-2-1987. Thus, the Parliament was aware of the earlier legislation and its non-obstante clause yet power was conferred by the later enactment authorizing the State Legislature to make rules in respect of minor minerals. Therefore, it would be assumed that the legislative intent or mandate is

that, the rule framed by the State under section 15(1 A) of MMDR Act should prevail over all previous enactments on the subject. It is well settled preposition of law that if the legislature does not want the later enactment to prevail then it could and would provide in the later enactment that provisions of the earlier enactment continue to apply. It is also cardinal principle of interpretation of statute that later enactment must prevail over the earlier one even if the non obstante clause is provided in the earlier enactment. Therefore, section 15(1A) of the MMDR Act since was brought in the statute book at later point of time cannot be made inoperative because of non obstante clause of the Act which was enacted earlier in point of time namely Environment (Protection) Act, 1986. We are fortified in our view by the decision of the Supreme Court in KSL and Industries Ltd. vs. Arihant Threads Ltd., (2008) 9 SCC 763 wherein the Supreme Court has held that where there are two special statutes which contain non obstante clauses, later statute must prevail. Besides that, if the petitioner's aforesaid contention is accepted then it would amount to giving higher status or putting the Notification on higher pedestal than the statutory Rules. However, we need not to further deliberate on this issue and suffice it to say on this since the Notification under Rule 5(3) of Environment (Protection) Rules, 1986 is not an enactment within the meaning of section 24(1) of the Environment Protection Act and, therefore, it cannot have overriding effect on Rule 49 of the 1996 Rules."

b. Telefonaktiebolaget LM Ericsson (PUBL) vs. Competition Commission of India and Ors. 2016 Comp LR 497 (Delhi) - (High Court of Delhi)

"150. In any case, in the event of any irreconcilable inconsistency between the two legislations, the later special statute would override the prior general statute, even though the earlier general statute contains a non-obstante clause. In Damji Valji Shah and Another v. Life Insurance Corporation of India & Ors.: MANU/SC/0230/1965 : AIR 1966 SC 135, the Supreme Court considered the question whether the provisions of Life Insurance Corporation Act, 1956 would override certain provisions of the Companies Act, 1956. Under Section 446(2) of the Companies Act, 1956, the Company Court would have jurisdiction to entertain any suit or proceeding or claim against a company which is being would up. Section 446 of the Companies Act, 1956 contains a non-obstante clause and its provisions would, thus, override other laws. The Life Insurance Corporation Act, 1956, on the other hand, did not contain a non-obstante clause. However, the Supreme Court held that the Life Insurance Corporation Act being a special Act would override the provisions of the Companies Act and the Tribunal constituted under the Life Insurance Corporation Act, would have the jurisdiction to entertain any claim of Life Insurance Corporation against erstwhile life insurance companies.

151. Thus, if there are irreconcilable differences between the Patents Act and the Competition Act in so far as anti-abuse provisions are concerned, the Patents Act

being a special act shall prevail notwithstanding the provision of Section 60 of the Competition Act."

5.3. Further the MYT Regulations 2016 deal with the determination of tariff/ transmission charges and therefore is a specific statute as opposed to Open Access Regulations which deals with the procedure and grant of open access. The transmission charges are to be determined by the Commission as per the MYT Regulations 2016 and therefore the MYT Regulations would override the Open Access Regulations in matters related to determination of tariff.

5.4. Further the principles of harmonious construction are to be applied. The Courts would not normally read inconsistency into the provisions. The provisions of the Open Access Regulations can be read with the MYT Regulations to provide that the transmission charges on energy actually scheduled basis i.e. per kWh is for collective transactions under short term open access and for bilateral transactions, it would on per MW per day basis. In this regard, the Hon'ble Supreme Court has in R.S. Raghunath vs. State of Karnataka and Ors. (1992) 1SCC 335 held:

"26. As already noted, there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause but when the scope of the provisions of an earlier enactment is clear the same cannot be cut down by resort to non-obstante clause. In the instant case we have noticed that even the General Rules of which Rule 3(2) forms a part provide for promotion by selection. As a matter of fact Rules 1(3)(a) and 3(1) and 4 also provide for the enforceability of the Special Rules . The very Rule 3 of the General Rules which provides for recruitment also provides for promotion by selection and further lays down that the methods of recruitment shall be as specified in the Special Rules, if any. In this background if we examine the General Rules it becomes clear that the object of these Rules only is to provide broadly for recruitment to services of all the departments and they are framed generally to cover situations that are not covered by the Special Rules of any particular department. In such a situation both the Rules including Rule l(3)(a), 3(1) and 4 of general rules should be read together. If so read it becomes plain that there is no inconsistency and that amendment by inserting Rule 3(2) is only an amendment to the General Rules and it cannot be interpreted as to supersede the Special Rules. The Amendment also must be read as being subject to Rules 1(3)(a), 3(1) and 4(2) of the General Rules themselves. The amendment cannot be read as abrogating all other Special Rules in respect of all departments. In a given case where there are no Special Rules then naturally the General Rules would be applicable. Just because there is a non-obstante clause, in Rule 3(2) it cannot be interpreted that the said amendment to the General Rules though later in point of time would abrogate the special rule the scope of which is very clear and which co-exists particularly when no patent conflict or inconsistency can be spelt out. As already noted Rules 1(3)(a), 3(1)

and 4 of the General Rules themselves provide for promotion by selection and for enforceability of the Special Rules in that regard. Therefore there is no patent conflict or inconsistency at all between the General and the Special Rules."

5.5. Once the Tariff Order is passed, the Petitioner cannot claim a tariff of another category within whose parameters it does not fall. When the Commission has not determined the per kwh tariff for short term bilateral transactions, the Petitioner cannot claim tariff on per kWh basis. There cannot be any unilateral variation of the Tariff Order. The Petitioner cannot claim a tariff which does not exist.

5.6. The Petitioner cannot claim that it does not need to challenge the Tariff Order because the Respondent had not raised the bill as per the Tariff order within the time stipulated for the appeal. The Tariff Order is published and all entities in the State are well aware of the Tariff Order. The Petitioner being a beneficiary of the intra-state transmission system should have and would have been aware of the Tariff Order and the charges determined therein. Even if the SLDC had interpreted the Order wrongly or made a mistake, it would not change the contents and validity of the Tariff Order. The Petitioner was well aware of the transmission charges as per the Tariff Order and should have challenged the same if it was felt that it was contrary to any Regulation. The Petitioner cannot claim ignorance of the Tariff Order or its terms and conditions.

5.7. Even assuming but not admitting that there is an error in the Tariff Order in terms of determination of tariff on per MW basis instead of per Kwh basis, the same is equally binding unless set aside either in a Review or in Appeal. In this regard following cases referred:

a. Food Corpn. of India v. S.N. Nagarkar, (2002) 2 SCC 475

"15…… We find considerable force in the submission urged on behalf of the respondent. In these proceedings it is not permissible to go beyond the order of the learned Judge dated 6-5-1994 passed in Civil Writ Petition No. 4983 of 1993. The execution application giving rise to the instant appeal was filed for implementing the order dated 6-5-1994 and in such proceedings, it was not open to the appellant either to contend that the judgment and order dated 6-5-1994 was erroneous or that it required modification. The judgment and order aforesaid having attained finality, has to be implemented without questioning its correctness. The appellant therefore, cannot be permitted to contend in these proceedings that the judgment and order dated 6-5-1994 was erroneous inasmuch as it directed the appellant to pay to the respondent arrears of salary with effect from the dates of promotion, and not from the dates the respondent actually joined the promotional posts."

b. State of West Bengal Vs. Hemant Kumar Bhattacharjee and Ors. 1963 Supp (2) SCR 542

"15. Before proceeding, with these arguments in detail, we can dispose of second contention very shortly. This argument proceeds on a fundamental misconception, as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The learned Judges of the High Court who rendered the decision on 4-4-52 had ample jurisdiction to decide the case and the fact that their was on the merits erroneous as seen from the later judgment of this Court, does not render it any the less final and binding between the parties before the Court. There is, thus, no substance in this contention. The decision of the High Court dated 4-4-52 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not."

c. Pradeep Kumar Maskara v State of West Bengal (2015) 2 SCC 653

"26. It is well settled that even if the decision on a question of law has been reversed or modified by subsequent decision of a superior court in any other case it shall not be a ground for review of such judgment merely because a subsequent judgment of the Single Judge has taken contrary view. That does not confer jurisdiction upon the Tribunal to ignore the judgment and direction of the High Court given in the case of the appellants.

27. In the aforesaid premises, the order passed by the Land Tribunal is erroneous in law. The High Court and the Tribunal are set aside. The Tribunal is directed to follow the decision of the Calcutta High Court decided in the case of the appellants."

d. Anandi Rubber Flour Mills v State of A.P. decided on 02.08.2001[2002] 125 STC 355 (High Court of Andhra Pradesh)

"14. Although the said exception was made in a different context of that case, the ratio decidendi of the above statement of law is that a litigant who has acquiesced to the decision of the Tribunal or the Court, as the case may be, without pursuing further legal remedies provided under the statute and the law, cannot be permitted to reagitate or reopen the correctness of such decision on the basis of a subsequent decision obtained by another person."

e. Mohanlal Goenka v. Benoy Kishna Mukherjee AIR 1953 SC 65

"22. There is ample authority for the proposition that even an erroneous decision on a question of law operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. A decision in the previous execution case between the

parties that the matter was not within the competence of the executing court even though erroneous is binding on the parties."

f. Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, (1970) 1 SCC 670

"6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties."

5.8. The principle of recovery through revised invoices has already been upheld by this Hon'ble Commission in Petition No. 1440 of 2014 dated 24.03.2015 and Petition No. 1558 of 2016 dated 08.09.2017. In the decision dated 08.09.2017, the Commission has rejected a similar contention by the Petitioner therein:

"7.26. Now we deal with the issue as to whether the Respondent is eligible to recover the dues for FY 2012-13 and FY 2013-14 as claimed in impugned invoice dated 16.4.2015 and 28.1.2015 retrospectively. We note that the transmission charges is recoverable from the Short Term Open Access consumers by the SLDC as per the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and amendment made in it. The aforesaid Regulations are a sub-legislation having statutory force. If the charges recoverable under the aforesaid Regulations were wrongly recovered by the SLDC, there is no restriction to correct the error and recover the correct amount. Further, the recovery of charges is counted in the ARR of the licensee and given effect in the Long-Term Open Access and Medium-Term Open Access customers charges. Hence, the plea of the Petitioner that the recovery of transmission charges retrospectively for FY 2012-13 and FY 2013-14 by the Respondent is not legal and is not acceptable and valid. Hence, the said prayer of the Petitioner is rejected."

The above Order dated 08.09.2017 has been upheld by the Hon'ble Tribunal vide Order dated 15.03.2019 in Ultratech Cement Limited v. Gujarat Electricity Regulatory Commission and Another in Appeal No. 83 of 2018:

"62. In the instant case, the second Respondent/SLDC has only collected the transmission charges as per the GERC Open Access Regulations and Tariff Orders passed by the first Respondent/GERC. It is significant to note that, if by inadvertence, there was under-recovery of the amounts; the differential amount can be recovered subsequently by raising corrected invoices/supplementary invoices. Therefore, the obligation of the Appellants/short term open access customer to pay the transmission charges as per the GERC Open Access Regulations and Tariff Orders.

They cannot deny the liability merely because the invoice was raised subsequently. The invoices raised by SLDC are not invalid merely because they were raised subsequently. This is particularly when the claim for transmission charges had not been time barred. There had been an under-recovery of the transmission charges for the relevant period and the second Respondent/SLDC had sought to recover the said amount. The second Respondent/SLDC cannot be prevented from recovery of legitimate dues. Therefore, the contention of the Appellant claiming application of promissory estoppel is misconceived and there was no application of such concept of estoppel in the instant case on the ground that the Appellant had not raised the issue of doctrine of estoppel/promissory estoppel in the Petition before the State Commission or even in the Memorandum Appeal before this Tribunal…….

5.9. The Hon'ble Tribunal had also rejected the contention of doctrine of promissory estoppel:

"63. ……It is well settled principle that any amount paid/received without authority of law has to return and can be adjusted as held by the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal v State of Uttarakhand and Others (2012) 8 SCC 417, which reads as under:
"14. We are …….. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardship but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment"

Therefore, the ground and the submissions/stands taken by the learned counsel for the Appellant regarding Doctrine of Estoppel/Promissory Estoppel cannot be acceptable and it is liable to be rejected at threshold.

5.10. It has been held by the Hon'ble High Courts as listed below that a benefit given or excess payment made by mistake cannot act as estoppel for correction of such mistake.

a. Arun Kumar Kashyap vs. State of Jharkhand and Ors. [2008 (4) JCR 98] (Jharkhand):

"17. It is by now well settled that any benefit given to a person by mistake is recoverable when the mistake is detected and such wrong benefit given to a person by mistake cannot confer any right on the recipient or act as an estoppel against the person who by mistake has granted such wrong benefit. It is also settled principle of law that mistake, if committed in passing an administrative order, the same may be

rectified and if such mistake is apparent on the face of the record, the rectification thereof is permissible even without giving any opportunity of hearing to the aggrieved party."

b. Bejgam Veeranna, Venkata Narasimhulu and Ors. vs. State of Andhra Pradesh and Ors. AIR 1981 Andhra Pradesh 350

"12. From the above it follows that G. O. 116 (Ex. B-4) is a valid piece of legislation and does not suffer from any legal or constitutional infirmity and accordingly the prices payable to the plaintiffs are the prices mentioned in Ex. B-4- It follows that payments made to the plaintiffs not on the reduced basis of Ex. B-4 prices but on the higher basis of Ex. B-1 prices, are excessive, As Lord Reid observed in Shiba Prasad Singh v. Srish Chandra Nandi MANU/PR/0149/1949 "there was no intention to make a present at money which was not due" (to the plaintiffs). The excess money paid on the basis of Ex. B-1 prices must therefore be taken to have been made under ft mistake of law. It has been held in Union of India v. K. Damodaraiah and Company (1968) 1 Andh WR 81, that such excess payments can be recovered by making deductions from or withholding amounts from the sums of monies payable to the plaintiffs. It follows therefrom that it is not necessary for the defendants to file suits for recovering these excess amounts paid under Ex- B-l. It also follows the recoveries which are now sought to be made from the plaintiffs are clearly lawful and just."

c. The Orissa Mining Corporation Ltd. and Anr. vs. The Joint Secretary (Revision Application) Ministry of Finance and Ors. AIR 1978 Orissa 96

"15. For the aforesaid reasons, payment of excess duty under Item 72A has been made under misconception of the legal requirements. The petitioners cannot be debarred by any rule of estoppel from demanding refund of the excess duty paid erroneously under Item 72A. The Revisional authority has rightly refused to apply the principle of estoppel against the petitioners and to that extent has expressly disagreed with the Customs Appellate Authority. Since an excess amount of duty has been paid, the petitioners are entitled to get refund of the same…."

5.11. It is further submitted that the said doctrine would not apply when payments/non payments have been made due to a mistake. It is well settled principle that any amount paid/received without authority of law has to returned and can be adjusted as decided in following cases:

a. Chandi Prasad Uniyal v. State of Uttarakhand and Others (2012) 8 SCC 417

"14. We are concerned with the excess payment of public money which is often described as 'taxpayers' money' which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers, may be due to various reasobs like negligence, carelessness, collusion, favouritism etc, because money in such situation does not belong to the payer or payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardship but not as a matter of right, in such siutations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment"

b. Sales Tax Officer, Banaras and Others v. Kanhaiya Lal Makund Lal Saraj (1959) SCR 1350

"24. We are of the opinion that this interpreeation put by their Lordshops of the Privy Counsel on Section 72 is correct. There is no warrant for ascribing any limited meaning to the word ""mistake" as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. there is no conflict between the provisions of Section 72 on on hand and Section 21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established entitles the party paying the money to recover it back from the party receiving the same."

5.12. Further the Hon'ble Courts have specifically upheld the raising of subsequent bills to rectify the error of under-billing:

a. U.A. Thadani and Anothr v. B.E.S.R. Undertaking and another AIR 2000 Bom 264:

"6…. It is, thus, clear that both the debit notes dated 3-2-95 were issued by respondents for recovery of amount of electricity charges for the electricity consumed by the petitioners but were not fully billed due to humar errors. The debit note No. 36695 for an amount of Rs. 2,82,130.48 was issued for the electricity supplied to petitioners for the period 26-11-1991 to 6-5-94 for which the petitioners was under-billed inasmuch as reading shown on meter was not multiplied by

multiplying factor of 40 and debit note No. 36696 for an amount of Rs. 9,675/- was issued since the petitioners were not billed for the period 7-3-94 to 29-3-94 though the electricity was consumed by the petitioners during that period. It is thus a simple case of human error and therefore, if the respondents issued the debit notes demanding the amount towards the charges of electricity already supplied an consumed by petitioners, it cannot be said that any illegality was committed by the respondents in issuing the two debit notes….."

b. J. K. Cement Works and Ors v. Rajasthan Electricity Regulatory Commission and Ors dated 20.02.2014 in S.B. Civil Writ Petition No. 16789 of 2013 and Batch

"44……What is being recovered is the amount, benefit of which has wrongly been extended to the Petitioners. In other words, what benefit has been extended to the Petitioners, was not payable on the date it was granted to them. Therefore, what is being recovered now by the respondent-Discoms is an amount benefit of which has unduly been granted to the Petitioners. They are merely seeking to rectify this mistake. Not making such recovery would tantamount to unjust enrichment of the Petitioners. Thus viewed, recovery of the incentive granted or extended by way of under-billing to the Petitioners cannot be said to be retrospective recovery. The cited judgments are therefore wholly inapplicable."

6. The matter was listed for hearings on 23.10.2018, 09.07.2019 and 09.10.2019. During the hearing on 09.10.2019, the Petitioners and Respondent completed their arguments and made their submissions in the matter and parties were directed to file their written submissions, if any and the matter was reserved for Order.

7. The Petitioner TPL in its final written submission dated 21.10.2019 submitted that-

7.1. It is submitted that as the present matter concerns the applicability, scope of the substituted provisions to the GERC (MYT) Regulations, 2016 vide the GERC (MYT) (Second Amendment) Regulations, 2018 vide Notification No. 02 of 2018 dated 18.08.2018, it is imperative to consider the facts as they have transpired in chronological order as given here under-

a. The GERC (Terms & Conditions of Intra State Open Access) Regulations, 2011 is notified under Section 181 of the Electricity Act, 2003 on 01.06.2011.

b. On 12.08.2014, GERC (Terms & Conditions of Intra State Open Access) (Second Amendment) Regulations, 2014 were notified. Regulation 21 (2) (ii) provided

for payment for Short Term Open Access (AO) on the basis of actual energy schedule and read as under:

"(ii) By Short-Term Open Access Customers:
Transmission Charges payable by a Short-Term Open Access customer shall be determined as under:
Transmission charges payable by Short-term open access customers = TTC /(ACsx 8760) (In Rs./ MWh)
Where;
TTC = Total Transmission Cost determined by the Commission for the transmission system for the relevant year (in Rs.) and
ACs = Sum of capacities allocated to all long-term and medium-term open access customers in MW.
Provided that transmission charges for short-term open access shall be payable on the basis of the energy actually scheduled for Short-Term transactions."

c. On 29.03.2016, the GERC (MYT) Regulations, 2016 came into force (Notification No. 04 of 2016) by their publication in the Official Gazette. The relevant Regulations for consideration of the present matter read as under:

"1.2 These Regulations shall come into effect from the date of their publication in the Official Gazette and shall remain in force till 31st March, 2021, unless otherwise reviewed/extended.

1.4 (a) These Regulations shall be applicable for determination of tariff in all cases covered under these Regulations from April 1, 2016.
These Regulations shall be applicable to all existing and future Generating Companies, Transmission Licensees, SLDC and Distribution Licensees and their successors, if any;
These Regulations supersede the "Gujarat Electricity Regulatory Commission (Multi-Year Tariff) Regulations, 2011"
These Regulations supersede the "GERC (Levy and Collection of Fees and Charges by SLDC) Regulations, 2005".

(2) "Act" means the Electricity Act, 2003 (36 of 2003), as amended from time to time;
(61) "Transmission System User" means a person who has been allotted transmission capacity rights to access an intra-State transmission system pursuant to a Bulk Power Transmission Agreement, except as provided in the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State

Open Access) Regulations, 2011, as applicable and as amended from time to time;

7. Saving of Inherent Power of the Commission
7.1 Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.
7.2 Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

7.3 Nothing in these Regulations shall, expressly or by implication, bar the Commission to deal with any matter or exercise any power under the Acts for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.

72. Sharing of charges for Intra-State Transmission Network

72.2 The short-term users of the transmission system shall pay transmission charges on Rs/MW/day basis, in accordance with the following formula:
TC (Rs/MW/day) = (Transmission ARR+SCC) +365,
Where,
TC (Rs/MW/day) = transmission charges payable by the short-term user of the transmission system;
Transmission ARR = Aggregate Revenue Requirement of the Transmission Licensee, determined in accordance with Regulation 68 of these Regulations;
SCC = sum of capacities contracted in MW by all long-term users and medium-term users of the transmission system:

74. Usage of Intra-State Transmission System

74.2 The charges for intra-state transmission usage shall be shared among various TSUs as specified in these Regulations."

d. On 31.03.2017, Tariff Order was passed by the Commission in Petition No. 1620 of 2016, inter-alia determining the transmission charges for short term users of transmission system on Rs. / MW / Day basis and Transmission

Charges payable in respect of Short Term Collective Transactions through power exchanges on Rs. Per kWh basis in accordance with the GERC (MYT) Regulations, 2016.

e. On 30th November, 2017, GETCO, the State Transmission Utility filed its Tariff Petition No. 1692 of 2017. Interestingly, GETCO at Para 2.4.3 of this Petition made submissions in consonance with the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 as amended. It was pointed out by GETCO that the CERC Regulations uniformly provided for Transmission Charges being made payable on kWh basis for all types of Transmission transactions without discriminating between the transactions through power exchanges / collective on one hand and bilateral transactions on the other hand. In its Petition GETCO stated that the earlier Tariff Order of the Commission dated 31.03.2017 had led to different types of charges for two (2) transactions done under one (1) nature of Open Access i.e. Short Term Open Access (STOA). As a Petitioner therein, GETCO, in line and conformity with the recovery of STOA Charges under the said CERC Regulations proposed recovery of Transmission Charges on per kWh basis for all types of Short Term Transactions irrespective of the nature of the transaction either through power exchanges / collective or bilateral.

f. On 31.03.2018, Tariff Order was passed by the Hon'ble Commission determining Transmission Charges after noting the Representation of GETCO.

g. 2017 to April 2018, the Petitioner continued to receive from the SLDC bills for Short Term OA on per unit basis.

h. On 20.04.2018, the Petitioner received the first Supplementary Bill claiming charges on MW basis instead of kWh basis for the power sourced during the month of April 2017. Subsequently, similar supplementary bills have been received.

i. On 26.04.2018, the Commission notified Draft GERC (MYT) (Second Amendment) Regulations, 2018 along with an explanatory note. In the note, Commission has referred to its order dated 31st March, 2017 in petition no. 1620/2016 and stated that the Commission has received representation from various Stake Holders requesting it to determine Short Term Transmission Charges for all types of Short Term Transactions uniformly.

j. On 28.06.2018, the Commission held a Public Hearing in respect of the Draft GERC (MYT) (Second Amendment) Regulations, 2018. On 18.08.2018, this Commission amended the GERC (MYT) Regulations, 2016, pursuant to the

GERC (MYT) (Second Amendment) Regulations, 2018 (Notification No. 02 of 2018)

k. By this amendment Regulation 72.2 and 72.3 stood substituted by the amended Regulation 72.2 which reads as under:

"72.2 For Short-term users, including the collective transactions through power exchanges, the transmission charges shall be determined in Rs. Per kWh in accordance with the following formula:
TC (Rs./kWh) = Transmission ARR ÷ Total units wheeled,
Where,
Transmission ARR = Aggregate Revenue Requirement of the Transmission Licensee, determined in accordance with Regulation 68 of these Regulations;
Total units wheeled = Total energy units wheeled through the transmission system, which shall be equal to the total energy input into the intra-State transmission system during the financial year."

Pursuant, to the substitution of the Regulations 72.2 and 72.3 the earlier Regulation 72.4 in the un-amended original Regulations stood renumbered as Regulation 72.3.

l. On 28.08.2018, the present Petition namely Petition No. 1740 of 2018 was filed. Thus, the present Petition seeking clarity has been filed within ten (10) days of the substitution of Regulations 72.2 and 72.3 of the original GERC (MYT) Regulation, 2016 by the new Regulation 72.2.

m. It is further stated that- it is pertinent to note that all along (i.e.) from 2017 onwards, the SLDC had been interpreting and giving effect to the Tariff Orders dated 31.03.2017 and the applicable Regulations by raising bills which were on per unit basis. The present Petition impugns the change of interpretation by SLDC which was very well aware of both the 2011 OA Regulations as amended and the 2016 MYT Regulations as amended by substitution.

7.2. On the issue regarding applicability of GERC (MYT) Regulations, 2016 for determination of charges payable by short term open access customers, it is submitted that-

a. The GERC (MYT) Regulations, 2016 defines the following:

“2. (14) "Bulk Power Transmission Agreement" means an executed Agreement that contains the terms and conditions under which a Transmission System

User is entitled to access an intra state transmission system of a Transmission Licensee;

2. (61) "Transmission System User" means a person who has been allotted transmission capacity rights to access an intra-State transmission system pursuant to a Bulk Power Transmission Agreement, except as provided in the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011, as applicable and as amended from time to time;

b. It further provides that *"the words and expressions used in these Regulations and not defined herein but defined in the Act or any other Regulations of the Commission shall have the meaning assigned to them under the Actor any other Regulations of the Commission."*

c. The GERC (T & C of the Intra State OA) Regulations, 2011 specifies the following definition:

"3.

(I) "Long-term access" means the right to use the intra-State transmission system or distribution system for a period exceeding 12 years but not exceeding 25 years.

(m) 'Medium-term open access" means the right to use the intra-State transmission system or distribution system for a period exceeding three months but not exceeding three years

(s) "Short-term open access" means open access for a period upto one month at a time, but not exceeding a period of six months in a calendar year."

d. A comprehensive reading of the above would reveal that the Transmission System Users defined in MYT Regulations, 2016 refers to only Long Term and Medium Term Open Access Customers having BPTA. Further, the term "rights" specified in the definition of Transmission System Users in the MYT Regulations, 2016 is specified in the definition of Long term access and Medium term open access and not specified in the definition of Short Term access in the OA Regulations, 2011.

e. Accordingly, in the case of short term open access, the Regulation 74.2 which provides for sharing of charges for intra-State transmission usage by TSUs does not get attracted.

7.3. It is further submitted by the Petitioner TPL that a perusal of the Notification No. 02 of 2018 dated 18.08.2018 notifying the GERC (MYT) (Second Amendment) Regulation, 2018, reveals that the Regulations 72.2 as notified therein substituted

the earlier Regulations 72.2 and 72.3 of the Original / Principle Regulations 2016. Substitution of the earlier Regulations 72.2 and 72.3 results in repeal of the earlier provisions and its replacement by the new provision. In other words, substitution combines repeal and fresh enactment. Therefore, the inserted provision Regulation 72.2 as notified on 18.08.2018 substitutes the original provision resulting in their repeal. Following judgements also referred by the Petitioner in its submission-

a. In Government of India & Ors vs Indian Tobacco Association (2005) 7 SCC 396, it has been held as follows:

"24. In Ramkanali Colliery of BCCL v. Workmen by Secy., Rashtriya Colliery Mazdoor Sangh 1(2001) 4 SCC 236 : 2001 SCC (L&S) 689] a Division Bench of this Court observed (SCC pp. 240-41, para 8):

"What we are concerned with in the present case is the effect of the expression 'substituted' used in the context of deletion of sub-sections of Section 14, as was originally enacted. In Bhagat Ram Sharma v. Union of India [1988 Supp SCC 30 : 1988 SCC (L&S) 404: (1988) 6 ATC 783] this Court stated that it is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression 'substituted' is used. Such deletion has the effect of the repeal of the existing provision and also provides for introduction of a new provision. In our view there is thus no real distinction between repeal and amendment or substitution in such cases. If that aspect is borne in mind, we have to apply the usual principles of finding out the rights of the parties flowing from an amendment of a provision. If there is a vested right and that right is to be taken away, necessarily the law will have to be retrospective in effect and if such a law retrospectively takes away such a right, it can no longer be contended that the right should be enforced. However, that legal position, in the present case, does not affect the rights of the parties as such."

25.In Zile Singh v. State of Haryana [(2004) 8 SCC 1] wherein the effect of an amendment in the Haryana Municipal Act, 1973 by Act 15 of 1994 whereby the word "after" was substituted by the word "upto" fell for consideration, wherein Lahoti, C.J. speaking for a three Judge Bench held the said amendment to have a retrospective effect being declaratory in nature as thereby obvious absurdity occurring in the first amendment and bring the same in conformity with what the legislature really intended to provide was removed, stating: (SCC p. 12, paras 23-25)

'23. The text of Section 2 of the Second Amendment Act provides for the word `upto' being substituted for the word 'after. What is the meaning and effect of the expression employed therein — 'shall be substituted'?

24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. 'Substitution' has to be distinguished from 'supersession' or a mere repeal of an existing provision. 25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid., p. 565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn. v. State of U.P. [(2002) 2 SCC 645] , State of Rajasthan v. Mangilal Pindwal [(1996) 5 SCC 60] , Koteswar Vittal Kamath v. K Rangappa Baliga and Co. [(1969) 1 SCC 255] and A.L.V.R.S.T. Veerappa Chettiar v. S. Michael [1963 Supp (2) SCR 244 : AIR 1963 SC 933] . In West U.P. Sugar Mills Assn. case [(2002) 2 SCC 645] a three Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case [(1996) 5 SCC 60] this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case [(1969) 1 SCC 255] a three Judge Bench of this Court emphasised the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

7.4. It is stated that the amendment made by this Commission vide Notification No. 02 of 2018 dated 18.08.2018 is curative in character and therefore retrospective and retroactive in operation. In this regard further submitted that-

a. A perusal of the statement of reasons dated 14.08.2018 by the Commission whereby it is decided to allow the Second Amendment to the GERC (MYT) Regulation, 2016 and directed its publication in its Official Gazette reveals the curative character of the amendment.

b. In a detailed statement of reasons dated 14.08.2018 the Commission even referred to the submissions of GETCO in Tariff Petition No. 1692 of 2017 to the extent that the earlier Tariff Order dated 31.03.2017 which allowed recovery of Transmission Charges on kWh basis for power exchanges / collective transactions and MW basis for bilateral transactions led to different types of charges for two (2) transactions done under one (1) nature of Open Access (i.e.) STOA.

c. This Commission also recorded its need for curative action by giving a finding as-
"The Commission also felt that there is a need to implement uniform Short-Term Transmission Charges for all types of Short Term Users of the Transmission System in the State of Gujarat
2.1.1...
Commission's View

We note that the Commission vide Transmission Tariff Orders in Petition Nos. 1620 of 2016 and 1692 of 2017 determined the Intra-State Transmission Charges for Short-Term Users of transmission system on Rs./MW/Day basis and the Transmission Charges payable in case of Short-Term collective transactions through power exchanges on Ps. per kWh basis in accordance with provisions of Regulations 72.2 and 72.3 of the GERC (Multi-Year Tariff) Regulations, 2016. It is also observed that the resultant per unit transmission charges varies depending upon the period of transactions and types of transactions under STOA. Thus, the methodologies for recovery of Transmission Charges for Collective Transactions and Bilateral Transactions under STOA are not uniform.
The Commission, further takes note of the Transmission Charges for Inter-State Short-Term Bilateral transactions being determined by CERC on Rs./MWh basis, i.e. on 'Energy Wheeled' basis.

It is also observed that these Regulations are not consistent with each other in recovery of Transmission Charges for STOA transactions such as Inter-State and Intra-State Transactions, Collective Transactions and Bilateral Transactions. The Commission is of the view that such inconsistency in the recovery of Transmission Charges for different types of STOA transactions needs to be addressed to bring them 'on par' with each other so as to bring about uniformity
2.1.2—
Commission's View
As regards the issue of past recovery of Transmission Charges, the same does not pertain to the draft Amendment. Accordingly, the Commission does not find it appropriate to deal with it in the present proceedings."

d. Thus, this Commission sought to address the anomaly which had crept in resulting in lack of uniformity of Transmission Charges for the same nature of transactions. This entire exercise initiated by this Commission by notifying the Draft proposed amendments on 26.04.2018 and culminating with its Notification dated 14.08.2018 is thus essentially curative and declaratory in character.

e. In Zile Singh Versus State of Haryana - (2004) 8 SCC 1, the Hon'ble Apex Court held as follows :

"14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: CO general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

17. Maxwell states in his work on Interpretation of Statutes (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

19. The Constitution Bench in Shyam Sunder v. Ram Kumar [[2001) 8 SCC 24] has held: (SCC p. 49, para 39)

"Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective." (p. 2487).

21. In Allied Motors (P) Ltd. v. CIT [(1997) 3 SCC 472] certain unintended consequences flowed from a provision enacted by Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.

"A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole." (SCC pp. 479-80, para 13)

The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid., p. 565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn. v. State of U.P. [(2002) 2 SCC 645] , State of Rajasthan v. Mangilal Pindwal [(1996) 5 SCC 60] , Koteswar Vittal Kamath v. K Rangappa Baliga and Co. [(1969) 1 SCC 255] and A.L.V.RS.T. Veerappa Chettiar v. S. Michael [AIR 1963 SC 933] . In West U.P. Sugar Mills Assn. case [(2002) 2 SCC 645] a three Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case [(1996) 5 SCC 60] this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case [(1969) 1 SCC 255] a three Judge Bench of this Court emphasised the distinction between

"supersession" of a rule and "substitution" of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

f. In R. Rajagopal Reddy v. Padmini Chandrasekharan, (1995) 2 SCC 630 the Hon'ble Supreme Court through its Full Bench held as under:

"Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction and enactment, it does not create new rights or obligations."

The Hon'ble Supreme Court thereafter referred to Principles of Statutory Interpretation 5th Edition by Shri. G.P. Singh and held as under:
"17…… In this connection, we may refer to the following observations in Principles of Statutory Interpretation, 5th Edn., 1992, by Shri G.P. Singh, at page 315 under the caption 'Declaratory statutes':
"The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court:

'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word "declared" as well as the word enacted.'

But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was

already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force the amending Act also will be part of the existing law.

g. Based on the above judgments, it is clear that the amendment is declaratory/curative in nature. It is settled principle of law that such declaratory statute comes into effect when the previous enactment was passed. If an Act is declaratory or explanatory in nature, it has to be construed as retrospective. Therefore, without prejudice to above, even considering applicability of GERC MYT Regulations, 2016; the same ought to be applied retrospectively and therefore, the earlier bills issued by SLDC based on per kWh basis were correct.

7.5. It is submitted that the occasion for challenging the GERC (MYT) Regulations, 2016 in relation to Regulation 72.2 and 72.3 of the original / principal Regulations did not arise as the Commission had in view of the powers vested in it under the Electricity Act, 2003, undertaken the amendment of the said Regulations and substituted Regulations 72.2 and 72.3 of the original / principal Regulations with the new Regulation 72.2.

7.6. Regarding reliance of the Respondent on the principle that a latter enactment would prevail over an earlier enactment, it is submitted by the Petitioner that this issue is completely irrelevant to the present case as this Commission has undertaken amendment of the said Regulations and substituted Regulations 72.2 and 72.3 of the original / principal Regulations with the new Regulation 72.2. In view thereof, the extensive case law cited by the Respondent SLDC has no bearing and applicability to the facts of the present case.

7.7. It is submitted that a perusal of the Statement of Reasons dated 14.08.2018 reveals that this Commission had specifically given a thought to the amendment of the related Regulations and in that context refrained from dealing with the issues of past recovery of Transmission Charges by coming to the finding that the proceedings pertained to the Draft amendment of the GERC (MYT) Regulations, 2016.

7.8. It is also stated that there was no occasion for TPL to challenge the Tariff Order dated 31.03.2017 as SLDC itself had issued the original bills in accordance with the GERC (T & C of Intra State OA) Regulations, 2011 as amended in 2014. Therefore, the question of challenging the Tariff Order did not arise. It is an admitted position that the SLDC after a duration of nearly a year issued Supplementary Bills around the time the Commission had seized itself of amending the MYT Regulations to ensure uniformity of Transmission Charges for STOA Transactions and to address the discrepancy in the MYT Regulations.

8. The Respondent SLDC in its final written submission dated 06.11.2019 reiterated earlier submission and further stated that-

8.1. The SLDC has acted uniformly for all open access customers, all short-term open access customers for bilateral transactions have been considered per MW per day and wherever the initial invoice was on per MWh basis, a Supplementary Invoice had been raised by SLDC. SLDC had already filed a list of supplementary invoices raised by SLDC in the Written Submissions dated 25.09.2019.

8.2. The Petitioner has in latest submission raised a completely new issue which had not been raised either in the Petition and the Rejoinder nor was it argued – the issue is based on the Amendment dated 18.08.2018 being applicable to period prior to 18.08.2018. This is a completely new argument and was never argued and therefore cannot be taken in the Written Submissions for the first time. Though the SLDC has responded to the same, the SLDC has taken a preliminary objection to such new issues being raised in the Written Submissions.

8.3. It may be noted that Regulation 72.2 of MYT Regulations 2016 recognized that the short term users would pay transmission charges on per MW per day basis except for the collective transactions which were to pay on per kWh basis as provided in Regulation 72.3. There is a contrast in Regulation 72.2 and 72.3 which have to be given meaning. The collective transactions fall within Regulation 72.3 and bilateral transactions fall within Regulation 72.2.

8.4. Despite the Petition filed by GETCO and noting the observations of objector/GETCO, the Commission had noted that it has approved the transmission charges for STOA as per Regulation 72 of the MYT Regulations 2016 and further determined the transmission charges on per MW basis and only for STOA collective transactions on per kWh basis.

8.5. The submissions of GETCO cannot override the final Order of the Commission or the MYT Regulations. The MYT Regulations were to be amended with effect from 18.08.2018 after which the transmission tariff even for STOA bilateral was on per KWh basis. Prior to such amendment, the MYT Regulations and Tariff Order provided for STOA bilateral transactions on per MW per Day basis and the same is applicable to Petitioner and all other STOA customers.

8.6. The Petitioner cannot claim a tariff which does not exist. Even assuming but not admitting that there is any error in the Tariff Order, the same is binding unless set aside. The Tariff Orders have not been set aside and therefore are binding. Therefore, the Petitioner cannot claim applicability of transmission charges contrary to the Tariff Order.

8.7. The Amendment is not in the nature of clarification. In fact, in the Statement of Reasons it is made clear that prior to the Amendment, the STOA collective transactions were on per KWh basis and STOA bilateral was on per MW basis.

"The Commission vide Tariff Order dated 31st March 2017 in Petition No. 1620 of 2016 determined the Transmission Charges for Short-Term Users of Transmission system in Rs./MW/Day basis and Transmission Charges payable in case of Short-Term Collective Transactions through power exchanges on Ps. per kWh basis in accordance with the aforesaid principal MYT Regulations, 2016.

……

GETCO, in its Tariff Petition No. 1692 of 2017, has submitted that as per the CERC (sharing of inter-state transmission charges and losses) Regulations, 2010 and its amendments, the Transmission Charges are payable on per kWh basis for all types of short-term transactions i.e. transactions through power exchanges / collective or Page 2 of 8 bilateral. However, the Commission vide Order dated 31st March, 2017 has allowed recovery of transmission charges on per kWh basis for power exchanges / collective short-term transaction and per MW/day basis for bilateral short-term transaction as per the principal MYT Regulations, 2016. This has led to different types of charges for two transactions done under one nature of open access i.e. Short-Term Open Access (STOA). In that light, to make the recovery of short-term transaction charges in line with the CERC Regulations, GETCO had proposed to allow recovery of transmission charges on per kWh basis for all types of short-term transactions irrespective of whether short-term transaction is done through power exchange or under bilateral arrangement.

…..

Commission's View

We note that the Commission vide Transmission Tariff Orders in Petition Nos. 1620 of 2016 and 1692 of 2017 determined the Intra-State Transmission Charges for Short-Term Users of transmission system on Rs./MW/Day basis Page 5 of 8 and the Transmission Charges payable in case of Short-Term collective transactions through power exchanges on Ps. per kWh basis in accordance with provisions of Regulations 72.2 and 72.3 of the GERC (Multi-Year Tariff) Regulations, 2016. It is also observed that the resultant per unit transmission charges varies depending upon the period of transactions and types of transactions under STOA. Thus, the methodologies for recovery of Transmission Charges for Collective Transactions and Bilateral Transactions under STOA are not uniform.

8.8. Therefore, it was only after the amendment that there has been a uniformity in the STOA transactions. Prior to Amendment, the STOA bilateral were on per MW basis. The Statement of Reasons by the Commission for the Amendment make it amply clear what the situation was prior to the Amendment. The said Amendment cannot be applied retrospectively.

8.9. The contention that Regulation 74.2 would not apply to STOA is incorrect. The Regulation provides for charges to be shared as specified in these Regulations. It is illogical that the LTOA and MTOA users would share the charges as per the MYT Regulations 2016 but the STOA users would not share the charges. Merely because the STOA users may not sign a Bulk Purchase Agreement does not mean that they are not a user and the MYT Regulation 2016 would not apply to them.

8.10. The contention about 'without Prejudice, the applicability of substituted provision namely Regulation 72.2 as amended vide Notification No. 02 of 2017 dated 18.08.2018 has been raised for the first time in the Written Submissions and had not been argued. The contention cannot be considered.

8.11. It is settled principle that delegated/subordinate legislation cannot be retrospective. This has been held specifically in context of delegated legislation under the Electricity Act, 2003 by the Hon'ble Tribunal in North Eastern Electric Power Corporation Ltd v. Tripura State Electricity Corporation Ltd and Ors Appeal No. 179 of 2009 dated 12.07.2010:

"15……While considering the merits of the matter it would be appropriate to refer to the principle which has been laid down by the Hon'ble Supreme Court in regard to retrospective effect. It is held in the case of State of Madhya Pradesh V/s Tikamdas (1975) 2 SCC 100 that subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute. The relevant observation made by the Hon'ble Supreme Court is as follows:

"There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf.

16. In the light of the dictum laid by the Hon'ble Supreme Court, if we look at the Electricity Act, 2003, it is evident that this Act, under which the Regulations on the terms of conditions of tariff are notified, does not authorize the Commission to make the Regulations which may apply retrospectively. Keeping in view of the above, let us discuss the relevant facts to analyse the issue."

8.12. The present case is also of Regulation on terms and conditions of tariff and the above judgment is applicable to the MYT Regulations 2016. Further the principle has been upheld in the following decisions:

a. Ultratech Cement Limited v. Gujarat Electricity Regulatory Commission and Another - Order dated 15.03.2019 in Appeal No. 83 of 2018 (Appellate Tribunal) *"55……The said amendment was made for the first time to recover the transmission charges payable for short-term open access on the energy actually scheduled for Short-Term transactions. However prior to the above Amendment, the transmission charges are to be based on the maximum reserved capacity as*

provided in the then prevailing Regulations. The second amendment to the GERC Open Access Regulations applies prospectively and not retrospectively. It is well settled principle that subordinate legislation cannot be applied retrospectively……..."

b. M/s Ferro Alloys Corporation v. Odisha Electricity Regulatory Commission dated 23.09.2013 in Appeal No. 52 of 2012 and Batch:

"84. The principles laid down in these judgments relating to retrospective operation are as follows:

(a) There is no doubt that the vested rights or benefits under the legislation could be retrospectively taken away by legislation, but then the statute taking away such rights or benefits must expressly reflect its intention to that effect.

(b) It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only.

(c) If a rule/notification/circular claims to be retrospective in nature, has to expressly specify, as per the rules of interpretation of statutes in the instant petition, the Appellants have failed to establish the nature with regard to retrospective effect of the notification/rules.

(d) There is nothing in the contents or in the language of the said office memorandum which would indicate that there was an intention to give a retrospective effect to the contents of the said notification. Instead, the language used in the aforesaid notification clearly shows that the same was intended to be prospective in nature and not retrospective.

(e) It is well settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent not found in the statute.

(f) In our constitutional scheme, however, the statute and/or any direction issued there under must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only.

g) Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature

intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity."

8.13. There is no express or even implied stipulation for the Amendment dated 18.08.2018 to apply retrospectively. There is nothing in the Amendment to indicate that the application retrospectively. The new Regulation 72.2 has come into effect on 18.08.2018 and the same cannot be applicable prior to such date. As is clear from the Statement of Reasons to the Amendment, the prior position was that the transmission charges for STOA bilateral transactions was on per MW basis. There is no express or implied intention in the Amendment to affect the prior period charges. In fact, it was the contention of the Petitioner itself that the transmission charges cannot be revised retrospectively.

8.14. The judgment relied on by the Petitioner – Government of India v& Ors v. Indian Tobacco Association (2005) 7 SCC 396 is not applicable to the present case. Further the said case dealt with the substantial legislation and not delegated legislation. The delegated legislation cannot be retrospective.

8.15. The contention that the Amendment was curative in character and therefore is retrospective/retroactive is wrong and contrary to the well settled principle. The Amendment was intended to bring uniformity among all short-term users but this does not mean that the amendment is curative or that the earlier unamended Regulations was in any manner ultra vires or void. It is denied that there is any anomaly in the earlier Regulations. The Amendment is not declaratory or curative. There is a clear amendment to the Regulations and it cannot be possibly contended that the Amendment was clarifying or declaring the position as already existing. The substitution of the Regulation 72.2 on 18.08.2018 does not 'explain' the earlier Regulation or clear any doubts or supply an obvious omission. There is a specific and deliberate shift for transmission charges for STOA bilateral from per MW basis to per KWh basis. If the intention was to apply the Regulation to period prior to 18.08.2018, this would have been so stated.

8.16. It is once again submitted that whereas a statute can be retrospective (though it has to be intended to be retrospective), a delegated legislation such as Regulations are not retrospective. Even the judgment cited by the Petitioner being Zile Singh v. State of Haryana (2004) 8 SCC 1 recognizes that there is a presumption against retrospective operation. Both the said decision and R. Rajagopal Reddy v. Padmini Chandrasekharan (1995) 2 SCC 630 deal with the declaratory enactment wherein the amendment seeks to clarify the existing. However, in the present case Amendment dated 18.08.2018 had changed the existing position wherein the STOA

bilateral users were being charged on per MW basis and after amendment are being charged on per KWh basis.

8.17. The Petitioner had sought for recovery of past period during the proceedings related to Amendment, the same was not considered by the Hon'ble Commission:
"As regards the issue of past recovery of Transmission Charges, the same does not pertain to the draft Amendment. Accordingly, the Commission does not find it appropriate to deal with it in the present proceedings."

8.18. This makes it even more clear that the Commission did not intend to apply the Amendment retrospectively to the past recovery. The Commission has stated that it does not find it appropriate to deal with the past recovery in the Amendment proceeding which means that the amendment was not intended to apply to the past period. If the contention of Petitioner was accepted on past recovery, it would have been stated so in the Statement of Reasons as well as Amendment Regulations.

9. Thereafter, the matter was relisted on 20.07.2020 for mentioning/ directions on account of change in quorum, during which the counsel for the Petitioners and the Respondent submitted that they have already made their submissions and completed their arguments earlier and no further submissions are required to be made by them in the matter and the Commission may decide the matter based on the submissions already made and the record of present Petition.

10. Based on the submissions of the Petitioner and Respondent, the issues now emerged for our decision are-

10.1. Whether the invoices raised by the Respondent SLDC for the past period for short term transactions by changing methodology from kWh basis to Rs. per MW on per Day basis are lawful and valid?
10.2. Whether treating each bilateral transaction by same user as distinct and collecting short term open access charges for each transaction separately and whether it amounts to duplicating of recovery of short term open access charges?

11. While dealing with the first issue, it is noted that every year the Commission undertakes annual determination of tariff and charges to be recovered by licensees and it is mandatory for all the licensees to recover tariff and charges as per the Commission's Orders. While deciding annual Transmission Charges for the FY 2017-18, the Commission in its Order dated 31st March 2017 (Case No. 1620 of 2016) specified that-

"Regulation 72.2 of the GERC (MYT) Regulations, 2016 specifies formula for levy of transmission charges on Rs./MW/day basis from short-term users of the transmission system. The Commission has already worked out Transmission Charges of Rs.

3821.98/MW/day for FY 2017-18 and accordingly the transmission charges from short term shall be recovered for FY 2017-18."

Further from the submissions of parties, it is noted that the Respondent SLDC instead of recovering charges as stated above, continued earlier practice of billing short term transactions on kWh basis, which was not valid as per the Commission's Orders.

Subsequently on realizing the above mistake in its billing procedure, the Respondent SLDC not only corrected it for past bills but also started raising future bills as per the above said order of the Commission. Accordingly, the Respondent raised supplementary invoices for correcting the bills of the past periods, which is not only lawful but justified also. Therefore, we do not find any merit in the Petitioner's objection on raising of supplementary bills by SLDC for the past period following the Commission's order correctly.

12. Now, as referred and submitted by the Respondent that similar issue related to correct recovery of short term open access charges for the past period has already been decided by this Commission in its Order in Petition No. 1558 of 2016 and held that such recovery as legal and valid. We do agree with the above submission of the Respondent. However, at the same time we are not pleased by the casual approach of SLDC to first charge the consumer wrongly and then after realizing its mistake gives the correct bills to consumers so as to set right their mistakes. Therefore, we are warning SLDC not to repeat such mistakes in future and avoid putting its consumers in any inconvenience.

13. We do not agree with the Petitioner that the recovery of the Short Term Open Access Charges shall be strictly in accordance with the OA Regulations 2011 as the Commission undertakes the determination of the tariff and charges to be recovered from the consumers/ user on annual basis in accordance with the Tariff Regulations which are in force at the time of application. Once Commission has determined the tariff and charges for particular period through its Tariff Order, it becomes necessary to recover such charges from the consumers and users during such period.

14. With reference to number of judgements quoted by the Parties in connection with the applicability of provisions of OA Regulations and MYT Regulations, we are of the opinion that said judgements are not applicable in the present matter as the case before us is limited to correct implementation of the Tariff Order and recovery of charges for the past period and not for deciding applicability of Regulations. This settles the first issue.

15. As far as second issue regarding treating each bilateral transaction as separate & distinct one and recovery of short term open access charges on Rs. Per MW per day for each transaction separately amounting to duplication of recovery, the Commission would like

to clarify that recovery of the short term open access charges shall be based on number of instances on which separate applications are made for short term open access. Further, for each application separate approval is required so as to consider them as distinct one and separate events. The Commission has also noted that similar practice is being followed by SLDC consistently in this regard from all open access consumers and accordingly the Short-Term Charges are levied on individual approval granted separately for each bilateral transaction which we consider as valid. This settles the second issue that there is no duplicating of charges.

16. In view of the above observations, we decide the present petition is devoid of merits and the same is dismissed.

17. We order accordingly.

18. With this order the matter stands disposed of.

Sd/-	**Sd/-**
(P. J. THAKKAR)	**(ANAND KUMAR)**
MEMBER	**CHAIRMAN**

Place: Gandhinagar
Date: 22/07/2020