BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION

GANDHINAGAR

Petition No. 1672 of 2017

In the Matter of:

Petition under Section 181 of the Electricity Act, 2003 read with Regulations 80 and 82 of GERC (Conduct of Business) Regulations, 2004, for amendment of GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011.

Petitioner No. 1	:	Indian Captive Power Producers Association
Petitioner No. 2	:	The Chamber of Commerce and Industry of Kutch
Represented by	:	Learned Advocates Shri Buddy Ranganadhan, Shri Hemant Singh, Shri Lakshyajit Singh Bagdwal along with Shri Ankit Gupta and Shri Rajiv Agrawal
		V/s.
Respondent No. 1	:	Gujarat Energy Transmission Corporation Limited
Represented by	:	Learned Advocate Ms. Ranjitha Ramachandran and Ms. Venu Birappa
Respondent No. 2	:	Madhya Gujarat Vij Company Limited
Represented by	:	Learned Advocate Ms. Ranjitha Ramachandran and Ms. N. V. Gupta
Respondent No. 3	:	Dakshin Gujarat Vij Company Limited
Represented by	:	Learned Advocate Ms. Ranjitha Ramachandran
Respondent No. 4	:	Paschim Gujarat Vij Company Limited
Represented by	:	Learned Advocate Ms. Ranjitha Ramachandran and Shri J. J. Gandhi
Respondent No. 5	:	Uttar Gujarat Vij Company Limited
Represented by	:	Learned Advocate Ms. Ranjitha Ramachandran and Shri K. D. Barot

Respondent No. 6	:	Torrent Power Limited Ahmedabad
Represented by	:	Shri Chetan Bundela along with Shri Jignesh Langalia and Ms. Luna Pal
Respondent No. 7	:	Torrent Power Limited Surat
Represented by	:	Shri Chetan Bundela along with Shri Jignesh Langalia and Ms. Luna Pal
Respondent No. 8	:	Torrent Power Limited Dahej
Represented by	:	Shri Chetan Bundela alongwith Shri Jignesh Langalia and Ms. Luna Pal
Respondent No. 9	:	MPSEZ Utilities Pvt Limited (Now MUL)
Represented by	:	Nobody was present.
Respondent No. 10	:	Kandla Port Trust (Deendayal Port Trust)
Represented by	:	Nobody was present.
Respondent No. 11	:	Jubilant Infrastructure Limited
Represented by	:	Shri C. B. Bhardwaj and Shri Mahesh Mandwarya
Respondent No. 12	:	Aspen Infrastructure Private Limited
Represented by	:	Nobody was present.
Respondent No. 13	:	GIFT Power Company Limited
Represented by	:	Shri Rakesh Inala
Respondent No. 14	:	State Load Despatch Centre - Gujarat
Represented by	:	Learned Advocate Ms. Ranjitha Ramachandran and Shri A. B. Rathod
Respondent No. 15	:	Gujarat State Electricity Corporation Limited
Represented by	:	Nobody was present.
Respondent No. 16	:	Adani Power Limited

Represented by	:	Shri Mehul Rupera, Kumar Gaurav, Shri Rahul Panwar
Respondent No. 17	:	Gujarat Mineral Development Corporation
Represented by	:	Nobody was present.
Respondent No. 18	:	Bhavnagar Energy Company Limited
Represented by	:	Nobody was present.
Respondent No. 19	:	Essar Power Gujarat Limited
Represented by	:	Nobody was present.
Respondent No. 20	:	Gujarat Industries Power Company Limited
Represented by	:	Nobody was present.
Respondent No. 21	:	CLP India Limited
Represented by	:	Nobody was present.
Respondent No. 22	:	GSPC Pipavav Power Co. Limited
Represented by	:	Nobody was present.
Respondent No. 23	:	Gujarat State Energy Generation Limited (GSEG)
Represented by	:	Nobody was present.
Respondent No. 24	:	OPGS Power Gujarat Pvt. Limited (Now Bhadreswar Vidyut Pvt. Ltd.)
Represented by	:	Ms. Saeeda Khan
Respondent No. 25	:	SUGEN
Represented by	:	Nobody was present.
Respondent No. 26	:	Nayara Energy Limited (Essar Oil Limited)
Represented by	:	Learned Advocate Shri Abhishek Shah
Respondent No. 27	:	Gujarat Alkalies and Chemicals Limited
Represented by	:	Learned Advocate Nisarg Desai.

Respondent No. 28	:	Gujarat Fluorochemicals Limited
Represented by	:	Nobody was present.
Respondent No. 29	:	Hindalco Industries Limited
Represented by	:	Shri Ronit Sarangi and Shri Abhilash Raghav.
Respondent No. 30	:	Jindal Saw Limited
Represented by	:	Nobody was present.
Respondent No. 31	:	Krishak Bharati Co-Operative Limited
Represented by	:	Nobody was present.
Respondent No. 32	:	Oil and Natural Gas Corporation Limited
Represented by	:	Learned Advocate Shri Rituraj Meena along with Ms. Neha Sharma.
Respondent No. 33	:	Phillips Carbon Black Limited
Represented by	:	Shri P. R. Mehta.
Respondent No. 34	:	Reliance Industries Limited
Represented by	:	Learned Advocate Shri Nimit Shukla along with Shri Mukesh Rathod and Ashok Singh
Respondent No. 35	:	SAL Steel Limited
Represented by	:	Nobody was present.
Respondent No. 36	:	Sanghi Industries Limited
Represented by	:	Nobody was present.
Respondent No. 37	:	Saurashtra Cement Limited
Represented by	:	Learned Advocate Shri Nikunt Raval.
Respondent No. 38	:	Shree Renuka Sugars Limited
Represented by	:	Shri Vinayak Puranik

Respondent No. 39	:	Shreeyam Power & Steel Industries Limited
Represented by	:	Nobody was present.
Respondent No. 40	:	Ultratech Cement Limited
Represented by	:	Learned Advocate Malcolm Desai.
Respondent No. 41	:	UPL Limited
Represented by	:	Nobody was present.
Respondent No. 42	:	Varsana Ispat Limited
Represented by	:	Nobody was present.
Respondent No. 43	:	Welspun Captive Power Generation Limited
Represented by	:	Shri Shalin Agrawal, Shri K. K. Bhaita, Shri Bhaumik Dave, Ms Metallica, Shri P. R. Mehta
Respondent No. 44	:	Abellon Clean Energy Private Limited
Represented by	:	Shri Parth Desai.
Respondent No. 45	:	Amreli Power Projects Limited
Represented by	:	Shri Parth Desai.
Respondent No. 46	:	Bhavnagar Biomass Power Project Private Limited
Represented by	:	Shri Parth Desai.
Respondent No. 47	:	Backbone Solar
Represented by	:	Nobody was present.
Respondent No. 48	:	Enerson Solar
Represented by	:	Nobody was present.
Respondent No. 49	:	GPCL Solar

Represented by : Nobody was present.

CORAM:

Shri Anand Kumar, Chairman

Shri Mehul M. Gandhi, Member

Date: 11/02/2021.

ORDER

1. The Petitioners have filed the present Petition under Section 181 of the Electricity Act, 2003 read with Regulations 80 and 82 of GERC (Conduct of Business) Regulations, 2004 and prayed for amendments in the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011.

2. It is necessary to note that in the power sector, the State Commission has important role. The Regulations are meant for a balanced growth in the sector and useful suggestions in this regard are always welcome so as to the make process dynamic. With this note, this Commission now proceeds with the present Petition.

3. Earlier, the matter was kept for admission hearing on 16.09.2017. After hearing the parties, the Commission passed Daily Order dated 29.09.2017 directing the Petitioners to join the distribution licensees and others as parties to the present Petition. Accordingly, Respondents No. 1 to 49 came to be joined as parties.

4. The matters were earlier heard by the Commission on 16.09.2017, 09.10.2018, 20.10.2018, and 22.01.2019. However, being aggrieved of the Commission's Daily Order dated 01.02.2019, the Petitioners filed Appeal No. 262 of 2019 before Hon'ble APTEL, wherein Hon'ble APTEL directed the Commission to expeditiously conduct hearings in Petition No. 1672 of 2017, and pass appropriate orders as expeditiously as possible but not later than three months from the date of judgement.

5. Thereafter, the Petitioners filed Contempt Petition No. 05 of 2020 before the Hon'ble APTEL and sought compliance of the aforesaid Order dated 02.03.2020 passed by the Hon'ble APTEL. In the said proceedings the Commission made

submission that there is no Coram in the Commission. Hence, the matter was not finally decided. Now, pursuant to joining of new Member on 01.12.2020 and thereby Coram of the Commission being complete, the matter was taken up for hearings.

6. The Petitioners have sought amendments/additions in the existing GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 (GERC Open Access Regulations) as under:

(1) Regulation 19 dealing with Allotment Priority for Open Access;
(2) Regulation 13 & 14 dealing with Flexibility in drawl points under LTOA and MTOA;
(3) Regulation 21 dealing with Transmission Charges for setting-off of LTOA charges against MTOA and STOA charges;
(4) Regulation 42 dealing with Relinquishment of LTOA.
(5) Regulation 28 dealing with Optimum scheduling of power exchange transactions;
(6) Regulation 22 dealing with Payment of Scheduling charges
(7) Proposed to add new Regulation with regard to Rebate on demand charges to captive consumers;
(8) Proposed to add new Regulation with regard to Monitoring and Dispute Resolution Committee for Open Access;
(9) Proposed to add new Regulation with regard to Mandatory publication of transmission system plan;
(10) Regulation 17 Consideration of applications for Open Access;
(11) Replacement of open access user for already granted LTOA;
(12) Ensuring independence of SLDC;
(13) Transmission planning and network expansion
(14) Reduction in minimum duration of LTOA
(15) Transmission charges for dedicated transmission lines
(16) Regulation 37 dealing with Payment Security Mechanism.

7. The facts mentioned in the Petition are briefly enumerated as under:

7.1. Indian Captive Power Producers Association (ICPPA/Petitioner No. 1) is an association actively taking up issues for safeguarding interests of Power Producing Industries. The members of ICPPA come from across section of industries mainly chemicals, papers, textile, iron-steel, cement, aluminum and many more. The Petitioner No. 2 - Chamber of Commerce and Industry of Kutch is an organization dedicated for resolving the policy related issues to increase the pace of socio-economic development of Kutch district. The Chamber of Commerce and Industry of Kutch works to support industrial units spread all over Kutch district and acts as a bridge between industry and Government agencies.

7.2. According to the Petitioners, there are significant changes observed in the sector impacting the market on Open Access (OA) related issues over the past few years which are not reflected in the GERC Open Access Regulations, 2011. Several open access consumers in the State of Gujarat are severely affected by these issues which, inter alia, include: -

(a) Disputes raised by Open Access consumer/generating companies regarding transmission capacity constraints for open access, where the constraint is taken as a ground by transmission licensee in most cases.

(b) Substantial rise in the number of Petitions filed by consumers before this Commission seeking amendments/modifications in the existing Open Access Regulations.

7.3. The Petitioners have relied on the legislative framework of open access in the Petition viz. (i) 31st Report of the Standing Committee on Energy on the Electricity Bill, 2001, (ii) Statement and Objects and reasons of the Electricity Act, 2003 (Act), (iii) Sections 2(47), 38, 39, 40 & 42 the Act, (iv) National Tariff Policy, 2005 and (v) Tariff Policy, 2016 and submitted that the objective of open access as contained in the Act (Act), is to facilitate supply of electricity from surplus region to deficit region and to tap the sources of electricity such as captive generation and renewable generation. As envisaged in the Act as well as the National Electricity Policy, open access is a key requirement for facilitating competition as wholesale as well as retail electricity markets. Section 42 of the Act, authorizes the respective Regulatory Commission to specify various norms and charges, including cross subsidy surcharge, for availing of open access. Open access is central to bring about

competition in the power sector. After de-licensing of generation, it was necessary that a generator can sell its power anywhere in India. It is also beneficial for the consumer to have a "choice" to procure power from reliable and efficient source. This objective can be achieved through Open access.

7.4. It is submitted that the introduction of the concept of open access and its rationale has been succinctly observed by the Hon'ble Supreme Court in the judgment dated 25.04.2014 passed in ***Sesa Sterlite Limited vs. OERC & Ors. [(2014) 8 SCC 444].***

7.5. It is submitted that on 29.09.2005, the Commission notified the Gujarat Electricity Regulatory Commission (Open Access in Intra-State Transmission and Distribution) Regulations, 2005.

7.6. It is further submitted that on 01.06.2011, this Commission notified the GERC Open Access Regulations 2011, the provisions of which are now sought to be amended by the Petitioners. Thereafter, the same have been amended twice i.e. (i) on 04.03.2014 and (ii) 12.08.2014. It is to be noted that the GERC Open Access Regulations presently hold the field with respect to open access in the State of Gujarat. The Petitioners through this Petition have sought amendments for the issues as stated in the foregoing paragraph.

7.7. The Petitioners through this Petition have sought amendments for the issues as stated in the foregoing paragraph. It is submitted that as per Section 181 of the Act and Section 21 of the General Clauses Act, 1897 read with Regulations 80 & 82 of the GERC (Conduct of Business) Regulations 2004, this Commission is vested with the power to amend the Regulations that have been framed by this Commission itself.

7.8. It is submitted that the role of the State Electricity Regulatory Commissions and their powers qua framing of Regulations has been decided by the Hon'ble Supreme Court in the case of ***PTC India Limited Vs. CERC & Ors, [(2010) 4 SCC 603]***.

7.9. It is submitted that the present GERC Open Access Regulations, 2011 are sought to be reviewed by this Commission to give complete effect to the objectives and benefits of open access to various stakeholders in the sector. Despite minor

amendments in the GERC Open Access Regulations, 2011, the same still do not take into account the sectoral realities and do not provide for an environment of growth in the State. Since the time the GERC Open Access Regulations, 2011 were notified, there have been wide spread changes in the market scenario with respect to several aspects of open access which merit the consideration of the Commission, such as: -

(a) Disputes regarding available transmission capacity for approval of open access.

(b) A substantial rise in the number of Petitions filed by the consumers with GERC against the actions of licensees to deny / discourage open access.

7.10. It is submitted that as envisaged in the Act, open access is a key requirement for facilitating competition in wholesale as well as retail electricity markets. Section 42 of the Act authorizes the respective Regulatory Commissions to specify various norms and charges, including cross subsidy surcharge for availing open access. It is submitted that various State Electricity Regulatory Commissions and the Central Commission have framed their respective Open Access Regulations that govern the open access transactions for the Intra-State and Inter-State transactions respectively.

7.11. It is submitted that the status of open access across various States is not uniform and thus effective competition is lacking in the market. In this regard, it is to be noted that poor open access in the State of Gujarat has not only adversely affected market competition but has also discouraged potential investors from investing in Gujarat. Gujarat Energy Transmission Company Limited (GETCO) is the State Transmission Utility in the State of Gujarat and approves the open access applications for the use of GETCO's transmission network. GETCO claims that GETCO develops the transmission network for its long-term users and at no point GETCO system is not available for long term users. Other open access consumers, such as MTOA/STOA are granted based on the availability of margin available after LTOA. Hence, the question of not granting open access arises only on account of such margins not being available. However, despite the above claim by GETCO, it has been observed that open access is not being fully utilised in Gujarat.

7.12. It is submitted that the lack of open access has adverse impacts such as restrictions on consumer choice, making consumers prone to exploitation by incumbent distribution companies enjoying monopoly power in the respective areas; excess capacity in captive plant because of inadequate competition for purchase of power and hence low prices; lack of incentive for investment in the generation business etc. At the same time, a few distribution companies are exploiting the mentioned shortages and charging very high prices for short term sale across States. It is submitted that there is a lack of clarity in the subsisting GERC Open Access Regulations regarding the procedures involved for giving effect to the true intent of open access. Such lack of clarity is presently being misused by the State utilities to their own advantage and the open access user being left without proper guidance. It is submitted that as a result of this, a lot of potential users exercise the option of not availing open access, thereby defeating the very purpose of introduction of open access. It is therefore in consumer interest that this Commission reviews the existing Regulations to identify various hurdles to open access at the State level by involving all stakeholders and the required regulatory amendments be made.

7.13. It is submitted that progressive steps ought to be taken to ensure open access and to give effect to the need for open access in the market. The lack of proper open access mechanism has increasingly made open access unviable in the State of Gujarat. It is submitted that Section 61(a) of the Act requires the State Commissions to take guidance from the principles and methodologies specified by the Central Commission for tariff determination.

7.14. It is further submitted in the Petition that as per the present GERC Open Access (OA) Regulations, 2011, a distribution licensee has the first priority in transmission capacity, irrespective of the long term / medium term / short term nature of open access transactions. This is governed by Regulation 19 of the GERC OA Regulations, 2011, where there is no logic/reasoning provided as to why a distribution licensee is given the top priority to open access especially when the open access is required to be "non-discriminatory" as per Section 2(47) of the Electricity Act. The priority in transmission capacity will have to be determined with respect to the term of the transactions only, with no regard to the users of such open access. Either there should be prior eligibility criteria that should be met by the distribution licensee or

some extra amount/charges that are paid by the distribution licensee for granting them this priority in seeking open access – otherwise, the distribution licensees ought not to be granted preferential treatment for grant of open access especially since open access is to be provided on non-discriminatory basis.

7.15. It is submitted that in case there is a preferential treatment provided to a particular category of open access users, it should include captive power producers, since they generate their own power for their own use, thereby decreasing the burden on the State Grid. It is submitted that the very purpose of freely allowing captive generation is to enable industries to access reliable, quality and cost effective power. Further, in cases where the dedicated transmission lines are constructed by the captive power consumers, it helps in strengthening of the grid. Captive generation is an important means to making competitive power available and hence may be considered on priority for grant of open access.

7.16. It is submitted that as per the provisions of the GERC OA Regulations, 2011, change in drawl point for open access is not allowed, both in Long Term Open Access as well as Medium term Open Access. It is submitted that once the drawl points are submitted in the applications as required under the GERC OA Regulations, 2011 and are approved for open access transactions, such drawl points cannot be modified/changed. This non-flexibility in change of drawl points results in practical difficulties for the open access consumers, since open access transactions, especially Long Term Open Access transactions, entail a period of 12 years to 25 years as per Regulation 3(l) of the GERC OA Regulations, 2011 for the grant of open access. It is submitted that in the current market environment, it is not practical to expect that the power drawl consumer remains the same for a long period of 12 years to 25 years.

7.17. It is submitted that when an Open Access Consumer/generating company is using the transmission system and has been granted the open access, the injection/drawl point cannot be changed in terms of the present Regulations. For instance, if GETCO's transmission system is being used for injecting 50 MW from a fixed injection point to a fixed drawl point, the transmission system remains the same. In such cases, if the open access consumer/generating company wished to change the

drawl point from point - A to point -B for drawing the same quantum of 50 MW, then no change in transmission system/strengthening would be required by GETCO. Hence, it is in the interest of the State that this flexibility in drawl point is allowed so that the Open Access consumer/generating company is not constrained by this process. It is submitted that taking the aforesaid limitation into consideration, this Commission ought to allow flexibility in drawal points after grant of open access. This could be done any number of times. This would help in the optimum utilization of the existing capacity in the grid with no resultant detriment to the interests of the transmission licensee. In this regard, it is submitted that the transmission licensee does not suffer any revenue loss if change in drawl point is allowed, as its receipt of transmission charges is assured for the period of open access. The use of transmission grid is permitted for the State owned distribution utilities without any specific identification of injection and drawl points. Therefore, as open access is to be "non-discriminatory" in nature, at least some level of flexibility ought to be granted to the open access consumers other than the distribution licensees.

7.18. It is further submitted that if this Commission permits change in drawl point within one year, there can be no question of system constraint to the new consumer as all these consumers have existing connected sanctioned load with the State companies and the power they will purchase under open access will be within the sanctioned load only. Accordingly, it is submitted that an additional clause/explanation to the Regulations may be added in the GERC OA Regulations, 2011, which allows the Long Term Open Access and Medium Term Open Access consumers to change their points of drawl without resulting in the cancellation of open access.

7.19. It is submitted that whenever open access is granted, the open access customer using the transmission system is required to pay certain charges known as open access charges which includes viz. (a) Transmission Charges; (b) Scheduling and System Operation Charges; (c) Wheeling Charges; (d) Cross Subsidy Surcharge; (e) Additional Surcharge; (f) Standby charges for drawl of power by open access customer from distribution licensee, etc.

7.20. It is submitted that presently, when a Long Term Open Access consumer opts for short term transactions using a portion of the same capacity to which it was granted

Long Term Open Access, such Long Term Open Access consumer will be required to pay additional transmission charges. For instance, if generator has approval of 100 MW Long Term Open Access, and if it is currently able to utilize only 80 MW under long term transactions and is supplying remaining 20 MW under short term transactions, it will be required to pay transmission charges for the entire 100 MW under Long Term Open Access in addition to the transmission charges for 20 MW under Short Term Open Access. It is submitted that this could be avoided if transmission charges paid under Short Term Open Access/Medium Term Open Access is set-off against payment obligations under Long Term Open Access corresponding to the same capacity, since such payment is going to the same transmission / distribution licensee and such licensee is not deprived of the cost for usage of the system. If this setting off is not done, then the Open Access consumer / generating company is saddled with the open access charges twice i.e. for long term and short/medium term, which is an unnecessary/unjust burden and can be avoided.

7.21. It is submitted that in contrast to the above, in case of Inter-State Open Access, for the same transmission capacity, the Central Transmission Utility (CTU) allows payments made towards such Medium Term Open Access and Short Term Open Access to be set-off against the Long Term Open Access payment obligation. Such adjustment allows the users to make use of transmission capacity granted to them under Long Term Open Access for Medium Term and/or Short Term Open Access until Long Term Open Access is operationalized, without having to pay twice for the same capacity.

7.22. It is submitted that one of the main objectives of the Act as stated in the Statement of Objects and Reasons and Section 61(a), Section 61(b) and Section 61(c) is to provide a legal basis for the determination of all tariff including transmission tariff on commercial principles which would encourage efficiency and investment. However, the present provisions of the GERC OA Regulations, 2011 discourage potential Long Term Open Access consumers from applying for Long Term Open Access since every time the Long Term Open Access is sought and cannot be utilized by the consumer and such consumer requires Short Term or Medium Term Open Access, the consumer would have to pay for both, viz., the Long Term Open Access

charges and Short Term/Medium Term Open Access charges without any setting off between the two charges.

7.23. It is submitted that there ought to be a mechanism wherein in case the Long Term Open Access consumer is unable to utilize the open access to a certain extent, the unutilized capacity may be allocated to Medium Term Open Access or Short Term Open Access consumer. Such capacity which is released for Medium Term Open Access or Short Term Open Access should be allowed with a condition that in case the original Long Term Open Access consumer seeks to utilize its capacity, the Medium Term Open Access or Short Term Open Access so granted shall be curtailed. It is submitted that in all fairness, when the Long Term Open Access capacity is released for any other category of open access, the concerned generator ought not to be made liable for payment of Long Term Open Access charges for the reallocated capacity. It is submitted that the provisions of the GERC Open Access Regulations, 2011 deserve to be amended wherein Intra-State Transmission Charges for Long Term Open Access is set-off against the payments made for Medium Term Open Access and/or Short Term Open Access for the same capacity.

7.24. It is submitted that GERC Open Access Regulations, 2011 provides that if a Long Term Open Access User relinquishes a part or whole of its Open Access capacity prior to twelve years, such user will have to pay transmission charges for the years falling short of twelve years in terms of Regulation 42. For instance, if the user relinquishes the Long Term Open Access granted to it after five years of grant of the same, the user will have to pay transmission charges for the balance seven years despite relinquishing the open access.

7.25. It is submitted that the GERC Open Access Regulations, 2011 does not balance the interests of the investors/generating companies and the transmission utility/STU. Such a provision for payment of such penalty charges does not take into consideration any actual loss/financial burden created by the transmission licensee on the Open Access consumer/generating company for such relinquishment of open access. It is submitted that in such situation or event where the Transmission licensee has strengthened or augmented the transmission system for grant of such open access in that case a proportionate cost could be recovered from the Open

Access consumer / generating company. However, if strengthening/augmentation has not taken place, then there is no logic to charge such penalty. Thus, a transmission licensee gets an undue benefit even if it has not enhanced the capacity of the grid for the open access user. It is submitted that such undue benefit that may be availed of by the transmission licensee due to the prevalent Open Access Regulations ought to be curtailed by this Commission and the loss/burden on the generating company should be taken into consideration.

7.26. It is submitted that there should be some flexibility allowed for the open access consumers in availing the open access considering the rapidly changing uncertain market scenario. It is submitted that this Commission may introduce a provision in the existing GERC Open Access Regulations, wherein Long-Term Open Access Consumer is availing Medium Term Open Access and/or Short Term Open Access on account of non-operationalization of Long Term Open Access granted to it: -

(a) Such Open Access consumer shall not be required to pay relinquishment charges towards relinquishment of Medium-Term Open Access/Short Term Open Access if the Long Term Open Access is operationalized during such period.

(b) Such Open Access consumer shall not be required to pay relinquishment charges towards relinquishment of Long-Term Open Access/Short term Open Access.

7.27. It is also submitted that in respect of optimum scheduling of power exchange transactions, in the prevalent market scenario in the State of Gujarat, the Power Exchanges are being allowed open access irrespective of the injection point and/or drawl point for collective transactions. However, in case of bilateral transactions, open access permission is denied by the State utilities by citing system constraints as main reason. It is submitted that such an approach defeats the very purpose of open access, since any prospective open access consumers prefers to avail power from the power exchange rather than directly from the generating companies since open access is preferably being allowed to power exchanges. In this regard, it is submitted that the consumers may opt to avail power only through power exchanges both during peak/off-peak hours due to the ease of obtaining open access

from power exchanges. In the event the consumers only use power exchanges to procure power during off peak hours, the rate is very low and this further weakens the credibility of the Open Access consumer/generating company. It is submitted that apart from the above, the Commission ought to ensure that the distribution licensee does not face difficulties in terms of peak and off-peak load management, medium and long term load forecasting due to such availing of power from power exchanges. Therefore, it is submitted that checks and balances may be introduced in the GERC Open Access Regulations for procurement from power exchanges. Since at present, the GERC Open Access Regulations, 2011 do not consider curtailing of power from Power Exchange transactions.

7.28. It is submitted that there appears to be an ambiguity in the GERC Open Access Regulations with respect to payment of scheduling charges when an agreed schedule is given on behalf of the consumers by a generator. It is submitted that even though the intent of the aforesaid Regulation seems to be the billing of operating charge at a rate of Rs. 2000/day/transaction for short term transactions. However, the impact of GERC Open Access Regulation is that it results in captive transactions being billed twice, once at the injection end and then again at the withdrawal end irrespective of the buyer and seller operating on the same open access approval. It is submitted that presently, the Short Term Open Access consumer has to pay the scheduling charges for each and every transaction. Further, the said charging/billing is done irrespective of the fact that an agreed schedule is given. It is submitted that in case of a single consumer, the scheduling charges and system operation charges should be paid only once for the entire duration of open access rather than for each transaction. It is submitted that when an agreed schedule is provided by the consumer for a specified amount of time, there should only be one composite amount of scheduling charges and system operation charges that should be levied on the open access user. It is further submitted that in any case, the composite charge of Rs. 2000/day/transaction is a considerable amount for scheduling and system operation charges which may be revised to Rs. 1000/day/transaction. Accordingly, Regulation 22 of GERC Open Access Regulations may be amended stating that for injecting entities or receiving entities that provide a mutually agreed schedule such as captive generating plants,

scheduling and system operation charges may be billed only from the injecting entity so that consumers will not unnecessarily be burdened to pay the same charges twice.

7.29. It is submitted that there are a significant number of consumers who are contracting for RTC (Round The Clock) power from their own captive power plants situated elsewhere in the State to meet a significant portion of their energy requirements. However, most of these consumers maintain their full contract demand with the distribution licensee. This is because open access, if allowed at all in Gujarat, is only allowed within the contract demand of the consumer, and therefore there is no option for the open access consumers to reduce their demand charges. This results in a situation where while a significant portion of the demand is being met from consumer's own captive plant, such consumer is required to pay for the demand charges corresponding to that demand also to the licensee. It is submitted that this Commission may consider introducing a framework wherein consumers are given a partial reduction in their demand charges due to the supply of demand through open access and the consumer is not unnecessarily burdened.

7.30. It is submitted that as per the present provisions in the GERC Open Access Regulations, 2011, there is no provision that allows the reduction in the contract demand in case the power is availed by a consumer through open access. Thus, effectively, the consumer ends up paying for the power availed through open access in addition to the demand charges for the contracted demand even though the power is not availed through the contract demand. Therefore, a mechanism may be introduced in Gujarat wherein open access consumers with a contract period of 3 years and above may be given a partial rebate of about 70% rebate in their demand charges corresponding to the demand contracted through open access.

7.31. It is also submitted that the Commission may consider to constitute a Dispute Resolution Committee for monitoring of open access, and addressing the grievances of the consumers related to open access. Considering the multitude of Petitions pending with this Commission on denial of open access and considering the conflict in the interest arising out of the common ownership of GETCO and SLDC with the distribution licensees (DISCOMs), setting up such a Committee in Gujarat might be

in the interest of the consumers. It is submitted that such Committee may be set up in Gujarat to regularly monitor the functions of nodal agencies for open access, pending/rejected open access applications etc. and to recommend changes in the existing Open Access Regulations to this Commission as and when such requirement arises. It is submitted that such a Committee would substantially reduce the burden of pendency before the Commission and help in the quick effective resolution of issues relating to open access. Moreover, mentioning various practical difficulties faced by the open access consumers in Gujarat, it is submitted that the same may be referred to such Dispute Resolution Committee.

7.32. It is submitted that when any matter is to be decided by majority/voting in the committee, in view of the common ownership of the utilities, the State owned SLDC, STU and Distribution Licensees may be treated as a single entity. The conflict of interest arising out of common ownership of these utilities is clearly evident from the common stand adopted by these utilities in many matters before this Commission. For example, in 2014-15 and 2015-16, none of the distribution utilities, despite being the biggest beneficiaries of GETCO had deemed, it necessary to raise any objections or comments on the Tariff Petition of GETCO. Therefore, if these utilities are given separate voting power in any Committee, the interests of the consumers may get compromised.

7.33. It is submitted that GERC Open Access Regulations do not specifically provide for sharing of information on future transmission capacity expansion with the open access consumers. The planned trajectory of strengthening and extension of transmission network in the State is a critical information which impacts the decisions of open access consumers regarding locating their generation plants, applying for open access etc. It is submitted that this Commission may consider amending the GERC Open Access Regulations, 2011 and to incorporate a provision wherein the STU is mandatorily required to publish the Transmission System Plan for next five years by September of every year so that all stakeholders are appraised about the growth of lines, sub stations, proposed strengthening schemes etc. Such provisions would help in facilitation of system strengthening for the benefit of all transmission users.

7.34. It is submitted that Regulation 17 of the GERC Open Access Regulations, 2011 regarding 'Consideration of application from defaulters' provides that the Nodal Agency shall be at liberty to summarily reject an application for Open Access on the ground of non-compliance of the provisions of the Regulations, specifically payment of charges specified therein. Therefore, in effect, an entity which is in default of the provisions of the GERC Open Access Regulations, 2011 cannot avail open access in the State of Gujarat.

7.35. It is submitted that the word "defaulter" is being misused / misinterpreted by the STU. A person/generating company may be considered a defaulter by the transmission licensee/STU for the purpose of grant of open access, whereas the person/generating company may actually not be a defaulter if he is given a chance to explain this. It is submitted that the transmission licensee/STU may reject an application of an alleged defaulter on the pretext that a miniscule amount reflects as outstanding in the STU's record. Any due shown in STU/transmission licensee's data would be considered as a default whereas it could also be an accounting error. In this regard, it is submitted that applications from alleged defaulters ought not to be summarily rejected by the Nodal Agency on the pretext of non-compliance of Regulations and/or non-payment of charges under the Regulations without providing an opportunity to such defaulter of being heard. It is submitted that such provisions in the Regulations curtail the competition in the market. This is further perpetuated in case of wrongful levy of open access charges by the transmission licensee, where in the defaulter is barred from availing open access if such wrongful charges are not paid by the open access consumer.

7.36. It is submitted that there ought to be a provision in the Regulations to state that if the charges demanded by the transmission utility are under challenge and are disputed by the open access user, then non-payment of such charges should not be a reason for rejection of open access. It is possible that the transmission utility can abuse its powers and raise bills for incorrect transmission charges and then refuse to grant open access on the pretext of non-payment of these incorrect transmission charges.

7.37. It is submitted that this Commission may consider certain changes in the provisions of the GERC Open Access Regulations, 2011 by allowing replacement of already granted LTOA to an open access user for the same transmission capacity without attracting the levy of relinquishment charges. For instance, if an existing open access user wishes to relinquish the LTOA granted to the user, such user may arrange for another open access user who can avail of the transmission capacity for which the LTOA is granted. If the above suggestion is taken into consideration, it would not amount to any prejudice to the transmission licensee, since the transmission licensee would continue to receive the transmission charges for the same transmission capacity which was granted to the erstwhile LTOA user. This would substantially benefit the consumers since it is not always possible to envisage the usage of the transmission capacity for a long period of time in LTOA, in view of the dynamic market conditions.

7.38. It is submitted that in spite of SLDC being required to be an independence agency so as to ensure "non-discriminatory open access", SLDC in the State of Gujarat functions merely as an extension of the transmission licensee. Both SLDC and GETCO have the same Board of Directors. It needs to be considered that the holding company of GETCO namely GUVNL is also the holding company of the distribution licensees in the State. Therefore, the Commission may issue appropriate directions in order to secure independence of SLDC by requiring SLDC to be segregated and constituted as a totally separate entity, with its shares to be directly held by the Government of Gujarat instead of GUVNL. It is to be noted that at the Central level, similar segregation of NLDC and RLDC is already being executed by the Government of India and the Power System Operation and Control Limited (POSOCO) is being made totally independent of PGCIL.

7.39. It is submitted that existing GERC Open Access Regulations do not impose any penalties on the failure of transmission licensee to conduct system strengthening and capacity upgradation in line with the capacity additions and load growth in the State. This results in a situation like that of now, wherein open access transactions are being curtailed on account of system constraints. Ultimately, the beneficiary of such curtailment is the Gujarat Utilities itself, who are all owned by a single holding company- GUVNL. Therefore, this Commission may consider inserting a Regulation

that authorizes it to mandatorily conduct annual review of transmission capacity and to penalize the transmission licensee for its failure to upgrade the transmission capacity. In terms of the Act a transmission licensee has several duties and liabilities for facilitating transmission, which needs consideration while amending the Regulations, which, inter alia, are as follows: -

(i) Every transmission licensee shall comply with such technical standards, of operation and maintenance of transmission lines, in accordance with the Grid Standard, as may be specified.

(ii) Every licensee, owning or operating intervening transmission facilities, shall on an order, provide his intervening transmission facilities at rates, charges and terms and conditions as may be mutually agreed upon;

(iii) It shall be the duty of a transmission licensee -

(a) to build, maintain and operate an efficient coordinated and economical Inter-State transmission system or Intra-State transmission system, as the case may be;

(b) to comply with the directions of the Regional Load Dispatch Centre and the State Load Dispatch Centre as the case may be; and

(c) to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges or any consumer as and when such open access is provided by the State Commission under Sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.

7.40. It is submitted that the GERC Open Access Regulations, 2011 define Long Term Open Access as "the right to use the Intra-State Transmission System or distribution system for a period exceeding 12 years but not exceeding 25 years." In this regard, it is to note that it is difficult for the Long-Term Open Access consumers to tie up their capacity for such a long period involving a time frame of 12 years and above, especially in the rapidly evolving market situation.

(i). In the recent times, it has been observed that the power procurement by State utilities has moved from long term contracts of 25 years to shorter/medium term contracts due to uncertainty prevailing in the sector.

Therefore, this Commission may consider reducing the minimum period of Long-Term Open Access from 12 years to 7 years which will also be in line with the long term contracts provided in the "Guidelines for Determination of tariff by Bidding Process for procurement of power by distribution Licensees dated 19th January, 2005". This change has already been notified by the Central Electricity Regulatory Commission in the CERC (Grant of Connectivity, Long-Term Access and Medium-term Open Access in Inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017.

(ii). The reduction in minimum duration of LTOA would help in creating transmission system for catering/availing LTOA as well as facilitating power scheduling under MTOA/STOA with increased availability margin. Further, due to the decrease in LTOA consumers because of availability of reliable and cheaper power in MTOA/STOA, the planning and augmentation of transmission system and new transmission corridors has become difficult.

(iii). In view of the above, it is submitted that the Commission may consider reducing the term of Long-Term Open Access for transactions which involve the right to use the transmission/distribution system for a period exceeding 7 years instead of 12 years to 25 years.

7.41. It is submitted that presently in the State of Gujarat, the transmission charges for the dedicated transmission lines are borne by the generating company, both prior to the operationalization of LTOA and after operationalization of LTOA. This results in the generating company being saddled with huge financial implications. However, in the recent times, it has been observed that there have been number of disputes regarding the mismatch of commissioning of generating station with the commissioning of the dedicated transmission lines where the dedicated transmission lines are not executed by the generator. This mismatch is due to various reasons that delay the commissioning of generating station/dedicated transmission line such as land acquisition, ROW issues, delays in obtaining clearances etc. It is also submitted that once the dedicated transmission lines are commissioned, they become a part of the Intra-State transmission network. Therefore, the generating company/open access user ought not be burdened with

the payment of transmission charges for such dedicated transmission line after operationalization of Long-Term Open Access. Accordingly, it is submitted that the Commission may consider introducing a provision in the present Regulations wherein if the dedicated transmission lines have already been constructed/are under construction by the State Utility: -

a) The transmission charges for such dedicated transmission lines shall be payable by the concerned generating company to the transmission licensee from the date of COD of the dedicated line till operationalization of Long-Term Open Access of the generating company.
b) After operationalization of the Long-Term Open Access, the dedicated transmission line shall be included in the PoC pool and payment of transmission charges for the dedicated line shall be governed accordingly.

7.42. It is submitted that presently, as per Regulation 37 of the GERC Open Access Regulations 2011, in case of LTOA and MTOA, the applicant for open access has to open an irrevocable Letter of Credit. Such Letter of Credit has to be opened in favour of the agency responsible for collection of various charges for the estimated amount of various charges for two months. However, it has been observed that GETCO, in contravention of the provisions of Regulation 37 of the GERC Open Access Regulations, 2011, demands a revolving Letter of Credit instead of a Letter of Credit from the applicants for open access. In view of the above, it is submitted that this Commission may consider clarifying/removing the confusion being created by GETCO that the payment Security Mechanism in the form of Letter of Credit does not have to be revolving Letter of Credit.

8. Upon notice being served, the Respondent Distribution licensees viz. PGVCL (Respondent No. 4), DGVCL (Respondent No. 3), MGVCL (Respondent No. 2) and UGVCL (Respondent No. 5) have filed their replies which are common contending that the present Petition seeking amendment of the GERC (Terms and Conditions of Intra State Open Access) Regulations, 2011 is misconceived and is liable to be rejected *in limine*. Their replies are summarised as under:

8.1. It is contended that the framing of Regulations, including amendments to the Regulations are legislative functions of the Commission and cannot be a subject matter of dispute to be settled through proceedings.

8.2. It is further contended that the said Intra State Open Access Regulations have been notified by the Commission after due deliberation of all the relevant aspects and after due process of publication of the Draft Regulations, inviting comments, suggestions, objections etc. and thereafter notifying the said Regulations as a statutory Regulation in terms of the provisions of the Act. It is also contended that the said Regulation cannot be now sought to be amended by reason of any alleged dispute or differences between a generating company or a transmission or distribution licensee. The Open Access Regulations have been notified to give certainty to the dealings between the parties and therefore, should not be varied from time to time at the instance of any person, as it would destroy the continuity and predictability of the dealings in the electricity sector.

8.3. It is contended that the GERC Open Access Regulations, 2011 has been enacted balancing the interest of all the parties concerned and specifically taking note of the importance of maintaining the supply of electricity by the distribution licensees of the area in discharge of its Universal Service Obligation provided under Sections 42 and 43 of the Act. The above has been premised on the basis that it is the general body of the consumers in the State through a distribution licensee of the area that have been contributing and will continue to contribute for the capital investments in the Intra State Power System in the State. The entire transmission and distribution network in the State has been established and upgraded from time to time primarily from the retail supply tariff collected from the consumers at large and, therefore, there has to be a priority to the transmission and distribution system for serving such consumers. The surplus capacity after meeting the requirements of the distribution licensees to enable them to serve the consumers is allowed to be given to the Open Access Applicants based on whether the application is for Long Term or Medium Term or for Short Term. There is a perfect balance maintained in the Intra State Open Access Regulations by giving priority to the distribution licensees for access to the transmission and distribution system as compared to others.

8.4. It is contended by the Respondents that the entire Intra State Power System is an integrated system and developed over a long period of time and substantially funded out of the retail supply tariff collected from the consumers at large of the distribution licensees. The entire system had been built in the initial stages only for serving the consumers of the distribution licensees. The introduction of Open Access to others in pursuance of the Act has been a recent development after the enactment of the Act. Such a right to the Open Access Applicants can be only in the surplus capacity available with the transmission and distribution licensees after meeting the requirements of the distribution licensees to serve its consumers.

8.5. It is further contended that the claim made by the Petitioners in the Petition has to be considered based on the above fundamental aspects of the electricity sector prevalent in the State of Gujarat. It is also contended that similar would be the case of other Intra State Electrical Systems established in other States for serving the respective consumers of the distribution licensees in the State. The distribution licensees may be required to use the transmission system and distribution system in the State on long term or medium term or on short term basis, as the case may be. Ignoring the rights of the distribution licensees of having such priority will seriously affect the discharge of the functions envisaged for the distribution licensees under the Act in the context to Universal Service Obligation. The Petitioners are seeking to interpret the provisions of the Electricity Act to favour the Open Access applicants at the cost of the consumers at large which is not permissible and contrary to the objective of the Electricity Act.

8.6. It is the further contention of the Respondents that in the light of the above, the need for giving priority to the distribution licensees in the Intra State Electrical System established and maintained by the transmission and distribution licensees to serve the consumers in the State. Therefore, the Petition filed by the Petitioners seeking amendment of the Intra State Open Access Regulations, 2011 notified by the Commission is misconceived and is liable to be rejected. It is further stated that the disputes sought to be raised by the Petitioners in regard to the Open Access qua the distribution licensee cannot be a subject matter of the Petition for seeking amendment of the Intra State Open Access Regulations, 2011. The principle on

which the Open Access needs to be considered and given by the Utilities have been properly and clearly set out in the Intra State Open Access Regulations, 2011 and there is nothing in the said Regulation which is required to be modified or amended or clarified. By filing the present Petition seeking amendment of the Intra State Open Access Regulations, 2011, the Petitioners are attempting to undermine the interest of the consumers at large and are seeking such consumers to cross subsidise and financially take the burden of the Open Access to be granted to the applicants for Open Access at the cost and interest of the consumers at large. The said course is contrary to the scheme and objective of the Act. It is submitted that the consumers in the State who are served by the distribution licensees are required to be given priority over and above the interest of any other Open Access applicant other than the distribution licensees. The integrated Intra State Power System had been established, upgraded, maintained and operated in the past for many years funded out of the retail supply tariff paid by the consumers at large and accordingly they being a block of existing users of the transmission and distribution system at the time when the Act came into force on 10.6.2003. The distribution licensee should therefore have the first priority. The Petitioners and other similarly placed persons are entitled to Open Access to the transmission and distribution system after meeting the requirements of the distribution licensees.

8.7. It is contended that the Open Access to be granted to the applicant is subject to the existing rights of the consumers at large for use of the transmission and distribution system by the distribution licensees to fulfil the Universal Service Obligation as provided under Sections 42 and 43 of Act. The primary purpose for which such electrical systems have been established for the past many years is to cater the needs of the consumers at large. The right of an Open Access applicant to the system is subject to the rights of the consumers at large already existing as on the date of the commencement of the Act. Thus, while the distribution licensee had not disputed the scheme under the Act related to Open Access to be provided, it is submitted that such Open Access entitlement is subject to the surplus capacity being available on the existing system after meeting the requirements of the distribution licensees. It is submitted that the Respondents have taken consistent stand with the principles laid down by the Hon'ble Supreme Court in the case of ***Sesa Sterlite Ltd.***

V/S. Orissa Electricity Regulatory Commission & Ors. *reported in (2014) 8 SCC 444.*

8.8. It is further denied that there has been a necessity to initiate amendment in the Intra State Open Access Regulations, 2011, in view of any existing environment in the competitive market in Gujarat or otherwise. It is wrong and denied that the aspects mentioned in Para 10 of the Petition was required to be considered by the Commission or changes were required to be made in the Intra State Open Access Regulations, 2011 as per the representation of the Petitioners. It is also wrong that the Petitioners have filed the instant Petition seeking a judicial order for direction or amendment to the Open Access Regulations after having made the representation before the Commission. As held by the Hon'ble Supreme Court in ***PTC India Limited vs. Central Electricity Regulatory Commission (2010 4 SCC 603)*** the power to make Regulation which includes the power to amend the Regulation is a statutory function to be exercise by the State Commission. The Petitioners are wrong in filing a Petition when a representation made by the Petitioners have not been considered by the Commission for exercise of its statutory functions to frame Regulations. Accordingly, the Petition filed seeking prayers for effecting changes in the Intra State Open Access Regulations, 2011 is misconceived and is liable to be rejected.

8.9. It is affirmed by the Respondent distribution licensees that this Commission has the power to amend any Regulation at any time, if the Commission considers it appropriate to do so. However, it is for the Commission to consider whether a Regulation need to be framed or to amend at any time and the same cannot be made a subject matter of a judicial proceeding for a mandatory direction with prayers as made by the Petitioners in the Petition.

8.10. It is further denied that the Open Access Regulations as notified and existing as on the date does not take into account the sectoral reality or fails to provide environment for growth in the State as alleged by the Petitioners or otherwise. It is wrong that the Open Access Regulations needs to be amended in view of any changes in the market scenario for fulfilling the Universal Service Obligation. As per Sections 42 and 43 of the Act, the distribution licensees have the duty to make available electricity to the persons within its area on demand within a specified

time. The general body of consumers in the State including persons who require electricity within the area of the distribution licensee have the priority right over the transmission and distribution system to be used for maintaining the supply of electricity to them. The right of the applicant for Open Access is to be considered only subject to the rights of the distribution licensees to maintain the supply of electricity to the consumers. In view of the Universal Service Obligation, the distribution licensee may require varied quantum of transmission and distribution capacity from time to time based on the variation in demand of the consumers at large. Accordingly, the distribution licensees may be required to use the transmission system and distribution system in the State on long term or medium term or on short term basis, as the case may be. It is wrong that the Petitioners need to be promoted in violation of the discharge of Universal Service Obligation. The transmission system owned and operated by GETCO is also in the same status as that of the distribution licensees, having been established during the past many years as an integrated system primarily to service the consumers of the distribution licensees in the State.

8.11. It is contended that the issue of a consumer's choice to seek electricity from any source is subject to the entitlement of the general body of consumers to be serviced by the distribution licensee which is a duty to supply in the terms of Sections 42 and 43 of the Act. The distribution companies are not exploiting the shortage or otherwise charging price higher than what is determined by the Commission. The allegations made are vague and unsubstantiated. As stated above, the Petitioners are trying to protect the interest of the members of the Petitioners without considering the claims of others including and in particular the general body of consumers who get the supply of electricity from the distribution licensees. The Petitioners cannot seek that a marginal section of the population in the State who wish to avail Open Access should be given preference at the cost of the consumers at large. It is further submitted that Section 61 relates to the specifying of terms and conditions for determination of tariff and does not relate to the grant of open access.

8.12. It is further contended that the amendment proposed by the Petitioners are neither necessary nor conducive for proper development of the electricity sector in the State. The amendment is not required in any of the aspects specified in the said

paragraphs of the Petition. It is wrong that the priority for Open Access to the distribution licensees as provided in Regulation 19 or identified drawl point under long term access and medium term open access provided in Regulations 13 and 14 or payment of the long term open access charges without setting off as specified in Regulation 21, relinquishment of long term open access charges as specified in Regulation 42, scheduling of Inter-State open access transactions as specified in Regulation 28, payment of scheduling charges specified in Regulation 22 and consideration of application for open access of defaulters as provided in Regulation 17, are required to be amended as suggested by the Petitioners or otherwise. The Open Access Regulations should not contain provisions relating to rebate on demand charges to captive consumers, monitoring and dispute resolution committee for open access, mandatory publication of transmission system plan as alleged or otherwise. Reliance is placed on the judgment of the ***Hon'ble High Court of Gujarat in Special Civil Application No. 9138 of 2016***.

8.13. It is contended that there is a valid, rational and justified reason to provide priority to the distribution licensee over the other Open Access applicants as contained in the existing Intra State Open Access Regulations, 2011. The general body of consumers serviced by the distribution licensees have been the existing consumers and have contributed for the past many years to the establishment of transmission and distribution network in the State. In fact, the integrated transmission and distribution network in the State has been established by funding by the said consumers. Accordingly, they need to have a priority over others. The provisions in the Electricity Act of non-discriminatory Open Access do not mean that the right of the existing persons need to be curtailed to accommodate open access to the new applicants. The new applicants for open access after coming into force of the Act can have the facility only on the capacity available after meeting the requirements of the distribution licensees in the State.

8.14. It is contended that the Petitioners are considering the provisions of the Act in a narrower and pedantic manner. The provision relating to non-discriminatory open access contained in Section 2 (47), Sections 39, 40 and 42 of the Act need to be harmoniously construed with the provisions dealing with the functions and obligations of the distribution licensees including in particular Sections 42 and 54

of the Act. The captive power producers generating power for their own use cannot be compared to the distribution licensee supplying power to consumers at large. The contention of the Petitioners on the alleged reduction in the burden on the State Grid is misconceived. It is wrong and denied that a dedicated transmission line constructed as a radial line from the captive power generating unit to the interconnection point of the transmission system would strengthen the transmission system used by the distribution licensees as alleged or otherwise. Further in case the captive power producers construct dedicated transmission lines to their consumption points, there is no issue of open access.

8.15. It is denied by the Respondents that the flexibility in the drawal point under the long term open access or medium term open access needs to be given to the applicants for open access. The open access to be given necessarily requires identification of the injection point and drawal point. The transmission transferable capacity available in the system to grant long term open access or medium term open access or short term open access is to be computed with reference to the injection point and drawal point. The transmission transferable capacity between the said two points available is then blocked for use of open access customers for the period of open access, long term open access or medium term open access or short term open access. Such capacity in between the two points, namely, identified injection point and identified drawal point may not be necessarily be available in regard to different drawal points, which may also involve separate distribution companies than originally considered. Further, after the grant of open access from the identified injection point to the identified drawal point, the transmission licensee and the distribution licensee are entitled to consider the capacity available at other points, namely, from the injection point to another drawal point for grant of open access to others. Further the transmission capacity for the previous drawal point may be stranded and which could have been considered for grant of open access by another applicant. Such consideration and grant of open access from time to time between different points is dynamic in nature. The contention that there is no change in the transmission system or strengthening for changing the drawal point is therefore erroneous. It is also denied that that there is no detriment or loss to grant of such flexibility being given to open access applicants. Accordingly, there

cannot be any issue of allowing any flexibility of changing the drawal point for open access customer. It is the Applicant's choice to opt for short term, medium term and long term open access based on its requirement. If the Applicant is uncertain of the requirement of open access for a particular drawal point for the period of 12 to 25 years, then it is up to the Applicant not to opt for long term open access. This cannot be a reason for allowing shifting of drawl or injection points during the term of open access. Accordingly, when an Open Access customer wishes to change the drawal point, he has to apply afresh in terms of the applicable Regulations and relevant provisions. The Petitioners are not dealing with the fundamental and relevant aspects of the dynamic integrated transmission and distribution system and making unwarranted and unsubstantiated allegations in the Petition.

8.16. It is further contended that the comparison of the members of Petitioners and other open access Applicants with the distribution licensee is wrong and misconceived. The Distribution licensees in the State have open access to the entire Intra State transmission network, such open access to the entire Intra State transmission network has been in existence historically even from the time when the entire electricity sector was integrated under Gujarat Electricity Board and additionally under the open access, there is a priority for the distribution licensee. The distribution licensee *per se* has an open access to the entire Intra State transmission network to fulfil its duties and obligations under Sections 42 and 43 of the Electricity, 2003, namely, maintaining the supply to consumer at large. The Distribution Licensees are paying for the above almost entire revenue requirement of transmission network.

8.17. It is denied by the Respondents that the long term open access charges can be allowed to set off against the medium term open access or short term open access charges. The open access customer cannot refuse to pay the transmission or wheeling charges for long term open access merely because it is not utilising the same. The long term open access charges are different from medium term and short term open access charges. Further, any such set off would result in increase in burden on the distribution companies and therefore consumers in the State, which cannot be permitted. These aspects have been considered by the Hon'ble High Court of Gujarat in Petition filed before it, viz., Special Civil Application No. 9138 of 2016

decided on 07.10.2016. Accordingly, there is no merit in the claim raised by the Petitioners and the same is liable to be dismissed.

8.18. It is contended that pursuant to relinquishment of the long term open access, the liability to pay relinquishment charges as specified in the Open Access Regulations is material and relevant because otherwise the liability of charges with respect to the capacity relinquished would be passed on to other open access customers and the distribution licensees which is unjustified. For the same capacity, the other customers and distribution licensees would pay higher costs. In any case, there is no undue benefit to any licensee. The Open Access customers having contracted to take Open Access for a long term period or medium term period is required to compensate the licensees in case he fails to adhere to the duration of the contract and wishes to terminate the contract pre-maturely. The licensees earmark the entire capacity for which the open access is given to be used by the open access customer and cannot give such capacity to any other person. Further, in the case of long term open access, the licensee incurs the cost of upgradation, maintenance etc. The long term open access customer cannot, therefore, be allowed to relinquish the open access duration without compensatory payment to the licensee. However, the relinquishment charges are not restricted only in cases where the transmission system is strengthened or augmented. If the applicant for Long Term Access had not been allocated the capacity, the said capacity could have been allocated to another Long Term User as a result the transmission licensee as well as the existing beneficiaries would have benefitted. Accordingly, the compensation should be payable even when there is no augmentation or strengthening.

8.19. It is contended that such compensatory payment is also regulatory in nature. A person contracting for long term open access or medium term open access cannot be allowed to vary the terms of the contract in relation to its duration without being liable for compensatory payment as it affects the operation of the system as a whole and other users of the system including the general body of consumers at large. In the recent decision of the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited vs. Solar Semi-Conductor Private Limited in Civil Appeal No. 6399 of 2016 dated 25.10.2017***, it is held that sanctity of the contract is to be maintained. The alleged loss to the generating company by making payment for the capacity

contracted by it cannot be considered. The long term open access, medium term open access and short term open access are different and are independently contracted between the Open Access Customer and the licensee/STU and one open access cannot be considered to dilute the obligations of the other open access. Relinquishment charges are payable for surrender of open access and the same is payable irrespective for the reason of the surrender. This has already been recognized by the Hon'ble High Court of Gujarat.

8.20. It is further contended that the provisions relating to relinquishment, the application to pay charges etc. are not required to be modified or altered in view of any recent development or otherwise in view of the market conditions now prevalent as alleged or otherwise. There is no need to deal with the optimum scheduling of power exchange transaction in the Open Access Regulation. It is further submitted that the functioning of power exchanges is within the regulatory control of the Central Commission. The availing of Open Access by a customer is a commercial act. The Open Access customer has to factor into account the charges payable irrespective of whether he is in a position to actually utilise it. The payment of Open Access charges etc. cannot be left to the vagaries of the ability of the Open Access customer to conclude the bilateral contract or the collective transaction to get power from the Power Exchange. It is submitted that there is no justification for making any amendment to the Intra State Open Access Regulations, 2011.

8.21. It is the contention of the Respondents that there is no requirement to change or clarify the provisions relating to payment of scheduling charges as alleged or otherwise. It is wrong and denied that there should not be any levy on scheduling charges for each and every transaction or only when agreed schedule is not given. Further it is submitted that the amount specified is reasonable. There is no basis for any reduction in the charges. The Commission has determined the scheduling charges after a reasoned consideration and any reduction in scheduling charges would reduce the recovery by SLDC resulting in subsequent increase in charges payable by other open access customers including the distribution licensees.

8.22. It is contended that there should not be any Rebate on the demand charges payable by a person maintaining the contract demand with the distribution licensee and also

simultaneously taking power from the captive power sources. The open access for procurement of power from outside and contract demand with the licensee in the area of supply are different concepts and carry different obligations for the licensee. The charges payable in one cannot be considered for reduction of charges in the other. The demand charges are payable in view of the obligation of the licensee to be ready to supply electricity at any time to the extent of the contract demand. The said obligation does not get varied only because the person has a captive power unit. The person who is maintaining contract demand with distribution licensee and also having a captive generating unit has right to draw power from distribution licensee under contracted demand. The objective and purpose of the demand charges related to the contract demand is different. The allegations relating to the contract demand maintained with the distribution licensee and consumption of electricity from captive sources is misconceived and is liable to be rejected. There is no need to make any Regulation in regard to the above in the Intra State Open Access Regulations, 2011.

8.23. It is further contended that there is no need to constitute any Monitoring or Dispute Resolution Committee for Open Access as alleged or otherwise. It is submitted that the provisions of the Intra State Open Access Regulations, 2011 are clear and in any case, in event of any issue on non-implementation of the Regulations or any dispute with a licensee or SLDC, the open access customers/applicants are required to approach the Commission. The Commission has jurisdiction to regulate the Intra-State transmission in the State of Gujarat and the same cannot be delegated in the manner sought by the Petitioners. Further the constitution of committee sought to be suggested is incorrect and unbalanced. The Petitioners are seeking to introduce multiple representatives of the open customers while reducing the presence of representatives of all the distribution licensees, transmission licensees and SLDC to one which is arbitrary and unreasonable.

8.24. It is contended that there exists a clear process and procedure for dealing with the application for Open Access. The Petitioners are seeking for processing of open access applications despite the non-compliance with the provisions of the Regulations which is unacceptable. The Petitioners are raising unsubstantiated and speculative allegations against the licensees to avail of open access even when it has

not made payment of various charges due under the open access. It is denied that there is any misuse or misinterpretation of the provision. In case the charges as raised by the licensee are disputed, then the open access customer can challenge the same before the appropriate forum and seek appropriate orders. Further if the provision as sought by the Petitioners are granted, then the open access customers/applicants would dispute each and every bill to avoid payment of transmission charges and yet continue to avail open access.

8.25. It is contended that the difficulty to tie up capacity for 12 to 25 years is misconceived. The Applicants have the option of choosing short term, medium term or long term open access based on their requirements. If the Applicants for open access are unable to tie up the capacity for 12 years, then they can opt for medium term or short term open access. This cannot be a reason to shorten the period of long term open access. The contracts entered into by the distribution licensees for power procurement cannot be compared for deciding the period of open access. The distribution licensees in the State bear the burden of transmission network irrespective of the term of their power procurements, unlike other open access customers. Further the Regulations of the Central Commission are not binding on the Commission as already held by the Hon'ble High Court of Gujarat. It is further submitted that the Act recognizes the duty of a generating company or captive generating plant to construct and operate a dedicated transmission line up to the load centre/sub-station under Section 9 and 10. There is no reason or logic for the other beneficiaries in the State to bear the burden for such dedicated transmission lines. Such lines cannot be included in the pooled cost. It is also contended that the Petitioners are seeking to pass the burden from the generating company/beneficiaries of the generating company to the distribution licensees and therefore, general body of the consumers in the State as well as the general body of open access customers which is arbitrary and unfair.

8.26. It is contended that the transmission system planning and related aspects are dealt in other Regulations and has nothing to do with this matter. The Open Access Regulations provide for system study for any expansion or upgradation works to be carried out for long term open access. The Open Access Regulations do not permit system strengthening or augmentation works for short term and medium term open

access. Thus, there cannot be any expansion or upgradation based on the system constraints resulting in denial of short term and medium term open access. This is because the investment in transmission or distribution network is substantial. The licensee would need to service such investment over a period of time. The charges payable by the open access customers is the only avenue to service the capital cost. Making such investment to cater to short term or medium term open access demand would leave the licensee in a lurch as they will not be able to recover transmission or wheeling charges for such expansion after the period of open access.

8.27. It is further contended that there cannot be any reduction in the minimum duration of long term open access not only based on above reasons but even otherwise duration of seven years is not sufficient to ensure that the licensee would be able to service the capital cost and debt servicing from the open access customer for whom the system is built. In such cases, the burden of the above would fall ultimately on the consumers at large in the State, which is arbitrary, unjust and unfair. On the other hand, the licensee cannot be made to bear the financial burden either.

8.28. It is further denied that the Letter of Credit is not being required with respect to the wheeling charges for distribution network for open access because not only Letter of Credit is required even for wheeling but the Letter of Credit has to be necessarily revolving and irrevocable. The payment security mechanism is necessary for the entire term of the open access. The Commission, instead of providing for Letter of Credit for the estimated charges for the entire period of open access has provided for an amount at estimated charges for two months. If the Letter of Credit is not revolving, then on invocation of the letter of credit once, there is no further payment security mechanism available for the rest of the open access term. This cannot be the intent of the Open Access Regulations. The Petitioners are purporting to propose different aspects in a Petition filed with prayers and the same cannot be a subject matter of Petition because framing of various Regulations is the prerogative of the Commission to be considered through an exercise of legislative function as held by Apex court in ***PTC India vs. CERC (2010) 4 SCC 603***.

8.29. Based on the above, the Respondents contended that there is no need for the Open Access Regulations to be amended as claimed and accordingly the Petitioners are

not entitled to any relief as prayed for or otherwise and therefore, the Petition is liable to be rejected with costs.

9. The State Transmission Utility GETCO (Respondent No.1), has filed their reply requesting to reject the Petition *in limine* and contending further that amendments to the Regulations being legislative functions of the Commission, it cannot be a subject matter of proceedings. The said Intra-State Open Access Regulations have been notified after due deliberation of all the relevant aspects and after following due process cannot be now sought to be varied by reason of any alleged disputes or differences between the generating company or a transmission or distribution licensee. There is a need to give priority to the distribution licensee in the interest of electrical system.

9.1. It is contended that it is the general body of the consumers in the State through a distribution licensee of the area that have been contributing and will continue to contribute for the capital investments in the Intra State Power System in the State. The integrated Intra State Power System had been established, upgraded, maintained and operated in the past for many years funded out of the retail supply tariff paid by the consumers at large and accordingly they being a block of existing users of the transmission and distribution system the time when the Act came into force on 10.06.2003. The distribution licensee therefore, should have the first priority to the transmission and distribution system for serving its consumers. The surplus capacity after meeting the requirements of the distribution licensees to enable them to serve the consumers is allowed to be given to the Open Access Applicants based on whether the application is for Long Term, or Medium Term or for Short Term. There is a perfect balance maintained in the Intra State Open Access Regulations by giving priority to the distribution licensees for access to the transmission and distribution system as compared to others.

9.2. It is contended that other Intra State Electrical Systems established in other States are also providing similar priority for serving the respective consumers of the distribution licenses in the State. The Inter-State Network cannot be compared to the Intra-State network.

9.3. The distribution licensees may be required to use the transmission system and distribution system in the State on long term or medium term or on short term basis, as the case may be. The Petitioners are seeking to interpret the provisions of the Electricity Act to favour the Open Access applicants at the cost of the consumers at large, which is impermissible and contrary to the objective of the Electricity Act.

9.4. It is denied that the disputes sought to be raised by the Petitioners in regard to the Open Access qua the distribution licensee can be a subject matter of the Petition for seeking amendment of the Intra State Open Access Regulations, 2011. The principle on which the Open Access needs to be considered and given by the Utilities have been properly and clearly set out in the Intra State Open Access Regulations, 2011 and there is nothing in the said Regulation which is required to be modified or amended or clarified. By filing the present Petition seeking amendment of the Intra State Open Access Regulations, 2011, the Petitioners are attempting to undermine the interest of the consumers at large and are seeking such consumers to cross subsidise and financially take the burden of the Open Access to be granted to the applicants for Open Access at the cost and interest of the consumers at large. The said course is contrary to the scheme and objective of the Act. It is submitted that the consumers in the State who are served by the distribution licensees are required to be given priority over and above the interest of any other Open Access applicant other than the distribution licensees. The Petitioners and other similarly placed persons are entitled to Open Access to the transmission and distribution system after meeting the requirements of the distribution licensee. This Respondent has denied in detail the contentions of the Petition para wise and taken the same stand as taken by the other contending Respondents State owned Discoms. Therefore, the same is not repeated here.

10. The State Load Despatch Centre – Gujarat (SLDC), Respondent No. 14, has filed their reply in the matter taking similar stand as that of the Respondents No.1 to 5 and further contended that the Petitioners had filed the representation before the Commission and if the Commission has not considered it appropriate to frame any new Regulation or amend any existing Regulation, there cannot be a stipulation by the Petitioners by seeking a judicial order in the Petition. Accordingly, the Petition

has been filed seeking prayers for effecting changes in the Intra State Open Access Regulations, 2011 is misconceived and is liable to be rejected.

10.1. It is further contended that bilateral transactions are denied open access whereas the collective transactions are being allowed open access. This is specifically denied. There is no discrimination by SLDC between bilateral and collective transactions and both transactions are treated equally while processing the open access applications and considering the upstream network issues. Where there are system constraints, open access is not allowed either for bilateral or collective transactions. It is submitted that there is no need to deal with the optimum scheduling of power exchange transaction in the Open Access Regulation as alleged or otherwise.

10.2. It is also contended that the functioning of power exchanges is within the regulatory control of the Central Commission and therefore the request of the Petitioners for checks and balances on power exchange may not be within the jurisdiction of this Commission. Further it is submitted that once a customer avails open access, it is required to pay all the charges irrespective of whether he is in a position to actually utilise it. The payment of Open Access charges etc. cannot be left to the vagaries of the ability of the Open Access customer to conclude the bilateral contract or the collective transaction to get power from the Power Exchange.

10.3. It is also contended that there is no justification for making any amendment to the Intra State Open Access Regulations, 2011 for reasons stated in the Petition or otherwise as alleged by the Petitioners. There is no requirement to change or clarify the provisions relating to payment of scheduling charges. It is also denied that there is any double billing in regard to scheduling charges. The SLDC considers the scheduling charges strictly as per the Regulations i.e. Rs 2000/day/transaction only as per the Regulations. The scheduling charges are charged for one transaction and not separately for injection and drawl points as alleged.

10.4. It is further denied that there should not be any levy on scheduling charges for each and every transaction or there should be a levy only when agreed schedule is not given. The scheduling charges cannot be considered the same irrespective of the period of open access and therefore the Commission has correctly determined the

scheduling charges on a per day basis. Further it is submitted that the amount specified is reasonable. In fact, in the submission of SLDC, the said charges should be higher i.e. Rs. 3000/day/transaction which is the case in other States. Thus there is no basis for any reduction in the charges. Each and every allegation to the contrary are wrong and are denied.

10.5. It is contended that although the Petitioners have sought for constitution of a 'Monitoring and Dispute Resolution Committee' for monitoring open access but the Act provides for specific statutory bodies of SLDC and STU to perform various functions as per the provisions of the Act and the Regulations framed by the Appropriate Commission. In the present case, the provisions of the Intra State Open Access Regulations 2011 framed by the Commission are clear. There is an in-built mechanism provided in the matter relating to open access, scheduling and despatch. The provisions relating to computation of the transmission capacity available for grant of Open Access are also clear. In case of any issue on non-implementation of the Regulations or any dispute with a licensee or SLDC, the open access customers/applicants are required to approach the Commission. The Commission has jurisdiction to regulate the Intra-State transmission in the State of Gujarat and the same cannot be delegated in the manner sought by the Petitioners.

10.6. It is contended that the constitution of committee sought to be suggested is incorrect and unbalanced. The Petitioners are seeking to introduce multiple representatives of the open access customers while reducing the presence of representatives of all the distribution licensees, transmission licensees and SLDC to one which is arbitrary and unreasonable.

10.7. It is contended by the Respondent SLDC that the submissions of the Petitioners regarding rejection of Open Access Application on account of default of charges of transmission licensee/STU is denied. The Petitioners are seeking for processing of open access applications despite non-compliance with the provisions of the Regulations, which is unacceptable. The Petitioners cannot default on payments and still seek processing of their open access application and continue to avail the open access. This is contrary to the principle enshrined in Section 56 of the Act which allows for disconnection of supply for non-payment of dues.

10.8. It is denied that there is any misuse or misinterpretation of the provision of the GERC Open Access Regulations, 2011. The Petitioners are raising unsubstantiated and speculative allegations in order to avail of open access even when it has not made payment of various charges due under the open access. In case there is any dispute on the charges raised by the licensee/SLDC, then the open access customer has legal recourse to challenge the same before the appropriate forum and seek appropriate orders. However, the open access customer cannot claim that without such order and merely on a statement of the open access customer, the nodal agency should process the open access application despite non-payment of the charges. If such provision as sought by the Petitioners are granted, then the open access customers/applicants would dispute each and every bill to avoid payment of transmission charges and yet continue to avail open access. Thus, there is no requirement of any clarification or provision in the Regulation in regard to the above.

10.9. It is further contended that the Gujarat SLDC is already working independently. Further, SLDC is self-sustained and filling separate Petition for approval of ARR of SLDC. It is submitted that first proviso to Subsection (2) of Section 31 of the Act specifically recognises that the State Transmission Utility shall operate the State Load Dispatch Centre until such time the State Government designates any other Government Company or any Authority or Corporation as the State Load Dispatch Centre. There is no provision in the Act or any of the Rules notified by the Central Government in exercise of the powers under Section 177 of the Act to the effect that the functions of the State Load Dispatch Centre should be given to or carried by an entity other than an entity which is discharging the functions of the State Transmission Utility. It is thus contended that the Petitioners are not entitled to any relief as prayed for in the Petition.

11. The Torrent Power Limited i.e. Respondent No.'s 6, 7 and 8 has filed their reply in the matter and submitted that the present proceeding cannot substitute the process of larger public consultation on the draft amendments before making any changes in the GERC Open Access Regulations.

11.1. It is further submitted that with regard to issue of Priority for Open Access**,** the comparison drawn by the Petitioners are incorrect since Section 43 of the Act casts duty upon the distribution licensee to supply electricity to an owner/occupier upon application. Hence, distribution licensee has Universal Service Obligation under the Act and Regulations framed thereunder. In extraordinary circumstances of grid constraints, it is not feasible to cater to the demand of all users of the Grid and the nodal agency is required to impose curtailment to ensure grid security and safety. In turn, to handle such situation, CERC has framed the 'Automatic Demand Disconnection Scheme' under the IEGC and accordingly, Discoms are required to ensure supply to high priority installations including essential services like hospitals, military, local authority, government installations amongst others in case of curtailment. Hence, distribution licensee is placed upon a different and distinct footing.

11.2. It is submitted that the Forum of Regulators while framing the Model Terms and Conditions of Intra-State Open Access Regulations and in turn the Commission has been consistent in approach and has rightly accorded highest priority to the distribution licensee while framing the Intra-State Open Access Regulations. Additionally, the reference placed on Section 62(3) is incorrect as it pertains to criteria for differentiating the consumers for determination of tariff. Even otherwise, the referred Section mandates that there should be no undue preference shown to any consumer except as provided which inter-alia provides for differentiating the Consumers based on "Nature of Supply". Further, an operating a captive plant is a commercial decision of the consumer and hence cannot be equated with the statutory duty cast upon the distribution licensee by the Act. Thus, the Petitioners are trying to equate the Unequal and based on submissions made hereinabove, the Respondent requests the Commission to continue with the existing provision of giving priority to Distribution Licensee.

11.3. With respect to flexibility in drawl points under LTOA and MTOA and associated charges including relinquishment charges of LTOA is concerned, it is submitted that setting up of captive plants to meet own requirement is inevitably a long term investment decision. Hence, the drawal point being its own unit, is clearly identifiable and would remain the same during the life of the captive plant. Any

change in drawal point before completion of Open Access tenure is a considered view taken by such captive consumers including the risk associated with such commercial decision. Further, regarding reference to the quantum of variation in Open Access up to 100 MW allowed in the CERC Regulations, the same is permitted only during processing of the Open Access application before operationalization and not during the tenure of the Long-Term Access.

11.4. As regards the submission of the Petitioners that augmentation is not required in case of change in drawal points or if required should be proportionately recovered, it is submitted that augmentation is made in the network for identified injection and drawal points for the Consumer. If that particular injection/drawal point is not to be utilized, the entity is still required to continue to pay the charges for the access sought as the cost is being incurred for granting such drawal/injection facility. For the new drawal point, the licensee may be required to carry out strengthening depending upon the network condition.

11.5. Regarding issue of double recovery, it is submitted that the contention of the Petitioners is incorrect and without any basis. The licensee is entitled to recover only regulated return in accordance with the provisions of the Tariff Regulations framed under the Act. Further, any contribution from the consumer is deducted from the gross block before computing return on equity by the distribution licensee. Thus, the question of double recovery does not arise at all. In respect of the reference given to the CERC Open Access Regulations, it is submitted that the CERC Regulations also provide that the POC charges have to be borne by the drawal entity for the minimum period of LTOA granted even if the drawal entity discontinue to draw power and there is no exemption. Hence, the inference drawn is irrelevant and incorrect.

11.6. With regard to the issue of Rebate on demand charges to captive consumers is concerned, the Petition has been filed by the Petitioners which is an organization of captive power producers. The captive consumers who requires certainty of the power supply 24x7 and want to draw power from licensee irrespective of status of its captive Generation, such consumers are required to pay the fixed/demand charges like other Retail Consumers for the contract demand being maintained with

licensee. The request by the Petitioners amounts to providing the contracted power at lower rate than the Retail consumers by way of granting rebate and therefore, same amounts to cross subsidization. Therefore, the request of the Petitioners is contrary to the Act as it neither allows to give preferential treatment to the Open Access/Captive consumers nor provides for cross-subsidization of Open Access/Captive consumers by other Retail consumers.

11.7. It is submitted that for considering of applications for open access, it should be mandatory for the customer to clear his dues before availing open access. In case of difficulty, the applicant may approach the Commission to seek legal recourse since each dispute can be different and distinct.

12. Respondent No. 34 Reliance Industries Ltd. has, over and above the submissions made by the Petitioners and concerned Respondents, further submitted as under:

Difficulty in sourcing power for units having varying requirement.

(i) Conditions to buy power at uniform rate (RTC)

In case the consumer has cyclic demand requirement (e.g. Weekend/two shift industry/lesser consumption of load during night). Hence, the Open Access consumer is not able to fulfil the criteria of uniform drawl requirement and ultimately will not apply for the open access/or may get rejected on same basis if applied.

In such situation, there should not be any restriction to consumer to procure power under bilateral/exchange mode on RTC basis only and the consumer should be allowed to buy power in varying nature as per his requirement.

(ii) Difficulty in buying RE power from Exchange:

IEX has recently launched the G-TAM Market for the procurement of RE Power (Solar/Non-Solar) certainly it will benefit the buyer to fulfil RO. However, the RE Power is of infirm nature and not available throughout the day. Contracts as on date for G-TAM at Exchange are intra-day and day ahead contingency which are 15 minute contracts, at an instance, it is possible that all blocks are not cleared considering option to buy for 1 day (24 hours). In

such situation, it is difficult to fulfil the condition of the undertaking required to be submitted along with open access application.

(iii) Use of Smart meters instead of ABT meters for distribution open access.

(i) Metering requirement for open access consumer is defined in Regulation 29 of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and which is as per the Central Electricity Authority (Installation and Operation of Meters) Regulation, 2006.

(ii) CEA has recently issued a clarification dated 27th October, 2020, accordingly use of Smart meters is permitted as interface meters to open access consumers of distribution network.

(iii) Accordingly, GERC Open Access Regulation may be modified in order to incorporate the use of Smart meters as per CEA's clarification being Central Electricity Authority (Installation and Operation of Meters) (Amendment) Regulations 2019. Therefore, this Respondent has prayed that the answering Respondent may consider the suggestions and proposals and being necessary amendments/modifications in the interest of justice.

13. Respondent No. 40 – Ultra Tech Cement Limited, has filed its written submission adopting the submissions/proposals of the Petitioners and has submitted additional issues since certain amendments that need to be carried out in the Open Access Regulations as the same are nor in line with the statutory framework and certain provisions need to be introduced to overcome the operational difficulties in availing Open Access.

13.1. It is submitted that in the State of Gujarat, an Open Access consumer is permitted to avail open access for capacity not exceeding its existing Contract Demand with the distribution Licensee.

13.2. It is an established fact that Capacity Utilization Factor (CUF)/Plant Load Factor (PLF) of Renewable Energy based generators is much lower than that of thermal generating plants. Hence, Open Access is required by Renewable Energy generator

for a capacity much higher than the stated drawal requirement of the Open Access consumer. Furthermore, Renewable Energy generation is infirm and an entity's power requirement is 10 MW, it would have to install 25 MW Solar Power Plant considering CUF as 25% to meet this energy requirement.

13.3. It is submitted that limiting the Open Access permission up to Contract Demand of a consumer makes procurement of Renewable Energy through Open Access difficult for a bulk consumer like UTCL, considering the inherent variable nature of non-firm Renewable Energy and lower CUF associated with such transactions. It is requested that the Commission may devise a mechanism of converting the injected capacity into grid by using the CUF factor to arrive at the total Open Access capacity at the consumer end or remove the ceiling of Open Access capacity to that of Contract Demand for the purpose of procuring renewable energy.

13.4. It is submitted that the Maharashtra Commission in its MERC (Distribution Open Access) (First Amendment) Regulations, 2019, has specifically excluded power sourced from Renewable Energy based generators from the specified capacity limit up to contracted demand or sanctioned load. Furthermore, the Government of Gujarat also published Gujarat Solar Power Policy, 2020 and removed the restriction on the installed capacity of Solar Projects in the State. Under the earlier Gujarat Solar Power Policy, 2015 installation of solar power projects was capped at 50% of Consumer's sanctioned Load.

13.5. It is requested that the provision restricting Open Access up to the Contract demand should be amended by the Commission so as to exclude power availed from Renewable Energy Sources. In the alternative, the Commission may devise a mechanism of converting the injected capacity into grid by using the CUF factor to arrive at the total Open Access capacity at the consumer end.

13.6. It is further submitted that in order to achieve true competition amongst different sources of energy, Open Access from different sources of energy i.e., conventional and/or renewable energy should be permitted at the same point in time. It is submitted that in terms of the MERC (Distribution Open Access) Regulations, 2016 and as amended in 2019, individual Open Access Consumers are eligible for availing

supply from multiple sources of power such as Captive Generator, Third Party Generators, Trader, Power Exchange, Other Distribution Licensee etc. Enabling a consumer to choose/switch its source of power on day-to-day basis facilitates the consumer to get the benefit of the most economical available power.

13.7. It is therefore prayed that the Commission may amend the existing Open Access Regulation, 2011 and permit Open Access Consumers to avail supply of power from multiple sources of power at the same time.

13.8. The Respondents also submitted that the approval time for revision in power schedule under Open Access is 6 time-blocks (i.e., 1.5 hours) from the time the revision is submitted to SDLC. The provision for a period of 6 time-blocks for approving revision in schedule has been in place since 2010-11, i.e. when such revisions were communicated via FAX. With the advancement of technology, scheduling systems have moved on-line and work seamlessly in real time. Despite the same, under most circumstances SLDC take approx. 6 time-blocks to approve the revision in power schedule, which leads to wastage of power and also results in payment of Unscheduled Interchange (UI) charges as well as may lead to grid disturbances/imbalances. Therefore, the Commission may reduce the approval time for revision in power schedule form 6 time-blocks to 1 or 2 time – blocks (i.e. 15-20 minutes), especially in case of captive generating plants. Reduction in the time-frame for approving revision in Open Access schedule will reduce wastage of power at the captive generating end, increase utilization of the wheeled power and also reduce the impact of Unscheduled Interchange (UI) charges as well as bring stability to the grid.

13.9. It also submitted that while seeking Open Access including renewal thereof, various consents/NOCs are required from concerned agencies viz. Distribution Licenses, SLDC, STU, etc. In practice, these agencies forward the consents/NOCs directly to GETCO. As such, an Open Access applicant is generally unaware about the consent/NOC has been granted or rejected owing to some deficiency. The Open Access applicant becomes aware of the same only when its Open Access permission is either granted or rejected. Non-issuance of consent/NOC, even on account of minor deficiencies, leads to rejection of the Open Access application. In case of such

rejection, the applicant on rectifying the deficiency is required to file a fresh application and to follow the entire process once again, which affects the Open Access applicant and increase its power procurement cost due to delays. In the event, any deficiencies and/or issues qua granting consent/NOC is intimated to the applicant in advance, an immediate corrective step can be undertaken by the applicant, which will reduce the chance of its Open Access permission being rejected. Therefore, it is requested that the Approval status of Open Access applications (STOA/MTOA) should be made available online on the website of the nodal agency. An applicant should be able to track the status of its application and if required, to act/to respond in a timely manner. This shall reduce the chance of its Open Access applications being rejected especially for minor issues, which otherwise can be easily remedied.

13.10. It is further submitted that the status of all Open Access applications can be easily hosted on the website of the nodal agency so that to bring transparency enabling the applicant to arrange its business affairs accordingly. Such a digital reform shall be in line with the Government of India's thrust towards 'Digital India' and 'ease of Doing Business' in the country which may contains numbers of Open Access Application received, process, fees paid, etc. as stated in its submissions.

13.11. It is also submitted that transmission Charges for Medium Term Open Access in the State of Gujarat have been regularly increasing year-on-year. In FY 2011-12, the Transmission Charges for MTOA were Rs. 2,776/MW/day whereas in FY 2020-21 it has increased to Rs. 4,176/MW/day. Meaning thereby it has been an increase of approx. 50% in the Transmission Charges between FY 2011-12 and FY 2020-21. Such increase on yearly basis substantially impacts the operating costs of industries like UTCL, which have already invested huge sums in setting up captive generating plants, with the overall aim of reducing power consumption costs. Therefore, the Commission may consider stabilizing and progressively decreasing the Transmission Charges considering the various technological advancements that have taken place over the years viz., upgraded technology for enhancing reliability and reducing transmission losses, atomization in process for administration and increased speed of communication.

14. Respondent No. 32 - ONGC, by its written submissions dated 13.01.2021 while conveying about its various Captive Generating Plants with corresponding LTOA for drawl points of its various facilities has supported the averments made by the Petitioners. It has further submitted that the Commission may consider amending the GERC Open Access Regulations, 2011, whereby preferential treatment be provided to Captive Power Producers since they generate their own power for their own use and thereby decrease the burden on the State Grid. It is also submitted to incorporate a provision wherein the STU is mandatorily required to publish the transmission system plan for next 5 years by September of every year so that all stakeholders are apprised about the growth of lines, substations, proposed strengthening scheme etc. This would help in facilitation of system strengthening for the benefit of all transmission users. As regards Priority to Open Access, this Respondent submitted that preferential treatment should be provided to Captive Power Producers since they generate their own power for their own use thereby decreasing the burden on the State Grid. On the issue of Rebate on Demand Charges to Captive Consumers, this Respondent submitted that a mechanism may be introduced wherein open access consumers may be given partial rebate in their demand charges corresponding to the demand contracted through open access. As regards Payment Security Mechanism, it is submitted that the Commission may consider clarifying/removing the confusion being created by GETCO that the Payment Security Mechanism in the form of Letter of Credit does not have to be revolving Letter of Credit.

15. The Respondent DISCOMs through its additional submissions dated 18.01.2021 has filed the submissions in pursuance to the Order dated 08.01.2021 issued by the Commission for the hearing on 04.01.2021 which is enumerated as under:

15.1. In the aforesaid additional submissions, it is contended that the Petitioner No. 1 has filed the additional submissions in relation to the duration of long-term access seeking reduction of minimum period from 12 years to 7 years and in support thereof sought to rely upon 'Scope' of the Guidelines issued in 2005 under Section 63 of the Act which reads as under:

"2.1. These guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for procurement of electricity by distribution licensees (Procurer) for:

(a) long-term procurement of electricity for a period of 7 years and above;

(b) Medium term procurement for a period of up to 7 years but exceeding 1 year."

15.2. It is further contended by DISCOMs that the above Guidelines are issued under Section 63 and are applicable for procurement of power by the distribution licensees. The said Guidelines do not apply to the transmission of electricity or open access. In any case, the same is applicable only for distribution licensees and does not assist the Petitioners or other open access customers. Even otherwise, it is submitted that the said Guidelines are existing since 2005 and despite the same, the Commission had consciously chosen 12 years as the minimum period for long term access under the Open Access Regulations 2011. In this regard, the detailed submissions are made in the Written Submissions filed on 31.12.2020 as to why the duration should not be reduced.

15.3. It is further contended by Discoms that the Petitioners have not demonstrated any provision of Tariff Policy in support of its contention. During the hearing, the Petitioners had sought to claim that the new Tariff Policy specifies the period. This is not correct as is clear from the submissions of the Petitioners, which only refers to the Guidelines which already existed at the time of notifying the Open Access Regulations 2011.

15.4. It is also contended that the Petitioners have wrongly relied upon the Statement of Reasons for Regulations of Central Commission and Maharashtra Electricity Regulatory Commission to contend that there would be no adverse impact on GETCO as it would be ensured recovery of transmission charges for the transmission assets created, even if they are created on the basis of requirement only for 7 years. However, what has been failed to be appreciated is that the recovery is assured by the fact that the transmission charges are shared by all users in the State/Region. This would mean that at the end of 7 years, when the open access customer for whom the infrastructure was established, is no longer paying the transmission charges, the costs for the same would be recovered from all other

open access customers and distribution licensees. Therefore, even though the said assets/infrastructure were not needed for them, these customers and licensees would have to pay higher transmission charges. The Statement of Reasons has only considered the issue from aspect of the transmission licensees but has not dealt with the specific aspect that the burden on other users would increase even though they may not need the said system. In such cases, the burden of the above would fall ultimately on the consumers at large in the State, which is arbitrary, unjust and unfair.

15.5. It is stated by the DISCOMs that the submissions of Petitioners mean that transmission facilities would have to be set up in case of any application for LTOA for 7 years only. Therefore, a transmission facility would be set up to serve the LTOA application but at the end of 7 years, the asset may be left stranded. In terms of tariff determination, the licensee would not have recovered its cost in the period of 7 years and this would be passed on to other customers/consumers.

15.6. It is further contended that the reduction in period would allow the same generating company to claim different open access requiring the licensees to set up various transmission assets during the life of the generating project which may not be fully utilised. This would not be efficient or economical use or optimal utilisation of resources. The same would not be in accordance with the preamble to Electricity Act, Section 39(2)(a)/Section 40(a) as well as Section 61(1)(b), (c) and (e) of the Electricity Act.

15.7. It is also contended that the rationale for Petitioners are based on its alleged difficulty to tie up capacity for 12 to 25 years. The Applicants have the option of choosing short term, medium term or long term open access based on their requirements. If the Applicants for open access are unable to tie up the capacity for 12 years, then they can opt for medium term or short term open access. This cannot be a reason to shorten the period of long-term open access.

15.8. It is contended that reliance placed upon by the Petitioners on Order dated 22.12.2020 is misplaced and misconceived. The difficulty for utilities to make realistic projections and business plan is completely different to the generators to

firm up power supplies. Further the difficulty in the said case was in regard to "prevailing circumstances" and not a general consideration. The situation is that the MYT Regulations had to be framed and in view of the COVID situation, the prevailing circumstances have created certain issues. The Commission had only deferred the 5-year control period for new Regulations for one year and the same would be considered from 2022-23. Therefore, it is not as if the 5-year control period would not be applicable. The Petitioners are reading the Order in a selective manner. The attempt of Petitioners to use the said order to justify its own difficulties in tieing up power is misconceived, mischievous and absurd. In any case, if there is difficulty to plan projections even for 5 years, then the Generators should apply for open access for shorter periods under MTOA and STOA.

15.9. It is contended that the Petitioners have wrongly relied upon certain Regulations for reference to the period of 7 years. These cannot be considered binding and the Commission may take a view after considering the contentions of the Distribution licensees. In any case, it may be noted that the State Commissions such as APSERC, CSERC, HERC, JSERC, MSERC, RERC etc. provide for the minimum period for a longer duration and no amendment has been carried out in the same.

15.10. It is contended that the Petitioners had sought to argue that the injection points and drawl points are only relevant for scheduling of power although the same has not been stated in the Petition or in the Written Submissions, which is not correct. The grant of open access itself is on point-to-point basis. The power cannot be scheduled to any point at the whims of the open access customer. Both injection point and drawl point is required to be identified before the open access is granted/operationalised. It is not correct that it makes no difference if the drawl points changes. It is not only the capacity which is reserved, the open access also requires the identification of the injection point and drawl point. The Hon'ble Tribunal in *Gujarat Energy Transmission Corporation Limited vs. Gujarat Electricity Regulatory Commission in Appeal No. 104 of 2009 dated 31.03.2010* has already held that the open access (not scheduling) is for point to point and the capacity is not reserved to the whole system. In case the drawl point is to be changed, the earlier open access is to be relinquished and a new open access is to be applied for.

15.11. It is also contended that once, the open access is granted to the customer, it is entitled to use the transmission system for such period in relation to such capacity and from identified injection point to identified drawl point. But the open access customer cannot change the injection point or drawl point. Any change would require relinquishment of earlier open access and application for open access.

15.12. It is further contended that the Petitioners sought to argue that the judgment of the Hon'ble High Court of Gujarat was based on the Regulations as they existed because the issue before the Hon'ble High Court was the challenge to the Regulation wherein the contentions were raised that the GERC Open Access Regulations 2011 provide for double charging. Therefore, the Hon'ble High Court had considered the validity of the Regulation and had specifically rejected the contention and held that there was no double charging. The same argument is being taken by the Petitioners for claiming set off that there is double charging. This was disputed by the Respondents and for the same, the decision of the Hon'ble High Court of Gujarat was relied upon.

15.13. It is contended that though the Commission is empowered to amend the Regulations but the same has to be only if there is a rationale or reason to amend the Regulations. There is no merit in the claim of the Petitioners that there is double charging and therefore the same cannot be claimed as reason for amendment in the Regulations.

15.14. With regard to written submissions of Respondent No. 40 Ultratech Cement, it is contended that the said is stated to be a member of the Petitioner No. 1, who has already filed the Petition and made submissions on behalf of its members. Therefore, it is not open for the individual members to then file submissions purportedly filed in pursuance to the liberty granted by the Commission during hearing. It is also contended that, the Respondent Ultratech is seeking to raise additional issues which are beyond the scope of the Petition and such attempt to raise additional issues was already objected by the Respondents Distribution Companies and GETCO during the hearing and accordingly, the Commission had restricted filing of submissions related to the issues in the Petition. However, it may be noted that the Respondent Ultratech has raised other issues after the parties had already concluded their arguments and which have not been raised in the Petition. The Respondents cannot on their own raise new and additional issues outside the

scope of the Petition for which any pleading is neither filed nor were these issues argued. Therefore, Respondent No. 40 cannot after the arguments are concluded and orders reserved, seek to raise additional points and accordingly, the submission filed by Respondent No. 40 cannot be considered.

16. During the course of hearings, Learned Advocate for the Petitioners submitted that the Petition has been filed by the Petitioners, on account of need for reform of the power sector in the State of Gujarat and to enable the said Open Access Regulations to be in line with the existing market conditions. Therefore, the present GERC Open Access Regulations, 2011 which was already amended twice on 04.03.2014 & 12.04.2014 requires a review by this Commission. The State Commission being the Sector Regulator needs to take into account the sectoral realities and to make necessary amendments which are beneficial and more market friendly for the Stakeholders.

16.1. He further submitted that the Hon'ble APTEL vide its Order dated 02.03.2020 in Appeal No. 262 of 2019 directed the Commission to decide the Petition in terms of its directions mentioned at para 8.1 to 8.10 of its Order. He submitted that the Hon'ble APTEL has observed that the Commission cannot keep a closed eye to the regulatory developments brought out by the CERC and other State Commissions for the purpose of creating conductive environment for development of the power market. Open access charges are part of overall tariff stream of the Transmission and Distribution Licensees, and accordingly the principles of Section 61 of the Act including adherence to commercial principles as envisaged under Section 61 (b), have to be complied with and for the said purpose, Commissions are required to carry out regular amendments. He also submitted that there is a positive binding mandate upon this Commission to ensure necessary amendments by taking into consideration the Regulations of CERC and other State Commissions. The above directions are not only passed under Section 111 of the Act but also in the nature of directions which can be issued under Section 121 of the Electricity Act. He accordingly submitted that, the above directions to this Commission to amend the Open Access Regulations is required to be strictly adhered to and consequently, the present proceedings are nothing but "compliance" proceedings of the aforesaid judgment of Hon'ble APTEL.

16.2. He submitted that over the years from 2011, the CERC and other State Commissions have carried out various amendments/modifications in their respective Open Access Regulations. He further submitted that as per Sections 2 (47), 39 2 (d), 40 (c) and 42 (3) of the Act, the open access shall be "non-discriminatory" and there cannot any discrimination amongst any class/stakeholder, who avails open access. In other words, there cannot be any priority for any particular open access customer, including the distribution licensee. It is submitted that as the Commission has already characterized open access into three categories, being long term, medium term and short term, there cannot be any discrimination *inter*-se within such categories.

16.3. It is a settled principle of law that there cannot be a sub-classification within a classification. In support of this statement, he relied upon the judgment of the Hon'ble Supreme Court in case of Maharashtra Forest Guards & Foresters Union vs. State of Maharashtra, (2018) 1 SCC 149. If priority is given to the distribution licensees, then the same will result into “discrimination” with other open access customers, which is contrary to Sections 2(47) and 42(2) of the Act.

16.4. With regard to contention of the distribution licensees that they are having the universal obligation towards their consumers for supply of power and therefore, the priority has to be given to such distribution licensees to avail open access and reliance placed by the Respondents on the judgements of the Hon’ble Supreme Court that there can be reasonable classification for the purpose of giving priority is not valid and proper as they do not relate to the proposition of class within a class and that such reasonable classification has already been provided by creating LTOA, MTOA and STOA categories and there cannot be further scope of sub-classification amongst these categories. He requested the Commission to re-look upon Regulation 19 of the GERC Open Access Regulations, 2011, and to make necessary amendments by removing the priority given to the Distribution Licensees over other open access.

16.5. He submitted that there is no provision in the aforesaid Regulations which provides for setting off of LTOA charges against MTOA and STOA charges. He submitted that when an LTOA consumer opts for an MTOA/STOA transaction using a portion of the

same capacity to which it was granted LTOA, such LTOA customer is burdened with payment of transmission charges for both LTOA and MTOA/STOA. There is no system strengthening/augmentation by the State Transmission Utility (STU) carried out in the transmission corridor. The State Transmission Utility GETCO is a revenue neutral entity and its tariff is determined by the Commission under Sections 61, 62, 64 and 86 of the Act and accordingly such tariff is to be recovered from all the users of the transmission system subject to the transmission capacity which has been booked, either under LTOA, MTOA or STOA, by the transmission system users. These transmission charges are utilised to meet the costs of the transmission system. Further, there cannot be any additional recovery from system users over and above its share of transmission charges for using the capacity in the system. The transmission system of GETCO is a single meshed network within the State of Gujarat and there is a cost of the entire network and the same is recovered by allocating LTOA, MTOA or STOA by GETCO to such system users. In certain cases, a system user applies and get allocated more than one type of open access involving same transmission capacity and therefore, they cannot be burdened to bear transmission charges for different categories of open access simultaneously and since transmission charges are with respect to the capacity booked in the system, the system users cannot be made liable to make payment of transmission charges twice for the same capacity.

16.6. In support of the above, he relied upon the judgement dated 11.02.2018 of the Hon'ble APTEL in Appeal No. 95 of 2007 in case of UPERC vs. CERC & Ors and submitted that the Hon'ble APTEL has taken due cognizance of the fact that there cannot be a position wherein an entity recovers tariff twice. Therefore, in the present case also, GETCO cannot at all be subjected to unjust enrichment at the instance of the open access consumers, who have availed both LTOA and MTOA/STOA under the same transmission network of the STU.

16.7. While drawing attention of the Commission that the Central Commission in its CERC Sharing Regulations, 2010 has provided for an off-set principle for LTOA charges against the MTOA/STOA charges and further submitted that Statement of Reasons to third Amendment dated 26.10.2015 and fifth Amendment to CERC Sharing Regulations, 2010, provides the basic principle behind providing netting/setting off

the MTOA charges with LTOA charges in a particular target region is that an open access customer should not be subjected to double charging of transmission charges, for the same quantum of power. This principle is based upon the settled commercial principle that an entity cannot be charged twice for the same service. Further, the rationale behind such mechanism is to avoid double levying of transmission charges for the same quantum of power availed under LTOA and MTOA/STOA, which is against commercial principles in the sector. In support he relied upon the judgment of the Hon'ble Supreme Court of India in the case of ***Mahaveer Kumar Jain vs. Commissioner of Income Tax, Jaipur (2018) 6 SCC 527***, wherein it has held that in the case of charging statutes, where double charging is contemplated, the same shall find specific existence in such statute enacted by the Parliament and in the absence of the same, double charging is prohibited as the same would amount to double jeopardy.

16.8. He submitted that as per provisions of the Act, the principles and methodologies prescribed by the Central Commission are guiding factors for all the State Commissions in the Country and the determination of tariff including transmission of electricity has to be based on commercial principles. Further, there is no provision in the Act which allows a transmission licensee to collect double transmission charges for the same quantum of power in the same region. The transmission business is based upon the principle of the transmission licensee being a revenue neutral entity. Further, Sections 38, 39, 40 and 42 of the Act, qua open access, provide that such access has to be "non-discriminatory", i.e. there cannot be any occasion whereby an open access customer is charged transmission/wheeling charges twice for the same quantum of power.

16.9. He submitted that if definition of "Untied LTOA" as incorporated by Central Commission in its CERC Sharing Regulations, 2020 is to be read with SOR, it is clear that the untied LTOA is the LTOA quantum which is left after considering the tied up LTOA capacity and the tied up MTOA capacity. Further, the tied LTOA subsumes within itself the tied up long term PPA and Medium Term PPA which means that any tied up medium term contract for selling power will be treated as a part of allocated LTOA capacity and enjoying the priority associated with an LTOA and the power under the medium-term contract will be scheduled under LTOA. This will prevent

any “double charging” of the transmission charges qua LTOA and MTOA. Therefore, the CERC Sharing Regulations, 2020 has contemplated an automatic set-off of MTOA with LTOA.

16.10. He submitted that that the entire basis for introduction of the setoff principle was to avoid any form of “double charging” from the open access customers. Therefore, in view of the aforesaid Regulations of CERC and under Section 61(a) of the Act, this Commission is duty bound to provide the set-off mechanism in the GERC Open Access Regulations. Therefore, the existing Regulations are required to be amended as there is no commercial sense in permitting double charging of tariff for the same transmission capacity.

16.11. He also draws our attention that in the past, this Commission has adopted the principles and methodologies of the Regulations of CERC and to support of this statement, he relied upon the Order dated 27.12.2019 passed by the Commission in Petition No. 1776 of 2019 of State Load Despatch Centre, seeking implementation of the fourth amendment to the DSM Regulations notified by the Central Commission in the State of Gujarat. The Commission has implemented the provisions of CERC DSM fourth Amendment Regulations, which is now applicable in the State of Gujarat. Hence, similar treatment should also be given to Open Access Regulations for implementation of set-off principles envisaged under the CERC Sharing Regulations, 2010.

16.12. With regard to objection of the Respondents that the issue pertaining to Regulation 21 is pending adjudication before the Hon’ble Supreme Court and therefore, this Commission ought to await the outcome of the said proceedings before amending its own Regulations is concerned, he submitted that the Hon’ble APTEL in its judgment dated 02.03.2020 in Appeal No. 262 of 2019 has rejected the same, therefore this issue does not survive furthermore and there is no restriction upon this Commission to pass any amendments in the existing open access Regulations, 2011.

16.13. With regard to Regulation 42 is concerned, he submitted that the aforesaid Regulation does not balance the interests of the investors/generating companies

and transmission utility. Such provision for payment of such compensatory/penalty charges do not take into consideration any actual loss/financial burden created by the transmission licensee on Open Access consumer/generating company for such relinquishment of open access. He submitted that if the transmission licensee has strengthened the transmission system for grant of such open access, then a proportionate cost could be recovered from the Open Access consumer/ generating company. However, if no strengthening has taken place, then there is no logic to charge relinquishment compensation/penalty.

16.14. He submitted that the principle for imposition of any compensation for relinquishment is that there has to be "stranded transmission capacity" in Intra-State transmission network of STU due to such exit/ surrender of LTOA. However, there are instances where the LTOA of the generator is not operationalized and the said generator availed MTOA or STOA for the same target regions. In such cases, if a generator relinquishes its LTOA, then as per the principle of relinquishment, there cannot be the position whereby the transmission system of the STU remains "stranded". Therefore, this Commission may consider that an open access customer shall not be required to pay any compensation/charge towards relinquishment of LTOA in a case wherein MTOA/ LTOA is availed for the same target region, as availed for MTOA/ STOA.

16.15. As far as Regulation 3 of GERC Open Access Regulations, 2011 is concerned, he submitted that over the years, it has been difficult for the LTOA customers to tie up their capacity for a period of 12 years and above more particularly in the existing market situations. As such, he requested that this Commission may consider to reduce the minimum period of LTOA from 12 years to 7 years, which will also be in line with Clause 2.1 (a) of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005, as amended from time to time, provided for the long-term procurement of electricity for a period of 7 years and above. In this context, he relied upon the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related Matters) (Sixth Amendment) Regulations, 2017 and MERC (Transmission Open Access) (First Amendment) Regulations, 2019 wherein the period for LTOA has introduced as 7 years.

16.16. He further submitted that the aforesaid amendment in the definition of Long Term Access is required as it is impossible for a generator to find a buyer who is committed to take power for a period more than 12 years. This aspect has also been recognized by this Commission in an Order dated 22.12.2020 passed in Suo Motu Petition. 07 of 2020. It is difficult for State-owned utilities to make a business plan even for a period of 5 years by taking into account the existing power market scenario, then surely a private generating company is also not in a position to firm up power supplies to a consumer under open access till 12 years. Hence, a reduction in the minimum period qua Long Term Access is very much required in the Regulations of this Commission.

16.17. He submitted that the argument of the Respondent licensees that the said period could not be reduced on account of Regulation 42, which provides for calculation of relinquishment compensation qua 12 years, does not hold any merit because under the CERC Connectivity Regulations, 2009, the provision governing relinquishment also stated the period of 12 years for computing relinquishment compensation. However, CERC has still amended the time period for LTOA by taking into account the Sector realities. Therefore, he prayed that the Commission may reconsider and amend Regulation 3 (1) (l) of the GERC Open Access Regulations, 2011.

16.18. With regard to independence of SLDC, he submitted that SLDC in the State of Gujarat functions merely as an extension of the transmission licensee (STU). Both SLDC and GETCO have the same Board of Directors. The holding company of GETCO viz. GUVNL is also the holding company for the distribution licensee in the State. Therefore, he prayed that the Commission may issue specific amendments/ modifications in the GERC Open Access Regulations in order to curb the ring-fencing of SLDC since the same ought to work transparently and independently from the STU and State-owned distribution licensees. To support of this, he relied upon the CERC's Order dated 17.06.2008 passed in Petition No. 8 of 2008 which was also challenged before the Hon'ble APTEL in Appeal No. 182 of 2008. Based on these judgements, he submitted that it is evident that the issue qua ring fencing of SLDC has been judicially recognized and that specific orders have been passed to the effect that SLDC cannot at all work under the patronage and aegis of the STU or the holding

company of the State, which clearly defeats the intent and purpose of the Act qua non-discriminatory open access.

16.19. He further submitted that CERC issued a statutory advice vide letter dated 11.08.2009 on the issue of ring-fencing of SLDC. Under the said statutory advice, it is categorically advised the State Commission to take up the matter with their respective State Governments for the purpose of separating the management and controlling interest between the entities operating SLDCs and the entities engaged in the business distribution/transmission activities. He also submitted that Ministry of Power, Government of India vide its letter dated 17.06.2020 has directed the separation of Central Transmission Utility (CTU) from Power Grid Corporation of India Limited (PGCIL).

16.20. He submitted that the Commission may take the submissions into consideration so that there is no nepotism in the State qua the issues relating to open access, on account of ring fencing of SLDC. As such, this Commission may amend the GERC Open Access Regulations, 2011 to the extent that SLDC will function independently and distinctly and will not at all be influenced by STU, State-owned Distribution licensee and the holding companies of the State of Gujarat.

16.21. The Petitioners have also submitted additional written note on 11.01.2021, wherein the Petitioners have relied upon the decision of the Hon'ble APTEL specifically para 8.5 of judgment in Appeal No. 262 of 2019 and submitted that the Hon'ble APTEL has given positive binding mandate to the Commission passed under Section 111 of the Act but also in the nature of directions which can be issued under Section 121 to ensure necessary amendments taking in to considerations the Regulations of the CERC and other State Commissions and therefore, the direction given by the Hon'ble Tribunal to amend Open Access Regulations is required to be strictly adhere and consequently the present proceedings are nothing but 'compliance' proceedings of the aforesaid judgment and therefore, necessary order in compliance to the aforesaid judgement of the Hon'ble APTEL needs to be passed by the Commission. Further, in support of submissions regarding reducing the period of LTOA from 12 years to 7 years, the Petitioners have relied upon the amendments carried out by various State Commissions, viz. Maharashtra Electricity Regulatory

Commission (7 years), Bihar Electricity Regulatory Commission (7 years), Delhi Electricity Regulatory Commission (5 years), Punjab State Electricity Regulatory Commission (7 years), Uttar Pradesh Regulatory Commission (5 years), Joint Electricity Regulatory Commission for Goa and Union Territories (7 years) and Assam Electricity Regulatory Commission (7 years).

16.22. The gist of the submissions is as enumerated below:

17.12.1. It is submitted that Regulation 3 (1) (I) of the GERC Open Access Regulations, 2011 which states the definition of the Long-Term Access as reproduced below:

"*3. Definitions*

(1) In these regulations, unless the context otherwise requires

…..

(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."*

Based on the above definition, it is submitted that it has been difficult for the LTOA customers to tie up their capacity for a period involving 12 years and above especially in the existing market situations. As such, it was argued that the Commission may consider reducing the minimum period of LTOA from 12 years to 7 years, which will also be in line with Clause 2.1 (a) of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19th January, 2005, as amended from time to time provided for the long-term procurement of electricity for a period of 7 years and above. The relevant extract of the aforesaid bidding guidelines is reproduced below:

"2.1.

……

These guidelines are being under the provisions of Section 63 of the Electricity Act, 2003 for procurement of electricity by distribution licensees (Procurer) for:

(a) Long-term procurement of electricity for a period of 7 years and above;

……"

17.12.2. It is submitted that CERC has notified (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017, wherein the period for LTOA has been reduced

from 12 years to 7 years and reasons for the same was stated in the Statement of Reasons issued by CERC. It is submitted that the CERC has rightly referred the Bidding Guidelines of the Central Government and the Tariff Policy, wherein the period for a long term PPA has been defined as 7 years & above, and accordingly, CERC has revised the period of LTOA as 7 years and above, to keep it aligned with the period of Long Term PPAs.

17.12.3. It is submitted that the aforesaid amendment in the definition of Long-Term Access is required for the reason that keeping in mind the existing power market scenario, it is almost impossible for a generator to find a buyer who is committed to take power for a period more than 12 years. This aspect has also been recognized by this Commission in its Order dated 22.12.2020 passed in Suo Motu Petition. 07 of 2020. The relevant portion of the Order is reproduced as under:

> *"7. Further, the Commission is also of the opinion that it may be difficult for the utilities to make realistic projections and business plan for the 5 – year control period in view of the prevailing circumstances at present."*

Based on the above, it is submitted that if it is impossible for State-owned utilities to make a business plan even for period of 5 years by taking into account the existing power market scenario, then a private generating company is also not in a position to firm up power supplies to a consumer under long-term open access till 12 years. Hence, a reduction in the minimum period qua Long term Access is very much required in the Regulations of this Commission.

17.12.4. With regard to the argument of the Respondent licensee is that a duration of 7 years is not sufficient to ensure that the licensee would be able to service the capital cost and debt servicing from the open access customers for whom the system built is concerned, the Petitioners have relied upon the Statement of Reasons (SOR) issued by the MERC while notified the MERC (Transmission Open Access) (First Amendment) Regulations, 2019, wherein it was brought the amendment to the terms of LTOA from 12 years to 7 years. Similarly, in the present case also, as the Commission has necessary Tariff Regulations which has governed and protect the interest of the Respondent GETCO for recovering its costs including debt, in the same

way the Commission also ought to consider and amend the existing Open Access Regulations accordingly. In view of the above, the aforesaid amendment under the GERC Open Access Regulations, 2011 qua reduction in the term of LTOA may be allowed by the Commission.

16.23. Based on the above submissions, he requested the Commission that the present Petition shall be allowed by making necessary amendments to GERC Open Access Regulations, 2011.

17. During the course of hearing, Learned Advocate Ms. Ranjitha Ramachandran for Respondent No.'s 1 to 5 and 14, reiterated the facts as mentioned above. She further submitted that the scope of the present Petition filed by the Petitioners are limited. It is a proceeding to hear the Petitioners and the Respondents to decide whether the Commission should consider a draft Regulation to be prepared and published to hear all the stakeholders and public at large and decide on the necessity to notify new or modification to the existing Regulations. The entire process is exercise of powers of the Commission which are legislative in character falling under Sections 181 and 182 of the Act. The Regulation making power is distinct from exercise of other regulatory powers, decision making or orders being passed by the Commission. It is not the case of determination of tariff, terms and conditions, or other functions as specified in Section 86 of the Act or other provisions of the Act other than what has been specifically stated as Regulation making powers under Sections 181, 61 etc. of the Act. She relied upon the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of ***PTC India Limited vs. Central Electricity Regulatory Commission 2010 4 SCC 603.***

17.1. She submitted that the inference drawn by the Petitioners with regards to the Judgement/Order dated 02.03.2020 passed by the Hon'ble APTEL is wrong and even the arguments made by the Petitioners on previous hearings clearly demonstrates that the present matter is for consideration of admissibility of the Petition. There is no direction of the Hon'ble Tribunal with regards to amending or modifying the existing Open Access Regulations. It is settled law that there cannot be any directions to legislate.

17.2. She submitted that there are several steps involved in the framing of Regulations. Upon the receipt of representations or information from any of the Stakeholders or Suo moto basis, the Commission is of opinion that there may be a case for considering the new or modification to existing Regulations. Therefore, the Commission has to consider only whether a case exists to explore the making or modification of the Regulations or not has to decide by the Commission that there is definitive need for such Regulations. In fact, if the Commission is convinced, accordingly draft Regulations is to be prepared on the aspects as the Commission considers appropriate by publishing draft Regulations with appropriate statement inviting objections from all interested persons and holding public hearing and considering the merits of the Regulations, if required and taking an informed decision and finalization of the Regulations and notified the same.

17.3. She submitted that the existing Open Access Regulations were notified by the Commission after due deliberation of all the relevant aspects and after due process of publication of the Draft Regulations, inviting comments, suggestions, objections etc. and thereafter, notified the said Regulations as a statutory Regulation in the terms of the provisions of the Act. The said Regulation cannot be now sought to be varied by reason of any alleged disputes or differences between a generating company or transmission or distribution licensees. The Petitioners in its Petition had made unsubstantiated and unwarranted allegations to make it seem that the open access regime was flawed, which was denied in the replies filed by the Respondent GETCO, distribution licensees and SLDC.

17.4. She submitted that the Petitioners have neither justified or substantiated its claims. The Petitioners and its members have been unfairly and unjustly seeking to create prejudice against GETCO, SLDC and the distribution licensee wrongly by justify the proposals for amendments, which is only to serve to their unilateral interest at the cost of others and particularly the interest of consumers at large being serviced by the distribution licensees and the general public interest. The Petitioners are in fact seeking unjust favourable discrimination in favour of its members under the guise of alleging discrimination.

17.5. She submitted that the Petitioners had vaguely referred to "dire need" and "sectoral realities" without substantiating the same. The reliance placed on the decision of Hon'ble APTEL dated 02.01.2020 in Appeal No. 262 of 2019 by the Petitioners is misconceived. The Hon'ble Tribunal has not held that the Commission is required to amend the Regulations but only for Commission is to expeditiously hear the present Petition. There is no positive mandate to consider the Regulations similar to those notified by the Central Commission. There is no such direction in the Order. The Hon'ble APTEL has only observed that the Commission is required to consider the regulatory developments brought out by Central Commission and other State Commissions. In fact, there cannot be any positive mandate by Hon'ble Tribunal to make a law which power is legislative in character and not justifiable under the Appellate Jurisdiction under the Act. The power to legislate cannot be a subject matter of directions by the Appellate Court as per the law laid down by the Hon'ble Supreme Court in PTC India case as stated above.

17.6. In support of the above submissions, the Learned Advocate Ms. Ranjitha Ramachandran relied upon the following decisions:

(a) Supreme Court Employees' Welfare Assn. vs. Union of India, (1989) 4 SCC 187;

(b) Narinder Chand Hem Raj vs. Lt. Governor, Administrator, Union Territory, H.P. [(1971) 2 SCC 747];

(c) Hon'ble Tribunal in its Judgement 06.05.2011 in Appeal No. 170 of 2010 between Madhya Pradesh Power Generation Company Limited vs. Madhya Pradesh Electricity Regulatory Commission and Ors. 2011 ELR (APTEL) 1041.

17.7. She submitted that the Petitioners are seeking to submit contrary to the oral arguments made during the hearings, wherein the Petitioners have admitted that the present proceedings are only for consideration of the aspects for admission. It is denied that there is any direction by the Hon'ble Tribunal or that the present proceedings are compliance proceedings to implement the modification of the Regulations. The Open Access Regulations have been notified to give certainty to the dealings between the parties and therefore, the same should not be varied from time to time at the instance of any person as it would destroy the continuity and predictability of the dealings in the electricity sector. Merely because it has been nine years since the Regulation was introduced is not a reason for the same to be

amended. The amendments have been carried out only to the extent they are necessary and there is no reason for any amendment as sought by the Petitioners.

17.8. She submitted that the principle on which the Open Access needs to be considered and given by the Utilities have been properly and clearly set out in the GERC Open Access Regulations, 2011 and there is nothing in the said Regulation which is required to be modified or amended or clarified. Many of the proposals made by the Petitioners were also raised in the Writ Proceedings filed by one of the generators being OPGS Power Gujarat Private Limited and the same were rejected by the Hon'ble High Court of Gujarat in Special Civil Application No. 9138 of 2016. The Civil Appeal against the said order dated 07.10.2016 is pending before the Hon'ble Supreme Court and there is no stay against the aforesaid Order of the Hon'ble High Court of Gujarat.

17.9. She submitted that the Intra State Open Access Regulations, 2011 has been enacted balancing the interest of all the parties concerned and taking note of the importance of maintaining the supply of electricity by the distribution licensees of the area in discharge of its Universal Service Obligation provided under Sections 42 and 43 of the Act. This is a fundamental aspect which need to be considered upfront in regard to the status of the Distribution Licenses under the Act vis-a-vis the other users of the Intra-State transmission and Distribution system in the State, whether under the long term, medium term or short-term basis. It is the general body of the consumers in the State through a distribution licensee of the area that have been contributing and will continue to contribute for the capital investments in the Intra State Power System in the State. The entire transmission and distribution network in the State has been established and upgraded from time to time primarily from the retail supply tariff collected from the consumers at large and therefore, there has to be a priority to the transmission and distribution system for serving such consumers. The surplus capacity after meeting the requirements of the distribution licensee to enable them to serve the consumers is allowed to be given to Open Access Applicants based on whether the application is for Long Term or Medium Term or Short Term. There is a perfect balance maintained in the Intra State Open Access Regulations by giving priority to the distribution licensees for accessing to the transmission and distribution system as compared to others.

17.10. She also submitted that the entire Intra State Power System is an integrated system and developed over a long period of time and substantially funded out of the retail supply tariff collected from the consumers at large of the distribution licensees. The entire system had been built in the initial stages only for serving the consumers of the distribution licensees. The introduction of Open Access to others in pursuant of the Act has been recent development after the enactment of the Act. Such a right to the Open Access Applicants can be only in the surplus capacity available with the transmission and distribution licensees after meeting the requirements of the distribution licensees to serve its consumers.

17.11. She submitted that existence of the duty to supply electricity to all the persons within the area of the Distribution Licensee, the Distribution Licensee has the Universal Service Obligation under Sections 42 and 43 of the Act and cannot choose the end user only whom it would like to serve. The open access transaction for sale of Power being entered into by the members of the Petitioners Association and others are pursuant to bilateral contract pursuant to mutually agreed terms decided without any compulsion or duty etc. The Distribution Licensee underwrites the payment of all the transmission charges and losses of the Intra-State transmission licensees involved and further has duty to establish, upgrade, maintain etc. the distribution system in perpetuity. There is no such thing as open access being for a limited period, the choice being exercised of taking long term or medium term or short term or taking open access only on point to point to basis to serve a specific end user or surrender or termination of open access by paying relinquishment charges. The Universal Service Obligation of the Distribution licensee requires it to arrange the power required by end user from any possible source and cannot claim that the supply of power shall be only from one designated generator. The supply is also based on merit order despatch requirements. This means the distribution Licensee is required to have the access to the entire intra state system to service a specific consumer. As against the above the other open access users take open access on a point-to-point basis from one identified generation source to the identified end use premises. The nature of the requirements of distribution licensee is different. In view of the Universal Service Obligation to supply electricity, the Distribution Licensee is required to arrange the procurement of power from

multiple-sources generators situated at different places in the State and outside and serve the consumers. Whereas in the case of other open access users of the system the procurement of power is from an identified source qua an end user.

17.12. She further submitted that the claim made by the Petitioners in the above Petition has to be considered based on the above fundamental aspects of the electricity sector prevalent in the State of Gujarat. It is also submitted that similar would be the case of other Intra State Electrical Systems established in other States for serving the respective consumers of the distribution licensees in the State. By way of the present Petition, the Petitioners are attempting to undermine the interest of the consumers at large and are seeking such consumers to cross subsidize and financially take the burden of the Open Access to be granted to the applicants for Open Access at the cost and interest of the consumers at large. The same is contrary to the scheme and objective of the Act.

17.13. The distribution licensees may be required to use the transmission system and distribution system in the State in a manner that it may on long term basis or medium-term basis or on short term basis or from time to time depending on the load in the system and power flow, pathways, the generating stations operating in the State, procurement of Power from outside the State, as the case may be. Ignoring the rights of the distribution licensees of having such priority will seriously affect the discharge of the functions envisaged for the distribution licensees under the Act in context of Universal Service Obligation. The Petitioners are seeking to interpret the provisions of the Electricity Act to favour the Open Access applicants at the cost of the consumers at large which impermissible and contrary to the objective of the Electricity Act. In view of the above aspect of identified source and identified end use in the case if other open access users the point of injection and point of end use use/delivery are identified. It is therefore point to point connection. As far as the Distribution licensee is concerned, it is not point to point but the use of all generating sources and all directions to reach the consumer premises. The aforesaid status and functioning of the Distribution Licensees in comparison to other open access users has led to the Distribution Licensees being held liable to defer and service on a comprehensive basis the entire revenue requirements of the transmission Licensee (GETCO) subject only to reducing the amount that may be

recovered from other open access users whether long term, medium term or short term. The quantum of such liability discharged by the Distribution Licensees exceed on year-to-year basis is more than 95% of the total revenue requirements of GETCO. While there are aspects of surrender, relinquishment of transmission capacity etc. available to other open access users, there is no such thing in the case of distribution licensees where the obligation of the Distribution Licensees is of a continuing nature as they will have to be liable to discharge the liability to meet towards meeting the entire revenue requirements of GETCO and the entire Intra State Transmission System has been developed over the years on the above fundamental basis that thedistribution Licensees and the consumers serviced by them as a whole have facilitated the establishment, operation, maintenance and upgradation of Intra State Transmission System. She submitted that the same is also the distinguishing features as to why the methodology and principles based on which the open access Regulations of the Central Commission applicable to interstate transmission system cannot be adopted and applied as such in the case of Intra State Open Access.

17.14. She submitted that the provision of the priority to the distribution licensee is well established and settled principle and has been followed by State Commissions almost universally. There is a valid, rational and justified reason to provide priority to the distribution licensee over the other Open Access applicants as contained in the existing Intra State Open Access Regulations, 2011. The consumers in the State who are served by the distribution licensees are required to be given priority over and above the interest of any other Open Access applicant other than the distribution licensees. The integrated Intra State Power System had been established, upgraded, maintained and operated in the past for many years funded out of the retail supply tariff paid by the consumers at large and accordingly they being a block of existing users of the transmission and distribution system at the time when the Act came into force on 10.06.2003. The distribution licensee should therefore have the first priority. The Petitioners and other similarly placed persons are entitled to Open Access to the Intra State Transmission and Distribution system after meeting the requirements of the distribution licensee.

17.15. She submitted that the distribution licensees may be required to use the transmission system and distribution system in the State in a manner that it may on long term basis or medium-term basis or on short term basis or from time to time depending on the load in the system and power flow, pathways, the generating stations operating in the State, procurement of Power from outside the state, as the case may be. Ignoring the rights of the distribution licensees of having such priority will seriously affect the discharge of the functions envisaged for the distribution licensees under the Act in context to Universal Service Obligation. The Petitioners are seeking to interpret the provisions of the Electricity Act to favour the Open Access applicant s at the cost of the consumers at large.

17.16. She submitted that the Petitioners have sought to rely upon the definition of Open Access to argue for an absolute equality in the treatment of the Distribution licensee and other open access users.

17.17. She submitted that Section 2(47) 'Open Access' is not to be read as absolute non-discriminatory provision of treating every one as equal. Further, the same has to be read with the latter half which is "in accordance with the Regulations specified by the Appropriate Commission". There can be reasonable classification in open access. The Petitioners are considering the provisions of the Act in a narrower and pedantic manner. The provision relating to non-discriminatory open access contained in Section 2 (47), Sections 39, 40 and 42 of the Act need to be construed harmoniously with the provisions dealing with the functions and obligations of the distribution licensees.

17.18. She submitted that the priority under the existing Regulations is a valid classification and therefore there is a valid discrimination in favour of the distribution Licensees. Such classification has been based on intelligible differentia. For this, she is relied upon the following judgements:

(a) State of West Bengal vs. Anwar Ali Sarkar AIR 1952 SC 75;
(b) Kallakkurichi Taluk Retired Officials Association, Tamil Nadu and Others vs. State of Tamil Nadu (2013) 2 SCC 772;
(c) Murthy Match Works vs. CCE, (1974) 4 SCC 428;
(d) Budhan Choudhry vs. State of Bihar, (1955) 1 SCR 1045;
(e) Mohan Kumar Singhania V /s. Union of India, 1992 Supp (1) SCC 594.

Based on the above submissions, she submitted that there is not discrimination and rather valid discrimination to have reasonable classification. On the other hand, treating unequal as equals is discriminatory. In this regard, she also relied upon the following decision of the Hon'ble Supreme Court:

(a) U.P. Power Corpn. Ltd. vs. Ayodhya Prasad Mishra, (2008) 10 SCC 139;

(b) Venkateshwara Theatre vs. State of A. P., (1993) 3 SCC 677 (Para 23).

17.19. She submitted that it is clear that even the Petitioners accepts the categorization of open access under long term, medium term and short- term open access and the provision of priority among the categories. Thus, it is accepted that the Act does not prohibit reasonable classification for purpose of open access.

17.20. It is submitted that the status of the distribution licensee distinguished from other open access users is not of a class within a class as sought to be claimed by the Petitioners. The vires of sub classification needs to be considered only if after classifying the broader category, there is a sub classification without any intelligible differentiation with nexus to the purpose sought to be achieved. Only a homogeneous group cannot be subjected to sub-classification and the sub-classification would be valid when there is no reasonable basis to differentiate between two entities/people that are in the same category or situation or position. But where there is a rationale and intelligible differentia, there cannot be any illegality of unconstitutionality in classification. To this, she relied upon the following decision of the Hon'ble Supreme Court:

(a) Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217;

(b) Jayesh A. Joshipura vs. State of Gujarat and Ors. dated 09.10.1982 in Special Civil Application No. 3032 of 1982.

17.21. She submitted that the judgment relied upon by the Petitioners in the case of Maharashtra Forest Guards and Foresters Union vs. State of Maharashtra and Others (2018) 1 SCC 149, in Para 17, it is stated that the situation would have been different had there been a classification and then subject to *inter-se* merit in the competitive examination. What was sought to be introduced was an additional restriction of graduation for participation in LDCE. Therein, the

forest guards were one class irrespective of education classification and the classification between graduates and non-graduates was considered unreasonable. The issue is not a restriction but of priority and further there can be no claim that the classification between distribution licensees and open access customers are not reasonable.

17.22. The Distribution Licensees form a separate class distinct from long term user classification and there is therefore no sub-classification whatsoever. In any event even such sub classification would be valid and justified if the differentiation principles mentioned above is satisfied. The issue is priority of allocation and there is straight forward priority given to distribution licensees. The distribution licensees are not to be considered with the LTOA/MTOA/STOA. Their nature of functioning is separate and cannot be compared to other open access customers. Therefore, they are classified separately and all other customers are categorized under LTOA/MTOA/STOA, otherwise, this would mean unequals are being treated equally.

17.23. She submitted that the reliance on Section 62(3) by the Petitioners to contend that it does not differentiate between the consumers of distribution licensee and the consumers through open access is misplaced. Section 62(3) relates to the determination of tariff for licensees and does not relate to open access at all. Even otherwise, Section 62(3) only recognizes that undue preference may not be given and further recognizes differentiation on various grounds including the nature and purpose for which supply is required. In this regard, she has relied upon the case of Association of Industrial Users vs. State of Andhra Pradesh (2002) 3 SCC 711.

17.24. She submitted that most other State Commissions such as RERC, MERC etc. have the similar provisions for providing the priority to distribution licensee because it caters to a huge number of consumers and requires adequate power to fulfil its obligation to supply. The said Regulations was included in the Model Regulation of Forum of Regulators and was also adopted by other State Commissions.

17.25. She submitted that the Regulation 21 of the existing Open Access Regulations provide for payment of transmission charges for LTOA. The Petitioners are seeking

provision for set off of LTOA charges with MTOA/ STOA charges which means that the amount paid as MTOA or STOA charges would be reduced from the LTOA charges payable. The said Regulations recognizes three periods of open access viz. long term, medium term and short-term open access. An application is to be filed for open access with capacity and location as well as period. Once the same is granted, there can be no change without consideration of relinquishment. Each Open access application is independent and considered based on capacity available as computed in terms of the Regulations. The Regulations provide for payment of transmission charges for each open access as per the capacity. Upon grant of open access, the open access customer is entitled to use the transmission system for such period in relation to such capacity and from identified injection point to identified drawl point. In term of the Regulations of the Commission, transmission charges are payable in MW capacity reserved for long term and medium term irrespective of whether the users avail the usage or not. This has been also recognized by the Hon'ble APTEL in its judgement dated 13.10.2015 in Appeal No. 6 of 2015 and affirmed by the Hon'ble Supreme Court vide Order dated 23.02.2018 in Civil Appeal No. 14062 of 2015.

17.26. She submitted that when the same customer applies for multiple open access, each application is treated separately and the customer is required to make payment of transmission charges for each open access granted. The open access customer cannot claim that it would not pay transmission charges for open access granted merely because it is not able to use the same. Nor can the open access customer claim that because it is paying transmission charges for one open access, it should not have to pay for the other open access. The Open Access Customer is liable to pay the transmission charges determined by the Commission from time to time for each open access whether short term/Medium Term in addition to and independent of the charges payable for long term access. The Open Access through Short Term/Medium Term sought for by the Open Access Customer is a contract for availing open access distinct and independent of the Long-Term Access already granted and therefore, the transmission charges are payable for such short term/Medium Term separately. Therefore, no double charging or arbitrariness in the existing Regulations providing for payment of such charges for short

term/Medium Term. Any applicant booking multiple capacity i.e. under LTOA or MTOA or STOA is seeking distinct and separate open access. It is not the same capacity but different capacity. It is the choice of the applicant/customer to apply for and be granted capacity under multiple open access and has blocked the capacity. The customer cannot now claim that it should not have to make the payment for each open access.

17.27. She submitted that the Long-Term Access taken by a generator with requirement of payment of transmission charges for such Long-Term Access is not inter-changeable with the transmission charges payable for Short Term/Medium Term because the identification of the Delivery Point is likely to be different and other inherent differences in the scope and application. If the Long- Term access is taken, the Open Access User/customer will be governed by the specific terms and conditions relating to such Open Access. If, in addition the Open Access User is seeking Short Term/Medium Term, the same is an independent transaction and the Open Access User is bound by the terms and conditions of the Short Term/Medium Term including payment of applicable transmission charges.

17.28. She submitted that the open access is for point to point as the open access to be given requires identification of the injection point and drawal point and the identification has to be for the entire period of open access. Any change in the point of injection or point of delivery would be treated as surrender of the existing open access with payment of compensation charges and a fresh application for open access would have to be filed. So long as the injection point and drawl point are same, the Petitioners can always avail the open access under already granted access, long term or medium term or short term, as the case may be. The contentions of the Petitioners that for the same consumer with an existing LTOA, it is required to apply for MTOA is not correct. However, when open access is sought for a different point, the same is a separate open access and has to be applied and granted separately. The transmission charges payable for such second open access cannot compensate for the transmission charges which are payable for the first open access. Therefore, there cannot be any set off.

17.29. She submitted that the Petitioners have sought to proceed on the basis that the open access allows its members access to the entire system in the State. The said contention has already been rejected by the Hon'ble Tribunal in Gujarat Energy Transmission Corporation Limited vs. Gujarat Electricity Regulatory Commission in Appeal No. 104 of 2009 dated 31.03.2010. In this case, the Hon'ble Appellate Tribunal has recognized the purpose of requiring point of injection and point of drawl and also has recognized that open access is specifically from a point of injection to point of drawal and any change in the points would require a separate open access. Therefore, when an open access customer with LTOA applies for MTOA for different point, it cannot claim set off.

17.30. She submitted that the contention of Petitioners to proceeds on the basis of same transmission capacity in the Intra State system irrespective of any direction etc. which is not correct. The open access is not only for MW capacity but for point to point. Further it is not the same transmission capacity if open access is sought under different category for conveyance to different identified delivery point. In any case, the capacity considered for short term and medium-term open access is independent for capacity granted under LTOA. The transmission charges are not for use of the capacity but for the capacity booked from point to point. To this, she has relied upon the decision of the Hon'ble Tribunal in Appeal No. 6 of 2015 (supra) and the same is upheld by the Hon'ble Supreme Court vide Order dated 23.02.2018 in Civil Appeal No. 14062 of 2015 read with the decision of Hon'ble Tribunal in Appeal No. 104 of 2009 (supra). There is also no double charging as sought to be claimed by the Petitioners. Each open access is separate transaction and it is not the same infrastructure. The period of Open Access, terms and conditions etc. are to be from each of the categories of Open Access, viz. Short Term/Medium term and Long Term. The capacity is blocked for each open access separately and therefore transmission charges are payable for each open access. The open access customer is paying for the capacity booked under each open access.

17.31. She submitted that the transmission charges are payable for Short Term/Medium Term Open Access are for a different transaction and cannot be said to be for the same transmission line as may be applicable under the Long-Term Access. She denied that the Customer has identified the point of delivery under the long-term

access and then seeking for conveyance of electricity on short term or medium-term basis for the same point of delivery, in which case there would not be any necessity to additionally apply for short term or medium-term open access or otherwise pay any additional charges. The principal aspect is that each Open Access user has to identify the Point of Injection and Point of Delivery on the Intra State Transmission Network. Once the points are identified, there cannot be change for the period of open access. Even, if a person does not identify the drawal point under a long-term access, it cannot take advantage of its failure by seeking not to pay the transmission charges. The claim for transmission charges for Short Term/Medium Term is for the Open Access provided to the Open Access Customer in Non-discriminatory manner, namely, the same as in the case of other similarly placed users of the Intra State Transmission Network in the State of Gujarat.

17.32. She submitted that the Regulations only recognize the payment of transmission charges for each open access granted and there is nothing wrong with the same. The judgments relied upon by the Petitioners on double taxation are distinguishable and are not applicable. The said judgments relates to double taxation and not for charges for provision of services or regulatory matter of allowing open access. The grant of open access is subject to terms and conditions and such conditions include payment of transmission charges as specified in the Regulations. The Regulations are delegated legislation and regulate the open access. In the present case, the Open Access Regulations are clear as they provide for transmission charges for each open access i.e. long term, medium term and short term. Each is a separate transaction and require payment of transmission charges. The basic aspect is that the Open Access Customer is continuing to keep the reserved capacity under the Long-Term access committed to it while seeking the Short Term/Medium Term Open Access. GETCO/licensee is required to provide Long Term Access as per the request of the Open Access Customer at any time notwithstanding that at the relevant time the short term or medium-term open access is also operating. The open access customer is therefore liable to pay both the charges i.e. for Short Term and Medium-Term Open Access for which the points of delivery have been identified as well as the charges for Long Term Access committed to it.

17.33. She submitted that there can be no swapping or inter mixing of the rights under the Long-Term Access with request for Short Term/Medium Term Access or any claim that once the Long-Term Access has been paid for, the Open Access user can have the liberty to set-off such charges against the claim for Short Term/Medium Term Open Access. If such set off is allowed, then this would be equivalent to allowing an open access customer to shift its drawal or injection points throughout period of open access. If the above option of set off is given, the Open Access users would be entitled to implement the Long-Term Access on Short Term/Medium Term basis for different Points of Delivery and change, vary, modify such Points of Delivery from time to time which would result in the Long-Term Access being given with a condition for identification of a specific Point of Injection and more so, the specific Point of Delivery meaningless and redundant. The very purpose of committing the applicant for Open Access to identify the Points of Injection and Delivery for the entire duration of the Open Access gets marginalized. The effect of the above would render the operation and maintenance of the Intra State Transmission System in a chaotic condition. There will be claim for Open Access to different Points of Delivery from time to time by the long-term users under the guise of seeking medium- or short-term open access. The transmission planning undertaken by GETCO from time to time of developing the Transmission Network in a manner to cater to the use of various users by providing them an assured Long-Term Access will be affected. This is particularly happening when the open access is considered under the Statutory Regulations based on the identified Point of Injection and identified Point of Delivery.

17.34. Moreover, she submitted that the specific sections of the Intra State Transmission System are earmarked, laid down, upgraded, improved for providing based on the commitment of use by Long Term Open Access Users from one identified point to another identified point. The identification of the specific Point of Injection and specific Point of Drawal is essential for proper transmission planning and development of the Intra State Transmission System. In this regard, the salient aspects of not adjusting the Short Term/Medium Term Access charges against the Long-Term Access charges payable are as under:

(a) There are large number of open access applicants in the State;

(b) If the open access applicants block the long-term open access and continues to shift the drawl point under open access from time to time, there would be chaos considering the number of such applicants;

(c) The transmission planning of GETCO will get affected if the LTOA applicant does not identify the drawl point at the earliest and continues to use, under the liability to pay same charges, the open access to various points of drawl. This would indirectly constitute change in the drawl point from time to time under LTOA, which is prohibited;

(d) The long-term access for transmission of power requires a point of injection and point of drawl. Such drawl point has to be identified for the entire period of open access since the LTOA has to be from an identified point of injection to identified point of drawl. In case the Generator wishes to change the point of drawl, he has to surrender the existing LTOA and apply for a fresh LTOA;

(e) There cannot be any circumvention of the requirement of identification of a Long-term consumer drawl point. In effect, the Petitioners are asking for benefit of identifying different drawl points for shorter periods, without identifying a long-term drawl point;

(f) If the contention of the Petitioners is accepted, then this would mean that no open access consumer is required to identify long term drawl point and can seek multiple short term or medium-term drawl point. If every long-term open access consumer seeks to change the drawl points in such a manner, this would lead to chaos in the transmission system and the purpose of requiring a long-term drawl point would be defeated; and

(g) Allowing all open access consumers to vary their drawl point from time to time under the guise offsetting short term and medium term against long term would affect the coordinated organized and economical method of transmission planning which is provided under Section 39(2)(c).

17.35. She submitted that the Petitioners are wrong in comparing the Intra State Open Access with Inter State Open Access regulated by the Central Commission and accordingly comparing the Statutory Regulations of the State Commission

Regulations with the Regulations notified by the Central Commission. Admittedly, the Central Commission's Regulations are not binding on the State Commission. Even otherwise there are essential differences between them. The Central Commission had also been previously following the same methodology as contained in the Statutory Regulations of the State Commission till 2011. In the year 2011 the Central Commission changed the methodology for computation and payment of transmission charges from considering the Point-to-Point Connection to a different methodology termed as 'Point of Connection Charges' based on the pathway and transmission line of the entire route. The charges are to be paid as Injection POC charge and withdrawal POC Charge as provided in Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations 2010. In terms of this Regulations, the Central Commission considers not only use of the transmission line from the Point of Connection to the Point of Delivery but also alternative routes and pathways. Further, the Central Commission is only catering to Inter-State Transmission from one State periphery to another State periphery or from a generating station to a State periphery and not to the premise where the electricity is finally consumed. This Commission has continued to follow the earlier methodology on regard to transmission charges as per the point-to-point transmission and has not so far adopted the new mechanism of point of connection charges which is based on different pathways. She submitted that no other State Commission has implemented the Central Commission Regulations for Intra State transmission. It is not practically possible to implement the Point of Connection mechanism within the State.

17.36. She has distinguished between the Central Commission Regulations and the State Commission Regulations as under:

(a) As per Section 61, State Commission is "to be guided" by the methodology of Central Commission for determination of terms and conditions of tariff of licensee and generating company and not for consideration of open access;

(b) Each State Commission has to consider the circumstances and factors within the State to determine the appropriate methodology and mechanism to implement open access;

(c) The Inter-State Transmission System is for a transmission to a State/Region

periphery whereas Intra-State Transmission System is within the State. The development of the Intra-State System and Inter-State system cannot be compared and the mechanism followed by Central Commission cannot be replicated in the State Commissions;

(d) The Central Commission does not deal with distribution network and maintenance of supply of electricity by the Distribution Licensee to the consumers at large;

(e) The Central Commission does not follow the same concept of Point-to-point Transmission of electricity. It has a different Regulation of treating the pathways from one region to another region as being used with various alternatives;

(f) The Central Commission deals with Inter-State system and the concept of computation of transmission charges of all the users is based on pathways, distance, directions, point of injection charges, point of drawl charges, a complex methodology which is possible considering the system in regional/pan India basis and has not been possible to be implemented in the intra state transmission in any state. The point – to - point transmission and postage stamp method is being followed in the State which is different;

(g) The point of connection methodology for transmission charges is based on study of path which the electricity will take, the sensitivity at place of injection, the sensitivity at place of drawl and the different routes which would be involved etc. and is a dynamic concept. The line connectivity is not only from the place of injection to place of drawl but also the implication on various other routes which the electricity injected may follow and the sensitivity and availability of other routes. Transmission charges computation is higher in such methodology as the person would pay not only the charges for the particular line to be used but also for other possible alternative lines through which the electricity may be transferred in a given situation;

(h) Further in the changed regime, Central Commission considers each State periphery to be a point of drawl, particularly as the transmission after State periphery is through Intra-State transmission network. The open access under Central Regulations is for target region and is different than the open

access under State commission;

(i) The above new methodology adopted by the Central Commission is peculiar to an Inter-State Transmission where geographical area under consideration is national/regional. The above concept has been consciously not implemented for Intra State Transmission in any State in India i.e., in Gujarat or any other State. The Intra-State Transmission follows the same regime as was followed in the Inter-State Transmission prior to the above new methodology of computing transmission charges followed by Central Commission. Admittedly, in the previous methodology of the Central Commission, the Central Commission also had the same Regulation.

(j) The consideration of Regulations of Central Commission is on injection and withdrawal charges which are determined for a region based on the actual load flow. Thus, the capacity actually being utilized plays a role in the determination of the injection and withdrawal charges in the POC regime. This is not so in the case of State Commissions and in fact such regime would be impractical and complicated to implement in the State Commissions.

17.37. She submitted that the Inter-State Transmission regulated by Central Commission was also on the same basis till the methodology relied upon by the Petitioners was changed only in 2015 after the new point of connection methodology was issued for computing the transmission charges in 2011 but this has not been introduced in any State. Thus, the consideration of Inter-State Transmission and Intra-State Transmission are on different methodologies and cannot be compared. She submitted that it cannot be that every time Central Commission amends its Regulations, all State Commissions have to follow the same.

17.38. She submitted that the Petitioners have also ignored that the licensees are regulated entities and do not recover more than their Annual Revenue Requirements. Therefore, there is no undue benefit or double charging for the licensees. The Hon'ble High Court of Gujarat vide its Order dated 07.10.2016 in Special Civil Application No. 9138 of 2016 has also recognized the same. All transmission charges recovered from open access are considered against the ARR of GETCO and all wheeling charges are considered against ARR of Distribution Licensee. Therefore, there is an adjustment at macro level for any recovery of transmission charges for

MTOA and STOA and it is not as if the licensee would retain the transmission charges for itself.

17.39. She denied that there is case of any licensee recovering tariff twice. There is no unjust enrichment. The licensees recover only their ARR. The Petitioners are seeking to burden other open access customers, including distribution licensees with higher transmission charges. Any reduction in the transmission charges payable by an open access customer for its MTOA/STOA or LTOA capacity would have to be recovered from other open access customers. The transmission charges are determined on the basis of capacity of LTOA and MTOA. Therefore, any grant of MTOA would reduce the transmission charges for all so that the total recovery by licensee remained the same. In case of STOA, the recovery of transmission charges is adjusted against the ARR as provided under Regulation 72.4 of MYT Regulations 2016, the determination of transmission charges for each MW. Thus, there is an adjustment of STOA/MTOA against transmission charges for LTOA. If there is any recovery of the quantum of money from Short Term Access or Medium-Term Access or Long-Term Access, which in aggregate is in excess of the admissible revenue requirements, the same is true up in the tariff for the ensuing year and the surplus is adjusted by reduction in the revenue requirements in the ensuing year. Thus, the licensees would never receive any amount greater than the revenue requirements as approved.

17.40. She submitted that the Hon'ble High Court of Gujarat vide Order dated 07.10.2016 in Special Civil Application No. 9138 of 2016 in the case of OPGS Power Gujarat Private Limited vs. Gujarat Energy Transmission Corporation Limited and Anr., has upheld the rationality and justification for the present Regulations and the principle that there cannot be any such set off.

17.41. She submitted that the reliance placed upon by the Petitioners on the decision of the Commission' s order dated 27.12.2019 in Petition No. 1776 of 2019 is not correct. The said Order related to the implementation Deviation Settlement Mechanism wherein the Commission had already linked the UI charges to the Central Commission UI charges at the early stages itself and therefore any amendments to UI by Central Commission would be applicable. The grant of open

access and the issues raised in the present Petition are completely different than ABT and UI/DSM. The UI/DSM of Intra-State and interstate are connected and the mechanism in State of Gujarat was adopted to allow for back to back application of the mechanism. The over and under drawl and over and under injection at Intra-State level affects the same on Inter-State level and payments of DSM at Inter-State level are made by SLDC and are to be collected at Intra-State level. The POC mechanism of Central Commission in relation to the open access and transmission charges are different than open access followed in Gujarat. Therefore, the provisions of Central Commission cannot be applied.

17.42. She submitted that there is no violation of Section 61(b) or the principle that transmission is to be conducted on commercial principle. In fact, the commercial principle requires that any customer pays for each transaction. It is up to the customer to arrange its affairs and apply for open access as per its needs. Once the same is granted, the open access customer cannot refuse the payment of transmission charge. She submitted that the Commission is not bound by the Central Commission's Regulations and the Hon'ble High Court of Gujarat has also upheld the said principle and therefore the contention that the existing Regulations have no commercial sense or are permitting double charging is not correct. The Petitioners cannot claim that there is any arbitrariness or illegality in the Regulations. The Hon'ble Tribunal has only observed that pendency of the Civil Appeal before the Hon'ble Supreme Court would not prevent the Commission from amending the Regulations but this does not mean that there has to be an amendment. The existing Regulation are valid and reasonable and there is no reason for amendment of the same.

17.43. She submitted that there is no deviation from Section 61(b) as there is adequate reasoning for transmission charges to be payable for each open access granted and there cannot be any inter mixing of LTOA and MTOA/STOA as sought by the Petitioners.

17.44. She submitted that with regard to Regulation 13(2)(a) of Change in requirement of new application in case of change in capacity beyond 10% is concerned, it is submitted that the above issue was not raised in the Petition and is outside the

scope of the Petition. Therefore, this issue may not be considered by the Commission as there is no merit in the aspect sought to be raised by the Petitioners.

17.45. She submitted that Regulation 13(2)(a) of the Open Access Regulations requires an Applicant to file a fresh Application in case of change in location of the points as well as change in capacity beyond 10%. The Petitioners during arguments on 07.12.2020 had sought to propose amendment of 10% to a fixed MW capacity or a higher percentage and suggested capacity of 100 MW or 40%. The claim of the Petitioners cannot be accepted as the Commission after due consideration had provided for 10% limit. This is at the stage of application and it cannot be that the location or capacity would vary to such extent before the application is processed. Further. the application is filed by the applicant and the applicant should be careful about the details being included in the application. The comparison with the Central Commission's Regulations is not correct. The capacity of Central Grid and the State grid cannot be compared. For the State of Gujarat, consideration of 10% is appropriate and there is no reason for increase in it.

17.46. With regard to relinquishment of open access, she submitted that the liability to pay relinquishment charges as specified in the Open Access Regulations is material otherwise the liability of charges with respect to the capacity relinquished would be passed on to pool of other open access customers and the distribution licensees. For the same capacity, the other customers and distribution licensees would pay higher costs. There has to be necessarily charges to be paid by a person walking out of the commitment based on open access taken from the licensees. The Open Access customers having contracted to take Open Access for a long-term period or medium-term period is required to compensate the licensees in case he fails to adhere to the duration of the contract and want to terminate the contract pre-maturely. The licensees earmark the entire capacity for which the open access is given to be used by the open access customer and cannot give such capacity to any other person.

17.47. Further, in the case of long-term open access, the licensee incurs the cost of upgradation, maintenance etc. The long-term open access customer cannot,

therefore, be allowed to relinquish the open access duration without compensatory payment to the licensee. However, the relinquishment charges is not restricted only in cases where the transmission system is strengthened or augmented. If the applicant for Long Term Access had not been allocated the capacity, the said capacity could have been allocated to another Long-Term User as a result the transmission licensee as well as the existing beneficiaries would have benefited. The capacity had been blocked for the open access customer and they are required to pay charges for the same. Accordingly, the compensation should be payable even when there is no augmentation or strengthening.

17.48. The capacity being blocked for long term access cannot be declared as "not stranded" because there "may be" MTOA/STOA. The future possibility of the utilization of the capacity cannot be considered for the purpose of deciding that there is no stranded capacity. Such compensatory payment is also regulatory in nature. A person contracting for long term open access or medium-term open access cannot be allowed to vary the terms of the contract in relation to its duration without being liable for compensatory payment as it affects the operation of the system as a whole and other user of the system including the general body of consumers at large. The alleged loss to the generating company by making payment for the capacity contracted by it cannot be considered. To support of this, she has relied upon the following judgements:

(a) Judgement dated 15.04.2015 of Hon'ble APTEL in Appeal No. 197 of 2014 between Jayswal Neco Urja Limited vs. Power Grid Corporation of India Limited and Another;

(b) Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited and Another (2017) 16 SCC 498

17.49. She reiterated that the long-term open access, medium term open access and short –term open access is different and are independently contracted between the Open Access Customer and the licensee/STU and one open access cannot be considered to dilute the obligations of the other open access. Relinquishment charges are payable for surrender of open access and the same is payable irrespective for the reason of the surrender which has also been recognized by the Hon'ble High Court

of Gujarat. The relinquishment charges are a well-established principle and is necessary to ensure that open access is taken seriously and applicants/customer do not at their whims and fancies seek open access and then relinquish them. She also submitted that the issue in Central Commission Regulations is related to MTOA while LTOA is not operationalized is not in the State. If the LTOA is not available, MTOA is not likely to be granted, Therefore, the issue does not arise in the present case.

17.50. With respect to the Regulation 17 of Applications for Open Access for Non-Payment of charges, she submitted that in terms of the aforesaid Regulations, the Open Access Applications may be rejected for non-compliance or provisions including on payment of charges. The Petitioners are seeking for processing of open access applications despite the non-compliance with the provisions of the Regulations, which is not proper. The Petitioners cannot default on payments and still seek processing of their open access application and continue to avail the open access. She submitted that it is a well settled and well-established rule that no person can claim a right of supply or service when there are outstanding dues, therefore, this is a standard practice wherein the non-payment of earlier dues disentitles the person from seeking future services. It is reasonable and necessary to have such a clause to ensure regular payment of dues of the licensees/SLDCs.

17.51. She submitted that Section 56 of the Act recognizes the disconnection of existing service in case of non-payment of dues. Therefore, the submissions of the Petitioners are contrary to the principle laid down in Section 56 and the same cannot be accepted. Further, the Petitioners had made vague allegation of misuse or misinterpretation of the provision in the Petition which is not substantiated.

17.52. She contended that the Petitioners have in their Petition sought to raise unsubstantiated and speculative allegations which were denied by the Respondent licensees. Thereafter, during the arguments, the same have not been raised by the Petitioners but referred to two aspects viz. (1) applications being rejected due to outstanding dues of Petty amounts, and (ii) Outstanding when there is 'bonafide' disputes on the amounts and Older claims/ disputes. She submitted that with regard to petty amounts being outstanding, there are no reason and clarity as to why

the same has been raised by the Petitioners. If the amounts are petty, there is no reason for the Applicant not to pay the same before applying for open access. There cannot any categorization of amounts as petty or not petty. The licensees/SLDC are regulated entities whose revenue requirements are to be met only by the charges and if there is non-payment even of petty amounts which would affect their cash flow. Further, the cumulative effect of such petty amounts of number of open access applicants would add up to a huge amount for the licensees or SLDC and it is therefore not correct to burden them with non-payment of dues even if it is for a petty amount. Whereas with regard to the disputed amounts, it is submitted that the Open Access Applications are processed by SLDC and/or GETCO and they cannot make any judgment upon disputes raised by the open access customers/consumers about outstanding dues. SLDC cannot be given the responsibility of deciding whether there is a bonafide dispute or not. Further any such exception for disputed amount would only mean that the open access customers/applicants would dispute each and every bill to avoid payment of transmission charges and yet continue to avail open access. She submitted that there is no clarity as to why there is a categorization of older claims or disputes as being older and there should be any exception for older claims/disputes. The outstanding of older claims is all the more reason to not grant further open access as the delayed recovery of dues would affect the functioning of SLDC/Licensees. Even the Central Commission under the Regulation 21 of Sharing Regulations 2020 provides that non-payment of charges would result in not only Regulation of power supply but also denial and suspension of open access.

17.53. She submitted that the Petitioners are seeking to reduce the minimum period of LTOA to 7 years instead of current 12 years. In this regard, she submitted that the Open Access Regulations do not permit system strengthening or augmentation works for short term and medium-term open access. Thus, there cannot be any expansion or upgradation based on the system constraints resulting in denial of short term and medium-term open access. This is because the investment in transmission or distribution network is substantial. The licensee would get to service such investment over a period of time. The charges payable by the open access customers is only avenue to service the capital cost. Making such investment

to cater to short term or medium-term open access demand would leave the licensee in a lurch as they may not be able to recover transmission or wheeling charges for such expansion after the period of open access. There is no proper reason for reduction in the minimum duration of long-term open access. A duration of seven years is not sufficient to ensure that the licensee would be able to service the capital cost and debt servicing from the open access customer for whom the system is built. In such cases, the burden would fall ultimately on the consumers at large in the State, which is unjust and unfair. On the other hand, the licensee cannot be made to bear the financial burden either.

17.54. She submitted that the Petitioners sought 7 years instead of 12 years which mean that transmission facilities would have to be set up in case of any application for LTOA for 7 years only. Therefore, a transmission facility would be set up to serve the LTOA application but at the end of 7 years, the asset may be left stranded. In terms of tariff determination, the licensee would not have recovered its cost in the period of 7 years and this would be passed on to other customers/consumers. The reason for 12 years was selected as minimum period as this was commensurate with the period of debt/loan. This is being because any transmission facility to be set should be ensured recovery for the period. The rationale for Petitioners is based upon its alleged difficulty to tie up capacity for 12 to 25 years. The Applicants have the option of choosing short term, medium term or long-term open access based on their requirements. If the Applicants for open access are unable to tie up the capacity for 12 years, then they can opt for medium term or short-term open access. This cannot be a reason to shorten the period of long-term open access.

17.55. She submitted that the difficulty for utilities to make realistic projections and business plan is completely different to the generators to firm up power supplies. Further, the difficulty was in regard to " prevailing circumstances" and not a general consideration. The situation is that there MYT Regulations had to be framed and in view of the COVID situation, the prevailing circumstances have created certain issues. The Commission had only deferred the 5 years control period for new Regulations for one year and the same would be considered from FY 2022-23. Therefore, it is not as if the 5 years control period would not be applicable. The

Petitioners are reading the aforesaid Order in a selective manner. The attempt of Petitioners to use the said order to justify its own difficulties in tieing up power is misconceived and absurd. In any case, if there is difficulty to plan projections even for 5 years, then the generators should apply for open access for shorter periods under MTOA and STOA. There is no reason as to why the same cannot be done.

17.56. She submitted that generating companies are allegedly unable to tie up power for 12 to 25 years but expect the network and transmission assets to be set up which are intended for a long period. Establishing the network at substantial cost when there is no assurance for use of the system/network is not efficient or economical use of resources or optimum investments. This is also recognized in Section 61(c) and (e) and ensure the recovery of cost of electricity under Section 61(d) of the Act. The Licensees would not be able to recover its cost from open access customer for whom the network is set up or even blocked for the period. The reduction in period would allow the same generating company to claim different open access requiring the licensees to set up various transmission assets which may not be fully utilized. The reliance placed on Central Commission Regulations by the Petitioners are not appropriate.

17.57. She submitted that the Inter-State Transmission System is different than the Intra-State Transmission System. The Inter-State System is under POC regime and based on load flow and pathways and the entire transmission planning and grant of open access is on different principles. Though the Petitioners have referred to Maharashtra Commission, there are other State Commissions including RERC which has been relied upon by the Petitioners providing for minimum of 12 years for LTOA, the period has to be decided balancing the interests of all stakeholders and ensure that there is optimal utilization of the resources and economical establishment of transmission system. The reduction of term of LTOA to 7 years and allowing transmission facilities to be established based upon applications for period of 7 years would not be efficient or economical use or optimal utilization of resources. The same would not be in accordance with the preamble to the Electricity Act, Section 39(2)(a), Section 40(a) as well as Section 61(1)(b), (c) and (e) of the Act.

17.58. She submitted that issues with respect to Regulation 37 of Payment Security Mechanism - Letter of Credit is concerned, that the payment security mechanism is essential and transmission licensee/distribution licensee should have assurance of the payments. In case, there is no payment security mechanism, this would jeopardize the financial viability of licensees if the open access customers do not make payments for transmission charges. This would further burden the other consumers as any such absence of recovery would eventually be passed on to them which is unfair and unproper. The assurance of security should be for the entire period of open access and therefore payment security mechanism is necessary for entire term of open access. The Commission instead of providing for Letter of Credit for the estimated charges for the entire period of open access has provided for an amount at estimated charges for two months. When the Commission has directed for Letter of Credit for amount of two months, it is obvious that the validity has to be for the entire period, i.e. it has to be revolving Letter of Credit. If the Letter of Credit is not revolving, then on invocation of the Letter of Credit once, there is no further payment security mechanism available for the rest of the open access term. This cannot be the intent of the Commission or Open Access Regulations 2011. The Central Commission in the Sharing Regulations 2020 provides for unconditional, irrevocable and revolving Letter of Credit.

17.59. On the issue of the Rebate on contract demand charges by a person availing open access, she submitted that the Petitioners are seeking a rebate on contract demand charges when availing open access. There is no rationale or reason for such rebate. Although this relates to Distribution companies and not GETCO. The aforesaid issue has no relation to Open Access and transmission charges payable to GETCO cannot be in any manner adjusted against any other charges and there can be no rebate of any other charges on the basis of recovery of transmission charges by GETCO. She also submitted that there is no specific requirement under the Open Access Regulations for such contract demand and there may be other issues such as why the Applicant seeking to continue the contract demand etc. The open access and contract demand with the licensee in the area of supply are different concepts and carry different obligations for the licensee. The charges payable in one cannot be

considered for reduction of charges in the other. The Petitioners are now claiming stand-by power which was not sought in the Petition or in the arguments. In any case, it is submitted that the stand-by power cannot be taken from the grid without any contract. The drawal of power can be allowed only if the power is scheduled under open access or as a consumer of a distribution licensee. There cannot be any other drawal of power from the grid. The drawal of power from the grid without an identified source would cause the disruption to the grid which is not permissible. There cannot be drawal without corresponding injection.

17.60. She submitted that in respect of the contention of the Petitioners that the dedicated transmission line to be included in the ARR after the COD of the generating company, the same is not an issue under open access but a matter of inclusion in ARR and an issue of determination of tariff. The same is outside the scope of consideration for Open Access Regulations 2011. She further submitted that there is no merit in the claim of the Petitioners. The dedicated transmission line constructed as a radial line from the captive power generating unit to the interconnection point of the transmission system would strengthen the transmission system used by the distribution licensees. There is no reason or logic for the other beneficiaries in the State to bear the burden for such dedicated transmission lines. Such lines cannot be included in the pooled cost. The Petitioners are seeking to pass on the burden from the generating company/beneficiary of the generating company to the distribution licensees and general body of consumers in the State as well as general body of open access customers. Further, in case the captive power producers construct dedicated transmission lines to their consumption points, there is no issue of open access.

17.61. She submitted that the request of the Petitioners to separate the Respondent SLDC from GETCO is not within the scope and jurisdiction of this Commission and therefore, the same cannot be entertained. She submitted that first proviso to Section 31 (2) of the Act specifically recognizes that the State Transmission Utility shall operate the State Load Dispatch Centre until such time the State Government designates any other Government Company or any Authority or Corporation as the State Load Dispatch Centre. The notification of operation of

SLDC by a company is by Government of Gujarat and until such time, STU shall operate as SLDC. Thus, the only authority which can decide on this aspect is Government of Gujarat at its discretion. There is not even any mandate in the Act or any of the Rules notified by the Central Government in exercise of the powers under Section 177 of the Act to the effect that the functions of the State Load Dispatch Centre should be given to or carried by an entity other than an entity which is discharging the functions of the State Transmission Utility. In regard to observations and contentions related to distribution companies and the corporate structure, she submitted that the corporate structure has been formed by the Government of Gujarat under the notification of Gujarat Electricity Reforms. Similar structures have been followed in all States. Therefore, the unwarranted allegations and contentions cannot be used to seek amendments which are outside the scope of the Open Access Regulations. There is nothing in the Act to prevent the SLDC and STU to be the same company or for corporate entity of SLDC/STU to be group company of distribution licensees/trading licensees etc. It is submitted that the State Electricity Boards in fact provided for all these activities in the same company itself.

17.62. With regard to the issue of independence of SLDC, Petitioners have relied upon the directives of the Ministry of Power to separate the CTU from Power Grid Corporation of India Limited or that POSOCO being separated from CTU/Power Grid, she submitted that the Petitioners have failed to notice the important aspect that both such separations were made by Government of India and not by Central Commission. In regard to SLDC and STU, the said decision is the prerogative of the Government of Gujarat.She submitted that in the notification dated 17.06.2020 of Ministry of Power, the CTU is going to be a 100% subsidiary of PGCIL. Therefore, the alleged issue on corporate organization by the Petitioners is not borne out. Further, all States are functioning with SLDC and STU in the same company and most of the States also have the STU as a group company of the distribution licensee/holding company. The contention of the Petitioners is without any basis. The statutory advice by Central Commission was made to Government of India in 2009 and there has been no action by Government of India or Government of Gujarat or any other State Government. The same cannot be compelled by the

Petitioners or even Central Commission. Therefore, the judgments being relied upon relates to grant of Trading Licence to a person who is in group company as STU/SLDC. There is no relation to STU and SLDC being separated. Further there is no issue of grant of any license in the present case. The statutory advice by Central Commission was made to Government of India in 2009 and no further steps have been taken by Government. When the issue is not within the prerogative of the Commission, there can be no Regulation in this regard.

17.63. She submitted that the Gujarat SLDC is already working independently while being within the corporate entity of GETCO. SLDC is self-sustained and filling separate Petition for approval of ARR of the SLDC function. The Petitioners have not substantiated any issue or instance of discrimination and is making vague allegations based on presumptions which cannot be accepted.

17.64. She submitted that with regard to flexibility to change the drawal points in long term open access or medium-term open access, the open access is from point to point as recognized by the Hon'ble Appellate Tribunal in Appeal No. 104 of 2009 in case of Gujarat itself. There cannot be any change in the drawal points as this would further lead to chaos and issues in transmission planning. The open access to be given necessarily requires identification of the injection point and drawal point. The transmission transferable capacity available in the system to grant long term open access or medium-term open access or short-term open access is to be computed with reference to the injection point and drawal point.

17.65. The transmission transferable capacity between the said two points available is then blocked for use of open access customers for the period of open access, long term open access or medium-term open access or short-term open access. Such transmission capacity or the distribution capacity in between the two points, namely, identified injection point and identified drawal point may not be necessarily be available in regard to different drawal points. Further, after the grant of open access from the identified injection point to the identified drawal point, the transmission licensee and the distribution licensee are entitled to consider the capacity available at other points, namely, from the injection point to another drawal point for grant of open access to others. Further, the transmission capacity

for the previous drawal point may be stranded and the same could have been considered for grant of open access by another applicant. Such consideration and grant of open access from time to time between different points is dynamic in nature. The contention that there is no change in the transmission system or strengthening for changing the drawal point is therefore erroneous. It is also denied that that there is no detriment or loss to grant of such flexibility being given to open access applicants. Accordingly, there cannot be any issue of allowing any flexibility of changing the drawal point for open access customer.

17.66. She submitted that such flexibility has not been provided in any Regulations even by Central Commission which destroy the entire purpose of open access being point to point and the Petitioners appears to proceed on the basis that it is the same infrastructure irrespective of injection or drawal points and there is no relevance to such points which is not correct. The transmission system for different drawal points is different. Any applicant should apply for open access only for the period for which it knows the injection and drawal points. There is no reason for any person to apply for open access for 25 years when it cannot firm up the point. Such person can apply for open access for shorter period.

17.67. She also submitted that it is the Applicant's choice to opt for short term, medium term and long- term open access based on its requirement. If the Applicant is uncertain of the requirement of open access for a particular drawal point for the period of 12 to 25 years, then it is up to the Applicant not to opt for long term open access. This cannot be reason for allowing shift of drawal or injection points during the term of open access. Accordingly, when an Open Access customer wants to change the drawal point, he has to apply afresh in terms of the applicable Regulation and provisions and relinquish earlier capacity on payment of relinquishment charges.

17.68. With regard to the levy of scheduling charges for each transaction by SLDC is concerned, she submitted that the Commission has determined the scheduling charges after a reasoned consideration and there is no reason for any reduction in scheduling charges which may affect the revenue requirements of SLDC.

17.69. With respect to the formation of Monitoring and Dispute Resolution Committee for Open Access, she submitted that there is no need or purpose of such committee. The provisions of the Intra State Open Access Regulations, 2011 framed by the Commission are very clear and an in-built mechanism provided in the matter relating to open access, scheduling and despatch. In any case, there is any issue on non-implementation of the Regulations or any dispute, the open access customers/applicants are required to approach the Commission. The Commission has jurisdiction to regulate the Intra-State Transmission in the State of Gujarat and the same cannot be delegated in the manner sought by the Petitioners. Further the constitution of committee sought to be suggested is incorrect and unbalanced. The Petitioners are seeking to introduce multiple representatives of the open access customers while reducing the presence of representatives of all the distribution licensees, transmission licensees and SLDC to one which is unreasonable and not proper.

17.70. She also submitted that the suggestion of the Petitioners for mandatory publication of transmission system plan and transmission planning and network expansion is concerned, the aforesaid aspects are dealt in other Regulations and outside the scope of GERC open access Regulations.

17.71. She submitted that the reference made by the Petitioners in respect to system study for Intra State medium-term and long-term open access transactions is concerned, the Open Access Regulations provide for system study for any expansion or upgradation works to be carried out for long term open access. The Open Access Regulations do not permit system strengthening or augmentation works for short term and medium-term open access. There cannot be any system studies or works for medium term open access as the same will not be an optimum utilization of resources and not be economical or efficient to establish networks based on the request for medium term use. This is because the investment in transmission or distribution network is substantial. The licensee would get to service such investment over a period of time. The charges payable by the open access customers is the only avenue to service the capital cost.

17.72. She submitted that the issues raised by Respondent No. 32 Oil and Natural Gas Corporation Limited are outside the scope of the present Petition and cannot be considered.

18. Respondent No. 14, State Load Despatch Centre also filed written submissions dated 28.12.2020 stating therein that framing of Regulations, including any amendment(s) thereto is the legislative functions of the Commission and therefore, it is for the Commission to consider whether a particular Regulation needs to be framed or is required to be amended at any time. Accordingly, the same cannot be made a subject matter of a judicial proceeding for a mandatory direction since there is a procedure to be followed for the framing of the Regulations and the present Petition is only to be treated as a representation by the Petitioners.

18.1. It is submitted that SLDC had earlier filed reply only on certain issues related to SLDC and the present submissions may not be considered in any manner whatsoever as admitting and accepting the case of the Petitioners in regard to other issues.

18.2. With regard to 'Optimum Scheduling of Power Exchange Transactions' in context of Regulation 28, it is submitted that the arguments made by the counsel for the Petitioners are different than the written submissions filed by them which is not correct and appropriate because in the Petition, the Petitioners had sought to allege that bilateral transactions are denied open access whereas the collective transactions are being allowed open access, which was specifically denied by SLDC in its reply already filed earlier. It is submitted that there is no discrimination by SLDC and both transactions are treated equally while processing the open access applications. It is after considering the upstream network issues, wherever there are system constraints, open access is not allowed either for bilateral or collective transactions.

18.3. It is also contended by SLDC that in the present Petition, the Petitioners have sought for specific inclusion in the Regulation for a provision for non-discrimination between bilateral and collective transactions without providing any substance to its claims and in fact during arguments on 07.12.2020, the Petitioners had accepted the

assertion of the SLDC in its reply. But now in the written submissions, the Petitioners are once again making vague allegations. It is further submitted that such inclusion is unwarranted and unnecessary, particularly when the Petitioners are unable to demonstrate any instance of alleged discrimination and entertaining such requests creates an erroneous and wrongful apprehension of discrimination without any basis. Hence, reiterating that there is no discrimination and no such requirement of any clarification and no amendment is necessary in the Regulations.

18.4. Respondent SLDC has submitted that it is not correct that the power exchanges are being allowed open access irrespective of injection point and/or drawl point. It is contended that in case of collective transactions, an injection point (generator) or drawl point (consumer) is to be provided. However, the collective transactions are interstate transactions and the other point is the state periphery and being there are some differences because collective transactions are Inter-State transactions and are governed by the Regulations of the CERC and within the control of the National Load Despatch Centre/Regional Load Despatch Centre. Therefore, while the Respondent SLDC does not discriminate between the two transactions, there may be some differences in procedure for collective and bilateral transactions under the CERC Regulations/ Procedure and hence the request for a specific inclusion of a provision in the State Regulations stating that no discrimination be made, besides being unnecessary, may not be correct. Moreover, it is submitted that the functioning of power exchanges is within the regulatory control of the CERC and therefore, the request of the Petitioners for checks and balances on power exchange may not be within the jurisdiction of this Commission.

18.5. With regard to Regulation 22 regarding 'Payment of Scheduling Charges', it is submitted by Respondent SLDC that during the arguments on 07.12.2020, the Petitioners had stated that they would not be pressing this aspect but in the written submissions filed by the Petitioners the same has been included. It is further contented that in the Petition, the Petitioners had made allegations of double billing etc. without substantiating or demonstrating their claim in any manner and made only vague allegations which are specifically denied by SLDC. The Respondent SLDC considers the scheduling charges strictly as per the Regulations i.e. Rs. 2000/day/transaction only. Moreover, as per the Regulations, the scheduling

charges are charged for one transaction and not separately for injection and drawl points as alleged in the Petition.

18.6. According to Respondent SLDC the contention that there should not be any levy on scheduling charges for each and every transaction or there should be a levy only when agreed schedule is not given is not acceptable since the scheduling charges cannot be considered the same irrespective of the period of open access and therefore the Commission has correctly determined the scheduling charges on per day per transaction basis. Further, it is submitted that the amount specified is reasonable and in fact the said charges should be higher i.e. Rs. 3000/day/transaction according to SLDC which is the case in other States. Hence, there is no requirement to change or clarify the provisions relating to payment of scheduling charges or reason for reduction to Rs. 1000 per day per transaction.

18.7. With regard to consideration of applications for open access that in terms of Regulation 17 of the Open Access Regulations, 2011, the Open Access Applications may be summarily rejected for noncompliance of its provisions including on non-payment of charges but the Petitioners are seeking for processing of open access applications despite the non-compliance with the provisions of the Regulations, which is unacceptable because the Petitioners cannot default on payments and still seek processing of their open access application and continue to avail the open access.

18.8. It is further submitted that it is a standard practice wherein the non-payment of earlier dues disentitles the person from seeking future services and there is nothing unreasonable or arbitrary about the same and in fact it is reasonable and necessary to have such a clause to ensure regular payment of dues of the licensees/SLDCs. It is also contrary to the principle enshrined in Section 56 of the Act, which allows for disconnection of supply for non-payment of dues. Accordingly, Respondent SLDC has denied that there is any misuse or misinterpretation of the provision and there is no requirement of any clarification or provision in the Regulation in regard to the above.

18.9. It is submitted that the Petitioners has in the Petition sought to raise unsubstantiated and speculative allegations, which have been denied and even during the arguments, the Petitioners had referred to following three aspects:

(a) Applications being rejected due to outstanding dues of Petty amounts
(b) Outstanding when there is 'bona fide' disputes on the amounts
(c) Older claims/disputes

18.10. In response to (a) above regarding petty amounts being outstanding, it is submitted that it is not clear why the Petitioners are raising this issue because if the amounts are petty, there is no reason why the Applicant cannot pay the same before applying for open access application and further there cannot any categorisation of amounts as petty or not petty. Respondents SLDC/licensees are regulated entities whose revenue requirements are to be met only by the charges and if there is non-payment even of petty amounts, this would affect their cash flow and the accumulation of petty amounts of number of open access applicants would add up to a huge amount for the SLDC or licensees and it is therefore not correct to burden them with non-payment of dues even if it is for a petty amount.

18.11. With regard to (b) about disputed amounts, it is submitted that that neither SLDC cannot make any judgment on disputes raised by the open access customers/consumers nor SLDC can be given the responsibility of deciding whether there is a bona fide dispute or not. Raising of dispute or even filing of Petitions cannot be a reason for non-payment of dues nor can the Applicant seek advantage of continued open access even when it has failed to comply with the payment obligations and when the amount is due to SLDC, there can be no acceptance of any dispute by SLDC. It is also submitted that any such exception for disputed amount would only mean that the open access customers/applicants would dispute each and every bill to avoid payment of transmission charges and yet continue to avail open access.

18.12. With regard to (c) above in respect of older claims/disputes, it is submitted by Respondent SLDC that there is no clarity regarding categorisation of such claims or disputes as being older and there should not be any exception for the same because

in respect of any outstanding of older claims there is more reason to not grant further open access as the delayed recovery of dues would seriously affect the functioning of SLDC/Licensees. It is further submitted that even the Sharing Regulations 2020 of CERC under Regulation 21 provide that non-payment of charges would result in not only Regulation of power supply but also denial and suspension of open access. Moreover, in case there is any dispute on the charges raised by the licensee/SLDC, then the open access customer has legal recourse to challenge the same before the appropriate forum and seek appropriate orders. However, the open access customer cannot claim that without such order and merely on a statement of the open access customer, the nodal agency should process the open access application despite non-payment of the charges.

18.13. With regard to the request of the Petitioners to separate the SLDC's corporate identity from GETCO through ring fencing for ensuring independence of SLDC, the Respondent SLDC has submitted that it is not within the scope and jurisdiction of this Commission and the request of the Petitioners cannot be entertained because the corporate structure of GETCO, GUVNL and distribution licensees has been under the Gujarat Electricity Reforms notified by the Government of Gujarat. As per first proviso to subsection (2) of Section 31 of the Act which specifically recognises that the State Transmission Utility shall operate the State Load Dispatch Centre until such time the State Government designates any other Government Company or any Authority or Corporation as the State Load Dispatch Centre. The notification of operation of SLDC by a company, is to be by Government of Gujarat and until such time, STU shall operate as SLDC. Therefore, the only authority which can decide on this aspect is Government of Gujarat at its discretion. It is also submitted that there is not even any mandate in the Act or any of the Rules notified by the Central Government in exercise of the powers under Section 177 of the Act to the effect that the functions of the State Load Dispatch Centre should be given to or carried by an entity other than an entity which is discharging the functions of the State Transmission Utility. Also, there is no bar in the Act for the STU and SLDC to be in the same company and in fact, the Act recognises the same. Even, there is also no bar in the Act for the STU and SLDC to be a group company of distribution licensee or trading licensee and in any case, as per Respondent SLDC these issues cannot be

subject matter of any amendment to the Open Access Regulations or any Regulations.

18.14. With regard to the references made by the Petitioners to the Ministry of Power directives to separate the CTU from Power Grid Corporation of India Limited or that POSOCO being separated from CTU/Power Grid, Respondent SLDC has submitted that the Petitioners have failed to notice the important aspect that both such separations were by Government of India and not by CERC. Accordingly, with regard to SLDC and STU, the said decision is the prerogative of the Government of Gujarat and in any case, it is submitted by Respondent SLDC that the Gujarat SLDC is already working independently while being within the corporate entity of GETCO and is self-sustained, filling separate Petition for approval of ARR of the SLDC function.

18.15. It is further submitted that the Petitioners have not substantiated any issues or instances of discrimination but is making vague allegations without any substance based on presumptions while seeking vague amendments which cannot be accepted and there cannot be any consideration of this issue

18.16. With regard to the judgments relied by the Petitioners which relate to grant of trading licence to a person who is in Group Company as STU/SLDC and there is no relation to STU and SLDC being separated. It is submitted that there is no observation in this regard and there is no issue of grant of any licence in the present case. Moreover, the Statutory advice by CERC was made to Government of India in 2009 and it is pertinent that no further steps have been taken by Government. Even there is no Regulation of CERC in this regard and when the issue is not within the prerogative of the Commission, there can be no Regulation in this regard.

18.17. It may also be noted that even in the notification dated 17.06.2020 by Ministry of Power, the CTU is going to be a 100% subsidiary of PGCIL. Further all states are functioning with SLDC and STU in the same company and most of the States also have the STU as a group company of the distribution licensee/holding company. The contentions of the Petitioners are without any basis.

18.18. The SLDC reiterates its reply and submits that there can be no such Monitoring and Dispute Resolution Committee for Open Access as sought by the Petitioners. The

Petitioners had raised vague allegations in the Petition, which were denied by the SLDC, and the Petitioners have failed to substantiate or demonstrate the same.

18.19. The Petitioners had sought for constitution of a Monitoring or Dispute Resolution Committee for Open Access for monitoring open access. The Act provides for specific statutory bodies of SLDC and STU to perform various functions as per the provisions of the Act and the Regulations framed by the Appropriate Commission. In the present case, the provisions of the Intra State Open Access Regulations, 2011 framed by the Commission are clear. There is an in-built mechanism provided in the matter relating to open access, scheduling and despatch. The provisions relating to computation of the transmission capacity available for grant of Open Access are also clear. In case of any issue on non-implementation of the Regulations or any dispute with a licensee or SLDC, the open access customers/applicants are required to approach the Commission. The Commission has jurisdiction to regulate the Intra-State transmission in the State of Gujarat and the same cannot be delegated in the manner sought by the Petitioners.

18.20. The alleged difficulties claimed by the Petitioners are wrong and denied and in particular, the allegations made by the Petitioners against SLDC are denied. The Petitioners have raised vague issues without any basis.

18.21. Further, the constitution of committee sought to be suggested is incorrect and unbalanced. The Petitioners are seeking to introduce multiple representatives of the open access customers while reducing the presence of representatives of all the distribution licences, transmission licensees and SLDC to one, which is arbitrary and unreasonable.

18.22. As regards reliance on the decision of the Commission dated 27.12.2019 in Petition No. 1776 of 2019 by the Petitioners to claim that the CERC Regulations are to be applied, Respondent SLDC submitted that the said contention overlooks and ignores the specific context of the Order dated 27.12.2019 which cannot be applied to the present case because the said Order relates to the implementation of Deviation Settlement Mechanism wherein GERC had already specifically linked the UI charges to the CERC UI charges at the early stages itself and therefore any amendments to

UI by CERC would be applicable. Moreover, it is submitted that the Deviation Settlement Mechanism (DSM) was implemented at Intra-State level effective from 17.02.2014 by this Commission and Respondent SLDC had filed the above Petition in respect of the implementation of the fourth amendment to the Regulations notified by the CERC on 22.11.2018. Further, grant of open access and the issues raised in the present Petition are completely different than ABT and UI/DSM mechanism which was adopted in State of Gujarat to allow for back-to-back application of the CERC mechanism whereby the UI/DSM of Intra-State and Inter-State are connected. All payments under DSM Mechanism at regional level payable by the State are to be shared by the Intra-State entities which the Respondent SLDC cannot bear on its own nor should it be required to do so.

18.23. It is also submitted that the over and under drawl and over and under injection at Intra-State level affects the same on Inter-State level and payments of DSM at Inter-State level are made by Respondent SLDC and are to be collected at Intra-State level and therefore, it is a completely different issue. That apart the issues of open access are not connected in such manner including the POC mechanism of CERC in relation to the open access and transmission charges are different than open access followed in Gujarat and hence, the provisions of CERC cannot be applied.

18.24. It is submitted that the issue of rebate on contract demand charges for person availing open access although relates to Distribution licensee but the Petitioners are now claiming in the written submissions about stand-by power, which was not sought in the Petition or in arguments and therefore, this issue cannot be considered. Moreover, stand by power cannot be taken from the grid without any contract and at whims and fancies of the connected entity because the drawl of power can be allowed only if the power is scheduled under open access or as a consumer of a distribution licensee else there cannot be any other drawl of power from the grid. It is further submitted that drawl of power from the grid without an identified source would cause disruption to the grid which is not permissible and there cannot be any drawl of power without corresponding injection.

18.25. It is submitted by Respondent SLDC that with regard to “system study for intra state medium term and long term open access transactions”, the Petitioners have

referred to the same in their written submissions but there is no aspect of any system study in the Petition and no submissions have been made in this regard. Moreover, according to Respondent SLDC, it is also not clear as to what the Petitioners are seeking with reference to system study and in absence of any clarity, there cannot be any consideration or submissions on the same when the procedure for consideration of capacity for processing open access applications is provided for in the existing Regulations and there are no further amendments required.

19. Learned Advocate Ms. Ranjitha Ramachandran submitted that she has made common submissions on behalf of DISCOMs, GETCO & SLDC. Apart from such submissions, she has made following submissions on behalf of the Respondents State owned Discoms as under:

19.1. With regard to issue of priority to the distribution licensees are concerned, she submitted that the Distribution Licenses have the Universal Service Obligations under Sections 42 and 43 of the Act to provide connectivity and supply electricity to every end user in the area of the Distribution Licensee. There are no such obligations on the part of any other open access users or generators or trading licensees or power exchange.

19.2. She submitted that the Distribution Licensees form a separate class distinct from long term user classification. There is therefore no sub-classification whatsoever. In any event even such sub classification would be valid and justified if the differentiation principles mentioned above is satisfied. The issue is priority of allocation and there is a straight forward priority given to distribution licensees. The distribution licensees are not to be considered with the LTOA/MTOA/STOA. Their nature of functioning is separate and cannot be compared to other open access customers. Therefore, they are classified separately and all other customers are categorised under LTOA/MTOA/STOA. Otherwise, this would mean unequals are being treated equally. There is nothing which states that there cannot be various classifications. There are varied factors to be considered for classification. It is submitted that the distribution licensees cannot fall within the LTOA/MTOA/STOA classification.

19.3. With respect to issue of rebate on contract demand, she on behalf of the Discoms, submitted that there is no rationale or reason for such rebate as sought by the Petitioners. The consumer is maintaining the contract demand with the distribution licensee and also simultaneously taking power from the captive power sources. There is no specific requirement under the Open Access Regulations for such contract demand. There may be other issues in case of non-maintenance of contract demand. Even otherwise, this does not change the fact that the consumer has a contract demand with the distribution licensee which necessary involves obligations on the licensee.

19.4. She submitted that the open access for procurement of power from outside and contract demand with the licensee in the area of supply are different concepts and carry different obligations for the licensee. The charges payable in one cannot be considered for reduction of charges in the other. The demand charges are payable in view of the obligation of the licensee to be ready to supply electricity at any time to the extent of the contract demand. The said obligation does not get varied only because the person has a captive power unit. The person who is maintaining contract demand with distribution licensee and also having a captive generating unit has right to draw power from distribution licensee under contracted demand. The objective and purpose of the demand charges related to the contract demand is different.

19.5. The distribution licensee has an obligation to be in a position to supply contract demand at any time and cannot use the excuse of availing of open access of a consumer to deny supply or even require notice of any reasonable period. Therefore, distribution licensee has to be in a position to supply contract demand which involves making various arrangements, including power procurement arrangements and distribution and transmission facilities. The distribution licensee has to incur various costs which would be incurred irrespective of whether the electricity is actually supplied or not. This is precisely the reason for concept of minimum demand charges which are applicable to consumers irrespective of the actual usage of electricity/energy. This has to be payable by all consumers and the fact that some of the consumers may have open access would not in any manner affect their obligation to pay such charges.

19.6. Any rebate in contract demand charges to open access consumers would have to be borne by other consumers of distribution licensees. The Distribution licensees are regulated entities and are entitled to their Annual Revenue Requirements and therefore one consumer paying less naturally would result in other consumers paying more. The proposal of the Petitioners is therefore unfair and would be discriminatory. Further such rebate would be contrary to Section 62(3) of the Act.

19.7. She submitted that Respondent Reliance Industries has raised completely new issues which are outside the scope of the Petition. Therefore, the same cannot to be considered by the Commission. She further submitted that the request of Respondent No. 32 in regard to RTC cannot be considered.

19.8. She submitted that one of the main aspects of operation of the power system which is also recognised under Section 32 (2) (e) of the Act dealing with the functions of SLDC is that SLDC be responsible for carrying out the real time operation for grid control and dispatch of electricity within the State through secured and economical operation of the State grid. It cannot be that the adverse impact of allowing Open Access results in adverse effect to the consumers at large and the open access customers unduly benefits there from. The customer seeking Open Access cannot benefit at the cost of the general consumers at large, particularly by adversely affecting the operation of the power system which is meant for maintaining the supply to the public at large.

19.9. She submitted that Open Access is to be allowed to the consumers in the State of Gujarat subject to Regulation 16. She referred Regulation 16 of the Open Access Regulations, 2011, which is reproduced as under:

"16. (2) Intra-State Open Access:

(a) In respect of a consumer connected to a distribution system seeking Open access, such consumer shall be required to submit the consent of the distribution licensee concerned. The distribution licensee shall convey its consent to the applicant by e-mail or fax or by any other usually recognised mode of communication, within three (3) working days of receipt of the application.

(b) While processing the application from a generating station seeking consent for open access, the distribution licensee shall verify the following, namely-

(i) Existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the State Grid Code in force,

(ii) Availability of capacity in the distribution network, and.(iii) Availability of RTU and communication facility to transmit real time data to SLDC.

(c) Where existence of necessary infrastructure and availability of capacity in the distribution network has been established, the distribution licensee shall convey its consent to the applicant by e-mail or fax or by any other usually recognised mode of communication, within three (3) working days of receipt of the application.

19.10. She submitted in terms of the above that in the case of consumers applying for Open Access the consent of the distribution licensee is mandatory and the distribution licensee can refuse such consent if the same has an adverse impact on the operation of the power system in the State of Gujarat, namely, if there is an adverse impact on the infrastructure being maintained in the State. This is provided under the Open Access Regulations, 2011 which states that the existence of necessary infrastructure besides the availability of the capacity in the distribution network as a pre-condition for grant of the consent by the distribution licensee. In fact, the grant of Open Access on an application by a consumer is dealt in Regulation 16 (2) (a) in a distinct manner from the grant of Open Access on an application filed by a generating company. While on an application filed by a generating company, the verification of the aspects of infrastructure and availability of capacity in the distribution network as set out in Regulation 16 (2) (b) are specific requirements but in the case of an application for Open Access by a consumer the consent of the distribution licensee is provided without any specific aspects, clearly showing that it is for the distribution licensee to decide on the grant or refusal of consent depending upon the impact on the infrastructure and facilities as a whole and not necessarily confining to the specific aspects mentioned in Regulations 16(2)(b). The term 'infrastructure' provided for in Regulation 16(2)(c) is also of a wider import and is not necessarily confined to the specific aspects mentioned in Regulation 16(2)(b) of the Open Access Regulations, 2011. When the generating company applies for Open Access, the generating company is subject to various Regulations dealing with the operation of the power system and more importantly the generating company injects power generally uniformly during the day.

19.11. The distribution licensee is required to decide on the consent to be granted for the Open Access on an application filed by a consumer connected to the distribution system of the licensee based on the consideration of the impact on the entire power system and different sources from which the distribution licensee is receiving power for maintaining the supply to the consumer at large, besides providing Open Access to the consumers seeking such access. The distribution licensee is required to purchase power from various generating stations both within the State and outside the State. Many of the generating stations are base load stations and the coal based thermal power station form part of the merit order for purchase of electricity by the distribution licensee. These coal based thermal power stations have to be operated throughout the day at a minimum generation level because of the technical requirements and it is not possible for such generating stations to operate below the technical minimum level of generation. These thermal power stations have to be kept on generation bar with injection of electricity from the station at a level of 50% to 55% depending upon the unit size of the generating unit and nature of fuel.

19.12. Even during the high frequency of the grid requiring backing down of the generating station to reduce the injection of the generated units into the power system, backing down of the base load thermal power station, namely, the coal based thermal power station are done recognising the need to maintain the generation at these stations to technical minimum generation. It is not possible to back down such generating station in a manner that it generates electricity of the required PLF during part of the day, particularly, during peak hours and thereafter generate much less than the technical minimum generation.

19.13. She submitted that when the consumers are allowed Open Access for part of the day and not for whole of the day and the supply taken by such consumer from the distribution licensee during non-peak hours is less than the supply taken during the peak hours, there will be serious issues on backing down of the base load generating stations to the extent of the capacity reduced during non-peak hours by the consumer resulting in the issue of dealing with the base load thermal power stations. In the circumstances, the distribution licensee shall not be able to manage the load in a situation where any consumer buys power from outside during lean load hours and at other time taking power from the distribution licensee and

thereby putting pressure on the distribution licensee's load management. It is, therefore submitted that the requirement of maintaining the load profile in the manner mentioned above was on account of the technical consideration and pressure on the infrastructure and not for the purpose of refusing Open Access to the consumers to have any commercial benefit to the distribution licensee.

19.14. The above impact on the infrastructure gets aggravated much more in the context of the following:

(a) the consumer depends upon the distribution licensee to supply its entire peak requirement when the drawl of power from the Discoms by various customers/consumers etc. is already excessive;
(b) the customer does not take power from the distribution licensee during non-peak hours or lean hours when such drawl of power in the system by various consumers and customers are significantly lower.

19.15. The power utilities in the State are already grappling with the load management of the power on account of variation between peak hours and non-peak hours load, significant mix in renewable generation and variation in renewable generation, less availability of Hydro generation for meeting peak demand and the facility of drawl of power for part of the day, particularly, during non-peak hours through Open Access will aggravate the entire load management causing serious prejudice to the power system as a whole.

19.16. She submitted that the endeavour in the power system is always to flatten the load demand/curves to the maximum extent possible for the effective management of the power system in the State. The Open Access consumers purchasing power through Short Term Open Access should not create any imbalance in the system.

19.17. She submitted that in the facts and circumstances mentioned as stated above, the distribution licensee has been fair to the consumers. The Open Access consumers are taking power through Open Access to any extent for a day on a uniform basis or if there is a variation, the power drawl from the distribution licensee, during the time when no power or less power is taken through Open Access (particularly

during peak hours) should not be more than the power drawn from the distribution licensee during other times (particularly during off-peak hours).

19.18. As regards to Smart Meter, she submitted that Distribution Companies are required to follow the provisions of Regulations notified by Central Electricity Authority in this regard. However, the issue of smart meters for consumers is a separate issue and cannot be considered limited to the open access Regulations.

20. We have heard the learned Advocates for the Petitioners and the Respondents as also the representatives of the Respondents at length and considered the Petition, replies, written submissions.

21. We have also considered the submissions made by the parties. We note that the present Petition is filed by the Petitioners seeking the amendments in the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011. The Respondent licensees and some others have objected the amendments sought by the Petitioners on the ground that the present proceedings cannot be substituted against the process of larger public consultation on the draft amendments before making any amendments or modifications in the existing GERC OA Regulations. Some of the consumer Respondents have supported some of the amendments in the Regulations as sought for by the Petitioners in the present Petition.

21.1. It is contended by the Respondents that the Hon'ble APTEL has not held that the Commission is required to amend the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011, but has only held that the Commission is required to expeditiously hear the present Petition and pass the appropriate order. There is no positive mandate to consider the Regulations similar to those notified by the CERC. The power to legislate cannot be subject matter or direction by Hon'ble Tribunal and accordingly, there is no mandate given by the Hon'ble Tribunal to make a law (Regulations) since making any law is possible through power which is of legislative character and therefore, not justifiable under the jurisdiction of Hon'ble APTEL under the Act.

21.2. It is also contended that prior to notifying the Regulations under the Act, it requires due deliberation of all the relevant aspects from the stakeholders by way of due

process of publication of the draft Regulations followed by inviting comments/suggestions/objections etc. and thereafter, considering the same, the Regulations to be notified by the Commission as a statutory Regulation in terms of the provisions of the Act.

21.3. The Regulations cannot be sought to be varied/amended through any alleged disputes or differences between generating company or transmission licensee or distribution licensee. The Open Access Regulations notified by the Commission provide certainty for the dealings between the parties and the same cannot be varied from time to time at the instance of any person.

21.4. Therefore, in view of aforesaid submissions and contentions of the parties regarding the mandate of the Hon'ble APTEL and admissibility with regard to powers of this Commission to decide the issues of amendment / additions raised by the Petitioners in the present proceedings, it is necessary to refer the relevant para of the judgement dated 02.03.2020 in Appeal No. 262 of 2019 of the Hon'ble APTEL. The relevant portion of the said judgment is reproduced below:

*"**8. Our consideration and findings:***

8.1. To decide upon the issue, we need to first refer to the Amendments sought for by the Appellant in its Petition before the Respondent Commission, which are indicated in the submissions of the Appellant at Para 4.4 above. A perusal of the above shows that there are various provisions of the GERC Open Access Regulations,2011 which the Appellant has sought for amendment by the Respondent Commission. However, it is relevant to note, as intimated to this Tribunal by the parties, that out of the above provisions of the Regulations, one of the Regulations, being Regulation 21, is under challenge before the Hon'ble Supreme Court, in Civil Appeal No. 3032 of 2019 by a power producer namely, M/s OPG Power Gujarat Ltd, who is one of the captive generators in the state of Gujarat. The said company has filed the above civil appeal challenging the vires of the above Regulation. The Counsel appearing for both, the Respondent Commission and the Respondent No. 2, have contended that based upon the above Civil Appeal pending before the Hon'ble Supreme Court, the Commission cannot go into the petition filed by the Appellant seeking amendment of various Regulations.

8.2. In fact, we cannot agree to the above view of the Respondents. A petition seeking amendment of a Regulation does not mean that the existing Regulation is erroneous, or there is some error. Even if the aforesaid Civil Appeal is rejected by

the Hon'ble Supreme Court, the Commission can always choose to amend its regulations, by exercising its legislative powers available under Section 181 of the Act, prospectively.

8.3. Therefore, we are of the view that there exists no reason for the Respondent Commission to sine-die adjourn the petition of the Appellant. The Commission has to dispose of the said petition, in accordance with law, instead of lingering the proceedings unwarranted. We have already observed above that the proceedings before the Hon'ble Supreme Court cannot come in the way of exercising of independent legislative functions by the Respondent Commission.

8.4. Further, the Appellant has also brought to our notice that the Central Commission, as well as various State Commissions such as Rajasthan, Punjab, West Bengal, Andhra Pradesh, Bihar, Delhi U.P., Maharashtra etc. have brought in amendments to their Open Access Regulations, in order to align them with the dynamic nature of the Open Access Market.

8.5. It would thus be evident that the Central Commission, as well as the various State Commissions are in fact, carrying out amendments in their respective Open Access Regulations, for the purpose of market development as provided under Section 66 of the Act, as well as for introducing reforms. The Respondent Commission cannot keep a closed eye to the regulatory developments brought out by the CERC, and other State Commissions, for the purpose of creating conducive environment for development of the power market. Further, it may also be pointed out that open access charges are part of overall tariff stream of the Transmission and Distribution Licensees, and accordingly the principles of Section 61 of the Act, including adherence to commercial principles as envisaged under Section 61 (b), have to be complied with, and for the said purpose, Commissions are required to carry out regular amendments.

8.6. As a matter of fact, that Respondent Commission is not bound by the Regulations / amendment brought out by the Central Commission and other State Regulatory Commissions but the principles and methodologies of the Central Commission carry a strong persuasive value in terms of Section 61 of the Electricity Act. In the present Appeal, the Appellant is only contending that the Respondent Commission should consider the principles and methodologies adopted by the Central Commission and bring out requisite amendments in its Open Access Regulations, 2011 applying its own prudence and keeping in mind Section 66 of the Act which requires the Appropriate Commission to endeavour to promote the development of a market (including trading) in power.

8.7. It is relevant to mention that the plea for amendment of Regulations is quite different from the challenge to a Regulation. A Regulation can be amended at any time by invoking the legislation jurisdiction. Accordingly, any decision of the Hon'ble High Court, Hon'ble Supreme court with respect to challenge to an existing

Regulation (Regulation 21) may be taken by observing that there is no arbitrariness or illegality in the said regulations. We have been informed by the counsel of the Appellant that the Gujarat Electricity Regulatory Commission carried out last amendment in its Open Access Regulations way back in the year 2014. Accordingly, we are of the view that the Respondent Commission in view of the above developments, should expeditiously dispose of the petition of the Appellant.

8.8. Further, with respect to the reliance placed by the Respondent No. 1 & 2 on the decisions of the Hon'ble Supreme Court in State of U.P. and Ors. vs. Anil Kumar Sharma and Ors. (2015) 5 SCC 716 and other judgments, mentioned supra, wherein it was held that no court can issue a mandate to a legislature to enact a particular law, we are of the view that the said judgment is not applicable to the present case as it is not for issuing any directions to the Respondent Commission to amend its Regulations, or enact a particular law.

8.9. Section 181 of the Act provides a procedure to be followed by a State Commission for amendment or enactment of Regulations, which also includes prior publication under Section 181 (3). The same enables all stakeholders, which will include the Appellant, and the Respondent No. 2 to make their detailed submissions during public consultation process. It thus emerges that the procedure for amendments would consume considerable time and as such, it necessitates to initiate at its earliest.

8.10 The Appellant and the Respondent No. 2 are well within their rights to raise all their arguments before the Respondent Commission. However, at this stage, we refrain from making any observation on the merits of the Petition filed by Appellant before the Respondent Commission."

"ORDER

For the forgoing reasons, as stated supra, we find merits in Appeal No. 262 of 2019, and accordingly, it is allowed. The impugned order dated 01.02.2019 passed by Gujarat Electricity Regulatory Commission in Petition No. 1672 of 2017 is hereby set aside, in accordance with our findings and directions set out in Para 8.1 to 8.10 above.

We direct the Respondent Commission to expeditiously conduct hearings in Petition No. 1672 of 2017, and pass appropriate orders as expeditiously as possible but not later than three months from the date of passing of this judgment.

….."

21.5. From the aforesaid decision, it is clear that there is no positive mandate given by the Hon'ble APTEL to the Commission to make amendments in the GERC (Terms and

Conditions of Intra-State Open Access) Regulations, 2011 as claimed by the Petitioners. In the aforesaid decision Hon'ble APTEL has recorded that they refrain from making any observation on the merit of the Petition filed before the Commission. Moreover, Tribunal has directed to the Commission to pass appropriate orders expeditiously.

22. With regard to the admissibility of the present Petition, consideration of Regulations passed by CERC & other SERCs, powers of this Commission to amend the Regulations in order to streamline the same with the evolving ground realities qua open access and prior to making necessary amendment(s), it is necessary for the Commission to consider whether necessary amendments are beneficial for the stakeholder duly considering the provisions of law. The Commission has accordingly earlier amended the GERC Open Access Regulations twice i.e. on 4.03.2014 and 12.04.2014 following the procedure laid down in the Act and Rules & Regulations made thereunder.

22.1. We have also considered the submissions of the parties and directions given by the Hon'ble APTEL as recorded supra on the permissibility aspect of amendment(s) in the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 as sought by the Petitioners by way of present Petition.

22.2. We note that the Petitioners have prayed for amendment in the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and in support it has relied on the Regulations notified by the CERC and others SERCs and also made submissions on merits which are rebutted by the Respondents stating that it is not permissible to decide the issues in the present matter. Prior to making any amendments it is essential to carry out the process specified in the Act, and Rules include the process of pre-publication of draft Regulations invite comments/suggestions/objections on it and after considering the same, Regulation be notified by the Commission.

22.3. It is essential to refer the relevant provisions of the Act, Rules and Regulations in this regard. Since, the Petitioners have sought amendment in the Regulations, it is necessary to refer Section 181 of the Act.

Section 181. (Powers of State Commissions to make regulations): ---

(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

As per above provision, the State Commission may notify the Regulations consistent with the provisions of Act and the Rules to carry out the provisions of the Act.

Section 181. (Powers of State Commissions to make regulations): ---
(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.

The aforesaid provision provides that all the Regulations made by the State Commission under the Act shall be subject to the condition of previous publication.

22.4. The aforesaid provisions provide that in respect of the State Commission's framed Regulations, which are consistent with the provisions of the Act and Rules made thereunder, it is also essential to carryout pre-publication for making the Regulations. Hence, we decide that prior to making any addition or amendment or alteration or substitution or modifications in the Regulations, it is necessary to carryout pre-publication as provided under Sub-section (3) of Section 181 of the Act.

22.5. It is also necessary to refer the Rules made by the Central Government under Sub-section (1) and clause (z) of Section 176 of the Act with regard to The Electricity (Procedure for Previous Publication) Rules, 2005, which are effective from 08.06.2005. The relevant provisions of the aforesaid Rules are as under:

"NOTIFICATION G.S.R 387(E)
In exercise of powers conferred by sub-section (1) and clause (z) of subsection (2) of section 176 of the Electricity Act, 2003 (Act 36 of 2003), the Central Government hereby makes the following rules, namely:

1. Short title and commencement

(1) These rules shall be called the Electricity (Procedure for Previous Publication) Rules 2005,

(2) These Rules shall come into force on the date of their publication in the Official Gazette.

(3) Procedure of Previous Publication –
For the purpose of previous publication of regulations under sub-section (3) of section 177, sub-section (3) of section 178 and the sub-section (3) of section 181 of the Act, the following procedure shall apply:

(1) the Authority or the Appropriate Commission shall, before making regulations, publish a draft of the regulations for the information of persons likely to be affected thereby;
(2) the publication shall be made in such manner as the Authority or the Appropriate Commission deems to be sufficient;
(3) there shall be published with the draft regulations, a notice specifying a date on or after which the draft regulations will be taken into consideration;
(4) the Authority or the Appropriate Commission having powers to make regulations shall consider any objection or suggestion which may be received by the Authority or the Appropriate Commission from any person with respect to the draft before the date so specified.
……."

From the aforesaid provisions it is clear that before making any Regulations by the Authority or the Appropriate Commission it requires publishing a draft of Regulations for information of persons likely to be affected, notice specifying the date on which draft Regulations will be considered, the Authority or the Appropriate Commission shall consider the objections/suggestions received by it on such draft and thereafter, make the Regulation by publication in the official gazette.

22.6. From the aforesaid it is clear that pre-publication of the Regulations framed under the Act are mandatory for the Commission prior to notifying the same in Gazette.

22.7. The Commission has also passed the Order No. 1 of 2005, GERC (Procedure for previous publication of Regulations to be made under Section 181 of the Electricity Act, 2003) Order, where the Commission had decided as under:

"…….
2. Procedure for previous publication

The following procedure, which the Commission considers sufficient in terms of rule 3(2) of the Rules, shall be followed for previous publication of regulations:

(a) Information regarding the draft Regulation shall be published in at least two largely circulated local newspapers in Gujarati and widely circulated English

local newspaper in the form of a notice inviting objections / suggestions / comments.

(b) The draft regulations shall be placed in the website of the Commission. A copy shall also be available in the Commission's office library for perusal by interested persons during office hours on working days.

(c) A copy of the draft regulations shall be given to the (i) State Government in the Energy and Petrochemicals Department; (ii) all the members of the State Advisory Committee; and (iii) all licensees.

(d) The notice referred to in (a) above shall specify the time period within which objections, comments and suggestions on the regulations may be submitted to the Commission. The period shall be two weeks, or more, as the Commission considers necessary in appropriate cases.

(e) The Commission shall consider the objections/ suggestions/ comments received from the stakeholders in response to the notice referred to in (a) above or otherwise before finalizing the regulations. In exceptional circumstances, the Commission may hold public hearing in appropriate cases before finalizing the same.

3. Notification of Regulation

(1) The regulations in the final form, as approved by the Commission, shall be notified in the official gazette. The publication in the official gazette of the regulations shall be conclusive proof that the regulations have been duly made.

(2) The notified copy of the regulations shall be placed on the website of the Commission. The Commission shall also place on its Notice Board by way of information that the regulations have been notified. The Commission will also issue Press Note for information of the general public regarding the notified regulations.

The aforesaid Order of the Commission also recognizes pre-publication, inviting comments / suggestions / objections from the stakeholders, considering the same and thereafter, notify the Regulations. The said Order has attained finality since the same is not challenged.

22.8. It is also necessary to refer the decision of Hon'ble Supreme Court of India in case of ***PTC India Ltd. Vs. CERC reported in (2010) 4 SCC 60.*** The relevant portion of the said Judgment is reproduced below:

"……

49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and Regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by Regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or Regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law. [See Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors. reported in (1990) 3 SCC 223].

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subject- matter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. This basic scheme equally applies to subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion herein below.

51. In the case of M/s Narinder Chand Hem Raj and Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors. reported in (1971) 2 SCC 747, this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other Authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if Courts cannot so direct, much less the Tribunal, unless power to annul or modify is expressly given to it.

52. In the case of Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors. reported in (1985) 1 SCC 641, this Court held that subordinate legislation is outside the purview of administrative action, i.e., on the grounds of violation of rules of natural justice or that it has not taken into account relevant circumstances or that it is not reasonable. However, a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular discretionary power by a statute. In the latter case, the impugned exercise of discretion may be considered on all grounds on which administrative action may be questioned such as non-application of mind, taking irrelevant matters into consideration etc. The subordinate legislation is, however, beyond the reach of administrative law. Thus, delegated legislation - otherwise known as secondary, subordinate or administrative legislation - is enacted by the

administrative branch of the government, usually under the powers conferred upon it by the primary legislation. Delegated legislation takes a number of forms and a number of terms - rules, regulations, by-laws etc.; however, instead of the said labels what is of significance is the provisions in the primary legislation which, in the first place, confer the power to enact administrative legislation. Such provisions are also called as "enabling provisions. They demarcate the extent of the administrator's legislative power, the decision-making power and the policy making power. However, any legislation enacted outside the terms of the enabling provision will be vulnerable to judicial review and ultra vires.

53. Applying the abovementioned tests to the scheme of 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as Regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories - mandatory functions and advisory functions. Tariff Regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependant upon making of regulations under Section 178 by the Central Commission. Therefore, functions of Central Commission enumerated in Section 79 are separate and distinct from function of Central Commission under Section 178. The former is administrative/adjudicatory function whereas the latter is legislative.

55. To regulate is an exercise which is different from making of the regulations. However, making of a Regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a Regulation, then the measure under Section 79(1) has to be in conformity with such Regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a Regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a Regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a Regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such Regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a Regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of

tariff under Section 61 has to be in consonance with the Regulation under Section 178.

57. One must keep in mind the dichotomy between the power to make a Regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a Regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a Regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178.

58. One must understand the reason why a Regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a Regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a Regulation under Section 178 became necessary because a Regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A Regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).

……..

92. Summary of Our Findings:
(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A Regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

(iii) A Regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a Regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a Regulation made under Section 178.
……"

In the aforesaid decision, Hon'ble Supreme Court decided that Rules and Regulations emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law. The decision making under Section 79 (1) is not dependent on making of Regulations under Section 178 by the CERC. The functions enumerated in Section 79 are separate and distinct from the functions of CERC under Section 178. The functions enumerated in Section 79 are administrative/adjudicatory functions, whereas functions under Section 178 are legislative in nature. It is also held that 'to regulate' is a different exercise than making of Regulations. It is also held that making of Regulation under Section 178 is not a pre-condition to pass an Order.

22.9. It is also necessary to refer the following decisions of the Hon'ble Tribunal and Hon'ble Supreme Court which are referred by the Respondents with regard to framing of Regulations having legislative characters and the same is not under the Appellate jurisdiction.

(1). Supreme Court Employees Welfare Association Vs. Union of India reported in (1989) 4 SCC 187.

".....51. There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a

legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority……"

In the aforesaid Judgment Hon'ble Supreme Court held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercising legislative power by way of sub-ordinate legislature, such authority cannot be asked or directed to enact a law which it has been empowered to do under the delegated legislative authority.

(2). Narinder Chand Hem Raj Vs. Governor, Administrator Union Territory H.P reported in (1971) 2 SCC 747.

"…7. What the appellant really wants is mandate from the court to the competent authority to delete the concerned entry from Schedule A and include the same, in Schedule B. We shall not go into the question whether "he Government of Himachal Pradesh on its own authority was competent to make the alteration in question or not. We shall assume for our present purpose that it had such a power. The power to impose a tax is undoubtedly a legislative power. That power can be exercised by the legislature directly or subject to certain conditions, the legislature may delegate that power to some other authority. But the exercise of that power, whether by the legislature or by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a legislature to enact a particular law. Similarly, no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact…."

In the aforesaid decision the Hon'ble Supreme Court held that what the appellant wants is mandate from the court to competent authority to delete the entry from the Schedule A and to include the same in Schedule B by exercising the legislative power provided to the authority. The court held that no court can issue mandate to legislature or sub-ordinate legislative body to enact a law, which it may be competent to enact.

(3). Judgement/Order dated 06.05.2011 of Hon'ble APTEL in case of MP Power Generation Company Limited Vs. MPERC in Appeal No. 170 of 2010.

"….38. We could not be in agreement with Mr. Ramachandran that it is not a case of direction to the Commission to bring about an amendment of the notified regulations but it is simply a case asking the Commission by the Tribunal to relax the norms. It has to be made clear that it is not a case where we have been asked to adjudicate upon a tariff determination order in respect of the generating stations of the appellant for any particular financial year. So far no tariff order has yet been passed by the Commission. The tariff application is pending before the Commission for hearing and disposal, it being application no. 54 of 2009. During the pendency of the

tariff determination application the appellant filed petition no. 08 of 2010 praying for amendment of the notified Regulations on the ground that the norms set out in the Regulations were on the part of the appellant being impossible to reach and that petition has been disposed of by the Commission through a rejection order on the grounds which we have set out above. Therefore, before us there is no concrete case for adjudication in respect of tariff for the appellant; the Commission has notified its Regulations dealing with how to determine tariff and a set of parameters has been laid down in respect of the generating stations of the appellant and we are asked by the appellant to examine whether the norms fixed by the Commission in the tariff Regulations by virtue of the legislative power of the Commission were pragmatic or otherwise so that the Commission could be asked to modify the regulations in order that the norms may be relaxed to the advantage of the appellant. We ask ourselves: what is meant when we say that the Commission should be asked only to modify the norms? The relaxation of norms or modification thereof to the advantage of the appellant irrespective of the question whether such relaxation or modification would or would not be justified is possible only when the notified Regulation is again notified by bringing about an amendment thereof. Unquestionably, the Commission has power to amend, modify, rescind or repeal Regulation in the same manner as the Central legislature or State legislature derives its authority from the Constitution to enact a law, to modify or amend, or rescind or repeal; and any of these functions falls within the legislative jurisdiction of the Commission. Therefore, what we are really asked to do is to direct the Commission to bring out the amendment of the Regulation. When we ask the Commission to amend its regulations it virtually implies that the regulations framed by it is deficient, short of achieving its purpose and defeats the objectives of the Act, the national tariff policy and the national electricity policy. We do not apprehend that when we say so nobody will say that we are not exercising the power of judicial review the very existence of which with the Tribunal has been negated by the decision of the Hon'ble Supreme Court in the PTC case which we have already noted and which really is not there in the Act or the Constitution. We cannot conceive of the source of the power of judicial review in the statute since the power is a constitutional power that enables a judicial authority to examine the validity of a legislation or a delegated legislation.

……

77. We have so far covered all the issues in a comprehensive manner and summarize our reasons as below:

- *(a) The appeal is not maintainable in its present form.*
- *(b) To direct the Commission to effect an amendment of the Regulation would entail encroaching upon the power of Judicial Review which we do not have.*
- *(c) The impugned order of the Commission dated 26th May, 2010 cannot be the subject-matter of challenge in an appeal under Section 111 of the Electricity Act.*
- *(d) Regulation 57 dealing with power to remove difficulties is inappropriate and cannot be taken as resort to for downgrading the benchmarks.*
- *(e) Regulation 56 as it is there in the Regulation does not entitle the Commission to come down from the norms and it is only when Regulation*

58 is exercised to amend Regulation 56 that the Commission may in its wisdom lower down the norms and benchmarks.

(f) Regulations 59.2 and 59.3 of Regulation 59 are exercisable in adjudicatory process, not in legislative jurisdiction.

(g) The Commission's impugned order does not suffer from lack of reason and objectivity of facts……."

In the aforesaid judgment Hon'ble APTEL decided that the prayer of the Appellant to direct the Commission to effect an amendment of the Regulations would cause encroaching the power of the judicial review which the Hon'ble APTEL is not having.

22.10. Considering the above, we decide that prior to making any amendment in the existing GERC (Terms and Conditions of Intra-state Open Access) Regulations, 2011 as sought by the Petitioners and others, it is essential to follow the aforesaid legal procedure by the Commission, which includes (i) Commission to form prima facie opinion for any new amendment in the existing Regulations either Suo-motu or based on the consideration of any representation or information received from stakeholders, if the Commission is of the view that it is necessary to make amendments or modifications in the existing Regulations. Further, in that case the Commission requires to follow the procedure of preparation of draft Regulations/Discussion paper as considered appropriate, (ii) publish draft Regulations/Discussion paper with statement in its support inviting comments and suggestions on it from the interested persons, (iii) holding public hearing, (iv) considering the objections, comments, suggestions etc. on merits and to take an informed decision based on the same for any Regulations amendments, (v) finalization of Regulation and its notification.

23. Now, based on the submissions made by the parties in their pleading and during the proceedings, all issues which emerge for the decision of the Commission are reframed for convenience as under:

(1) Whether distinction qua the priority towards the distribution licensee for open access provided in Regulation 19 of the GERC Open Access Regulations is illegal and against the provisions of Act?

(2) Whether the provisions of Regulation 21 of the GERC Open Access Regulations needs to be amended for dealing with setting-off of LTOA

charges against MTOA and/or STOA charges in terms of the CERC Sharing Regulations 2010?

(3) Whether the provisions of Regulation 42 of the GERC Open Access Regulations requires amendment for relinquishment charges of long-term open access and/or to allow replacement of open access user for already granted LTOA?

(4) Whether duration provided for LTOA period in Regulation 3(1)(l) of the GERC Open Access Regulations requires to be revisited and amended?

(5) Whether Regulation 13 and 14 of the GERC Open Access Regulations requires amendment for allowing LTOA and MTOA customers to change their drawl point without cancellation of open access?

(6) Whether Regulation 28 pertaining to 'Scheduling' of the GERC Open Access Regulations requires amendment in respect of transactions from power exchange?

(7) Whether scheduling and system operation charges provided in the Regulation 22 of GERC Open Access Regulations deserves any amendment?

(8) Whether the provision of Rebate on demand charges to the captive consumers taking Open Access needs to be introduced in the GERC Open Access Regulations and issue pertaining to Standby (Start-up) power?

(9) Whether independence and ring fencing of SLDC by way of amendment/modification in the GERC Open Access Regulations is required?

(10) Whether new provision in respect of 'Monitoring and Dispute Resolution Committee for Open Access' needs to be introduced in the GERC Open Access Regulations?

(11) Whether new provision in respect of Transmission Planning and Network extension plan and its publication needs to be introduced in the GERC Open Access Regulations?

(12) Whether Regulation 17 of the GERC Open Access Regulations regarding 'Consideration of application from defaulters' needs to be amended or not?

(13) Whether any amendment in respect of transmission charges for dedicated transmission lines is required or not?

(14) Whether Regulation 37 of GERC Open Access Regulations regarding the Payment Security Mechanism requires any amendment?

Our findings on the above issues are as under:

ISSUE NO. – (1)

24. Now, we deal with issue No. (1) regarding distinction qua the priority towards the distribution licensee for open access provided in Regulation 19. Both the Petitioners and the Respondents have made submissions on this issue at length.

24.1. The Petitioners have made the following submissions on the above issue:

(i) In Regulation 19 of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 distinction qua priority given to distribution licensee for availing open access is not logical and no reasoning is provided as to why the distribution licensee is given top priority for Open Access especially when Open Access requires for non-discriminatory.

(ii) Sub-section (47) of Section 2, Sub-section (2) clause (d) of Section 39, clause (c) of Section 40 and Sub-section (3) of Section 42 of the Act provides that open access shall be non-discriminatory. Thus, there cannot be any discrimination between any class of stakeholders availing open access and no priority for any particular open access customer including distribution licensee.

(iii) Regulations provides for long-term, medium-term and short-term open access and once such classification is made out, then there cannot be any discrimination inter-se within such category. Therefore, distribution licensee cannot be given priority over other open access customers.

(iv) The Electricity Act provides for open access without any priority or first right to be provided to any particular class of customer, such as distribution licensee.

(v) The principle of non-discrimination is similar to principle of equality provided under Article 14 of the Constitution of India. There cannot be sub-classification within a classification. In support thereof, the Petitioners relied upon decision of the Hon'ble Supreme Court of India in case of Maharashtra Forest Guards and Foresters Union vs. State of Maharashtra reported in (2018) 1 SCC 149.

(vi) The contention of the Respondent licensees that priority be given to them since they have Universal Service Obligation towards supply of power to the consumers and that there can be reasonable classification for the purpose of giving priority of one over the other in terms of Article 14 of the Constitution

of India is completely frivolous and the Judgments of Hon'ble Supreme Court relied upon by them are not valid and legal on following reasons:

a) There are three categories as classification of open access, i.e. LTOA, MTOA and STOA.
b) As per classification LTOA customers are given priority over MTOA and STOA. MTOA customers are given priority over STOA. There cannot be a priority within LTOA, MTOA and STOA.
c) The Judgment relied upon by the licensees are not applicable as they do not relate to the proportion of class within a class.
d) Article 14 of Constitution of India provides equality before law to an individual/ entity there can be reasonable classification between the parties. Reasonable classification has already been provided by creating LTOA, MTOA and STOA categories. Once a reasonable classification made out there cannot be sub-classification within the above category.
e) Once classification made out sub-classification based on Universal Service Obligation to supply electricity to the customers in the State by distribution licensee as sub-classification under open access is not permissible.

24.2. The Respondents distribution licensees have made following submissions with regard to priority to Open Access:

(a). The priority provided in GERC Open Access Regulations, 2011 with consideration of importance of maintaining supply of electricity to the consumers of the distribution licensee area in compliance to discharge of duty of its Universal Service Obligations as provided under Section 42 and 43 of the Act. This is the reason that the status of distribution licensee under the Act have priority over other users of the Intra-State Transmission and distribution system in the State whether under LTOA, MTOA or STOA.
(b). The general consumers of the State are contributing for creation of Intra-State power system network in the State by way of paying capital cost investment of distribution and transmission network and its upgradation from time to time by way of paying retail supply tariff to the licensee. The

priority on transmission and distribution system is for serving such consumers.

(c). The capacity surplus if any available after meeting the aforesaid requirement made enable to allow open access applicant i.e. Long term or medium term or short term customers. It provides balancing of priority amongst the various open access users.

(d). Intra-State power system is an integrated system and developed from the substantial fund obtained from the retail supply tariff collected from the consumers at large of the distribution licensees.

(e). The entire system had been built in the initial stage for serving consumers for the distribution licensee. The introduction of open access to others has been introduced/created pursuant to enactment of the Act.

(f). Right for open access available to the other applicant only for the surplus capacity if any, available with the transmission and distribution licensee after meeting the requirements of the distribution licensee to serve its consumers.

(g). The open access transactions carried out by the Petitioners' Association and their members are pursuant by bilateral contract on agreed mutual terms permissible under Section 49 of the Act. It is not mandatory duty of the Petitioners or its members to supply the electricity to the others.

(h). The distribution licensee underwrites the payment of transmission charges and losses of the Intra-State transmission and distribution network and also duty bound to establish and upgrade and maintain the distribution system in perpetuity. The Petitioners and its members are not having such duties. They have limited period liability to pay the charges depending upon the types of open access granted to them. Once the open access is granted either surrendered or terminated by paying relinquishment charges the LTOA, MTOA and STOA have no liability for such payment.

(i). The Universal Service Obligation of the distribution licensee necessitates supplying power to the consumers from any possible source, i.e. multiple sources situated at different places in the State and/or outside, to serve the supply to the consumers. It cannot claim that power supply from one designated source is not available because catering the demand requires it

procure from multiple sources. Moreover, such supply is also based on merit order dispatch requirement notified by the Commission. The distribution licensee therefore, require to access the entire Intra-State system to service a specific consumer in contrast to above. The other open access consumers take open access on point-to-point basis from one identified source to the identified end user(s) premises.

The distribution licensee may require to use the transmission system and distribution system in the State on Long-term, Medium term and Short term basis from time to time depending on the load in the system, power flow, pathways, generating stations operating in the State, procurement of power from outside the State as the case may be. Ignoring of such right may affect the discharge of its functions as envisaged in the Act on the distribution licensee under the Universal Service Obligations. The interpretations of the provisions of Act given by the Petitioners in the favour of open access consumers is contrary to the object of the Electricity Act and the same is not permissible.

In case of other open access customers, there is identified source and identified end use point. Therefore, it is point to point use of network, while in the case of distribution licensee it is not point to point use of network because there is use of multiple point of all available sources to reach the consumer premises. Moreover, in case of distribution licensee, change in path utilization arises from time to time for supply of electricity to the consumers depending on level of generation qua demand/load growth and the same requires to be accomplished by the distribution licensee since it dynamic in nature for all time, while in the case of other open access customers the same is static in nature.

24.3. The differences of status between functions of the distribution licensee in comparison to other open access users are as under:

(i) The distribution licensee is held liable to service on comprehensive basis entire revenue requirement, of the transmission licensee (about 95% of total revenue requirement) subject only to reducing the amount that may be

covered from other open access users i.e. LTOA, MTOA and STOA or may defer the same.

(ii) Surrendering or relinquishment of transmission capacity available to other open access users, however, the same is not available to the distribution licensee. The obligation of the distribution licensee is in continuing nature to pay the entire revenue requirement of the transmission licensee.

(iii) The entire Intra-State transmission system has been developed over the years on the basis that the distribution licensee and the consumers serviced by them as a whole have facilitated the establishment operation, maintenance and upgradation of Intra-State transmission system.

24.4. The contention of the Petitioners that the provisions of Sub-section (47) of Section 2 as absolute non-discriminatory provision of treating everyone as equal is not correct as the said Section provides that it requires to consider in accordance with the Regulations specified by the Appropriate Commission. Hence, the reasonable classification is permissible as per the aforesaid Section by way of Regulations notified by the Appropriate Commission.

24.5. Sections 2(47), 39, 40 and 42 of the Act need to be harmoniously construed with the provisions dealing with function and obligation of the distribution licensee including Section 42 and 43 of the Act.

24.6. Priority provided under Regulation is valid classification. Hence, there is valid discrimination in favour of the distribution licensee. Such classification has been based on intelligible differentia in support of aforesaid submissions, the Respondents relied upon the following Judgments:

a) State of West Bengal Vs. Anwar Ali Sarkar AIR 1952 SC 75;
b) Kallakkurichi Taluk Retired Officials Association, Tamil Nadu and Others V. State of Tamil Nadu (2013) 2 SCC 772;
c) Murthy Match Works V. CCE, (1974) 4 SCC 428;
d) Budhan Choudhry V. State of Bihar, (1955) 1 SCR 1045;
e) Mohan Kumar Singhania V. Union of India, 1992 Supp (1) 594.

24.7. There is no discrimination and rather valid discrimination to have reasonable classification whereas treating unequal as equal is discrimination. In support of the

aforesaid submission, the Respondents relied on the decision of the Hon'ble Supreme Court in the case of ***UP Power Corp. Ltd. V. Ayodhya Prasad Mishra (2008) 10 SCC 139 and Venkateshwara Theater V. State of A.P. reported in (1993) 3 SCC 687.***

24.8. The status of distribution licensee is distinguishable from the other open access users; it is not a class within a class as claimed by the Petitioners. The vires of sub classification can be considered only if after classifying the broader category, there is a sub-classification without any intelligible differentiation with nexus to the purpose sought to be achieved. Only a homogeneous group cannot be subjected to sub-classification and sub-classification would be valid when there is no reasonable basis to differentiate between two entities/people that are in the same category or situation or position. In support of aforesaid submissions, the Respondents relied on the following Judgements:

1) *Indra Sawhney V. Union of India reported in (1992) Supp. (3) SCC 217.*
2) *Jayesh A. Joshipura V. State of Gujarat and others judgement dated 09.10.1982 in SCA No. 3032 of 1982.*

24.9. The reliance on Sub-section 3 of Section 62 by the Petitioners that it does not differentiate between the consumers of the distribution licensee and consumers through open access is not legal and valid. Even, otherwise Section 62 (3) only recognizes that undue preference may not be given amongst consumers and it further recognizes differentiation on various grounds including the nature and purpose for which supply is required. The Hon'ble Supreme Court in its decision in case of ***Industrial Users vs. State of A.P. reported in (2002) 3 SCC 711*** set out the principles on which the classification can be done in the electricity matters.

24.10. The classification can be based on various provisions of the Act, scheme and objective of the Act including the salient features and functioning of the distribution licensees vis-à-vis other open access users.

25. We have considered the submissions made by the parties pertaining to various provisions of the Act.

25.1. Therefore, it is necessary to refer the same specifically Sections 2, 39 (2) (d), 40 (c), 42, 43, 49 and 52 of the Act, which are reproduced and interpreted hereunder:

"Section 2. (Definitions): --- In this Act, unless the context otherwise requires,

(3) "area of supply" means the area within which a distribution licensee is authorised by his licence to supply electricity;

The aforesaid definition states about the area of supply is linked with area of the distribution licensee.

(4) "Appropriate Commission" means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be;

The Appropriate Commission is defined as Central Regulatory Commission referred under Sub-section (1) of Section 76 and State Regulatory Commission in Section 82 or Joint Commission referred under Section 83 of the Act.

(8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;

The aforesaid definition provides that any person including co-operative society of association of person is eligible to set up power plant for own use or members of the co-operative society of association of person.

(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

The consumer is a person who is supplied the electricity by the licensee or Government or by any person engaged in the business of supply of electricity.

(16) "dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9

or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;

The dedicated lines are an electric supply lines or point to point transmission which are required for the purpose of connecting electric lines or electric plant or a CGP refereed under Section 9 or generating station referred under Section 10 to transmission line or sub-station or generation station or load. Thus, dedicated transmission lines is a lines connected between generating station or captive generating plant to transmission line or sub-station or generating station or load.

(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;

The distribution licensee is a licensee authorise to operate and maintain distribution system or supply of electricity to the consumers in its area of supply. As per the aforesaid definition the duty cast upon the licensee to operate and maintain distribution system for supply of electricity in its area of supply.

(19) "distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;

The distribution system includes the wires and associated facilities between the delivery point of the transmission line or generating company and point of connection to the installation of the consumers.

(28) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;

The generating company is a company which own and operate or maintain a generating station.

(39) "licensee" means a person who has been granted a licence under section 14;

Licensee means the license granted to any person under Section 14 of the Act.

(47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in

generation in accordance with the regulations specified by the Appropriate Commission;

The open access is non-discriminatory use of transmission line or distribution system or associated facilities with such line or system of the licensee or consumer or a person engaged in generation provided in accordance with Regulations notified by the Appropriate Commission, i.e. either Central Commission or State Commission.

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

The supply means sale of electricity to a consumer or licensee. It includes the captive generating plant or generating company or distribution licensee or trading licensee to any consumers.

(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;

As per aforesaid definition, when electricity is purchased for resale, it qualifies as trade.

(73) "transmission licensee" means a licensee authorised to establish or operate transmission lines;

Transmission licensee means a licensee who is authorise to establish or operate transmission lines.

"Section 39. (State Transmission Utility and functions)
……
(2) The functions of the State Transmission Utility shall be -
…….
(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the State Commission:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission: Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.
……."

The aforesaid provisions provide that the State Transmission Utility to provide non-discriminatory open access to its transmission system for use by any licensee, generating company, on payment of transmission charge. While in the case of any consumer the open access is provided by the Commission under Section 42 (2) of the Act on payment of transmission charges and sur-charge thereon specified by the Commission.

"Section 40. (Duties of transmission licensees):

(c) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy: Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the Appropriate Commission:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use….."

The aforesaid provisions provide that the transmission licensee to provide non-discriminatory open access to its transmission system for use by any licensee, generating company, on payment of transmission charge. While in the case of any consumer the open access is provided by the Commission under Section 42 (2) of

the Act on payment of transmission charges and surcharge thereon specified by the Commission.

"…….
Section 9. (Captive generation): (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

[Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.]

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.
……"

The aforesaid provisions provide that a person may construct, operate captive generating plant and dedicated transmission line. Whenever, the captive generating plant desire to supply the electricity from the Grid the same is regulated in the manner in which the supply from generating company be made. Further, the captive generating plant supply the electricity generated from it to any licensee or consumer in accordance with the Regulations notified by the Commission. Whenever, the captive generating plant supply the electricity to the consumer the same is regulated activity and it is governed by the Regulations framed under Sub-section (2) of the Section 42 of the Act. The Captive Generating Plant have the right of open access for carrying electricity from its captive generating plant to the place of use.

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

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.

(3) Every generating company shall –
(a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority;
(b) co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.
……"

The aforesaid provisions provide the duties of the generating company which includes establishing, operating and maintaining generating stations, tie-line, sub-stations and dedicated transmission lines connected therewith in accordance with the Regulations made under the Act. The generating company may supply the electricity to any licensee or any consumers subject to the Regulations made under sub-clause (2) of Clause 42.

"……
Section 42. (Duties of distribution licensee and open access): ---

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that [***] in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced [***] in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.
……."

The aforesaid Section cast duty on the distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in its supply area and supply electricity in accordance with the provisions of the Act. It also provides that the Commission specify the introduction of open access in phased manner and determine the charges for wheeling, cross-subsidy and surcharge etc. The cross subsidy shall not be leviable on captive generating plant for carrying the electricity to its destination for its own use. Sub-section (3) of Section 42 provides that when any person whose premises is situated within area of supply in distribution license requires supply of electricity from generating company or any licensee other than distribution licensee, the wheeling of electricity be carried out in accordance with the Regulations framed by the State Commission and it is the duty of the distribution licensee to such supply shall be a common carrier for non-discriminatory open access. Thus, the network of the distribution licensee be qualifying as carrier for non-discriminatory open access.

"……..
Section 43. (Duty to supply on request):

(1) [Save as otherwise provided in this Act, every distribution] licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to

such premises, within one month after receipt of the application requiring such supply:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

[Explanation:- For the purposes of this sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.]

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

……"

The aforesaid provisions provide that it is the duty of the distribution licensee to provide supply of electricity to the premises to the applicant/person within one month after receipt of application requiring for supply of electricity. The exception is provided in the above that in case of any extension of distribution mains or sub-station etc. required the said period may be extended. Moreover, in case of village or hamlet or area wherein no provision for supply exists, the Appropriate Commission may extend the aforesaid period. Sub Section (2) of Section 43 cast duty on the distribution licensee to provide required electric plant or lines for giving electric supply to the premises specified in its area of supply. Sub-section (3) of Section 43 provides that in case of failure to supply the electricity within period specified in sub-Section (1) of Section 43 the distribution licensee liable to pay a penalty which may be extended to Rs. 1000 for each day of default. Thus, the

aforesaid provisions mandated to the distribution licensee to provide the supply of electricity to the premises of the person in its area of supply.

"Section 49. (Agreement with respect to supply or purchase of electricity):

Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."

The aforesaid Section provides that Appropriate Commission when allows open access to consumers under Section 42, such consumers may enter into agreement with any person for supply or purchase of electricity on agreed terms between them.

Section 52. (Provisions with respect to electricity traders): ---

(1) Without prejudice to the provisions contained in clause (c) of section 12, the Appropriate Commission may, specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader.
(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

The aforesaid provision provides that the electricity traders shall discharge the duties with regards to supply and trading of electricity as may be specified by the Appropriate Commission. The Appropriate Commission may specify the technical requirement, capital adequacy requirement, and credit worthiness for the electricity traders.

25.2. The aforesaid provisions of the Act recognise various entities and their functions/ duties. The different entities created under the Statue i.e. the Act are as under:

a) Consumer
b) Captive Generating Plant
c) Generating Company
d) Distribution Licensee
e) Trading Licensee
f) Transmission Licensee

25.3. From the scheme of the Act as referred above, the consumer is a person who is being supplied electricity and such supply may be made by the distribution licensee in

whose area such consumer is situated or by a generating company or by captive generating plant or Government or trading licensee.

25.4. The generation of electricity may be either from a captive generating plant or from plant of generating company, which fall under Part III of the Act, i.e. Generation of Electricity. Further, as per Section 7 of the Act, the generating company is not required any licence under the Act and may establish, operate and maintain a generating station provided it complies with the technical standards relating to connectivity with the Grid referred in clause (b) of Section 73. Further, generation of electricity is subject to directions under Section 11 of the Act. The generating company or captive generating plant which is set up by the person for utilisation of electricity for self-use and permitted to sale surplus energy, if any, available after compliance of Rules for captive generating plant notified by the Ministry of Power is eligible to sale such surplus energy to the consumers situated in the area of distribution licensee by utilisation of distribution system consisting of distribution network or transmission network, as case may be. The supply of electricity by captive generating plant (CGP) or plant of generating company does not require license as per the provision of the Act. Further, the CGP or generating company is eligible to construct the dedicated transmission line which is point to point connection for the purpose of connecting electric lines or plants of CGP or generating company to any transmission line or sub-station or load centre as case may be. They are also entitled to operate and maintain such dedicated line. The supply of electricity by the CGP or generating company if made through grid the same may be governed as per the provisions of the Act, Rules and Regulations framed under Sub-Section (2) of Section 42. In the present case such Regulations made under GERC (Terms and Conditions of Intra-State open access) Regulations, 2011. Moreover, when the captive generating plant utilises open access for self-utilisation of electricity generated, it is also governed by the Regulations notified by the Commission and in that case the captive generating plant are not required to pay any cross subsidy or surcharge thereon to the distribution licensee as specified by the Commission. In case of supply of electricity from captive generating plant or generating company to the consumers through grid the same is governed by the provisions of Sub-section (2) of Section 42, which provides for open access and in

such case if the utilisation of STU network or Transmission license network is involved, the open access customers are liable to pay the cross subsidy surcharge and surcharge as specified by the Commission under Section (2) of Section 42.

25.5. Part IV of the Act provides regarding 'Licensing' and as per Section 12 of the Act, transmission of electricity or distribution of electricity or trading in electricity qualify as licenced activity and for which it is required to obtain licence from the Appropriate Commission by making application under Section 15 of the Act to the Appropriate Commission. The Appropriate Commission may grant licence for the aforesaid activity after following the procedure under Section 15 of the Act and under Section 14 of the Act. The licensees are governed by the provisions made under Section 12 to Section 24 of the Act.

25.6. Section 39 of the Act provides that the State Government may specify by way of notification that any Board or Govt. company such as STU shall not be eligible to undertake the business of electricity trading. The STU shall be required to carry out the functions of planning and coordination relating to Intra-State transmission system to ensure development of efficient, co-ordinated and economical system of Intra-State transmission lines for smooth flow of electricity and provide non-discriminatory open access to the transmission system on payment of transmission charge and surcharge thereon as may be specified by the State Commission. Similarly, as per Section 40, the transmission licensee has duty to build, maintain and operate an efficient, co-ordinated, and economical Intra-State and Inter-State transmission systems and also provide non-discriminatory open access to the transmission system on payment of transmission charges and surcharges thereon as specified by the Appropriate Commission.

25.7. Part V of the Act consists of Section 25 to Section 41 pertaining to transmission of electricity comprising of Inter-State transmission, Intra-State transmission and constitution of SLDC, RLDC and NLDC and their duties and functions. It also consists of various provisions, Intra-State transmission carried out by the transmission utility (CTU) and STU, as well as transmission licensee. The functions and duties of these entities are also specified in the aforesaid provisions of the Act.

25.8. Part VI of the Act provides regarding distribution of electricity which consist of provisions for distribution licensee, trading licensee, supply or purchase of electricity carried out by the entities with utilisation of open access carried out by certain consumers under Section 42 of the Act and agreement carried out for such supply or purchase of electricity the consumers etc. This part consists of Section 42 to 60 of the Act.

25.9. The distribution licensee is cast with the duty to develop and maintain an efficient, co-ordinated an economical distribution system in its area of supply and to supply the electricity. It also provides that whenever any person whose premises is situated in the area of distribution licensee and seeks supply from any person other than the distribution licensee, he is eligible to obtain such supply from other person(s) which may be Captive Generating Plant or generating company or trading licensee or other distribution licensee or Government as the case may be. While obtaining open access from distribution system in such case, the open access on the distribution system is governed as per the Regulations notified by the State Commission. The open access to be introduced by the State Commission in phased manner. The Distribution Licensee shall be required to provide Non-discriminatory open access on its distribution network wherein the distribution network is to be utilised as common carrier for Non-discriminatory open access. Further, when the open access is granted to the consumer, the same may be allowed with consideration of Cross Subsidy Surcharge and Surcharge etc., which may be specified by the State Commission.

25.10. Section 43 of the Act mandates to the Distribution Licensee to provide supply of electricity to the owner or occupier of any premises within period of one month after receipt of an application for supply from such person. In exceptional cases as per the proviso of the said Section, the aforesaid time limit may be extended in special cases as specified by the Commission. It also provides that in case of failure to provide supply of electricity within stipulated time specified under Section 43(1), the distribution licensee shall be penalised with a fine which may extend to Rs. 1000 for each day of default as provided in Section 43(3).

25.11. Moreover, Section 49 of the Act provides that when a supply of electricity is made to the consumers situated in the distribution licensee area through open access notified by the Commission and in that case the CGP or generating company or trading licensee may enter into agreement with consumers for the purpose of supply or purchase of electricity as per terms and conditions mutually agreed between the parties.

25.12. Section 52 of the Act provides with regard to electricity trading and electricity traders. We also note that trading is an activity recognised in the Act as a licensed activity, where any person purchases the electricity for resale thereof. Thus, the trading licensee is also entitled to purchase the electricity and resale the same to the other licensee(s) or consumer(s) by utilisation of transmission network of Transmission licensee/STU or the distribution licensee by obtaining the open access on it.

25.13. Considering the above provisions of the Act, it transpires that the Statue has classified different entities in the Act with different functions duties, responsibilities, rights and obligations on them. The classification broadly made out in the Act with consideration rights and obligations are as under:

1) Generating company
2) Captive Generating Plant
3) Consumers
4) Licensee
5) NLDC, RLDC, SLDC

25.14. The generating companies are the entities who eligible to generate the electricity by establishment of generating plant and dedicated lines if any, the same may be operated and maintained by them. The electricity generated from it is supplied by them to the licensee or the consumers by utilisation of transmission system or distribution system as case may by obtaining open access as specified in Regulations by the Appropriate Commission. The CGP set up by any person for utilization of electricity generated from it for self-consumption and surplus energy is any available from it may be sold/supplied to any persons i.e. consumer or licensee by utilisation of transmission system or distribution system of the licensee(s) as per

the provisions of Regulations notified by the Appropriate Commission. The supply of electricity by the generating company to the consumer as per the agreement entered between the CGP and the consumer is not regulated activity. The generating company and CGP are also exempted from obtaining the license as specified under Part IV of the Act.

25.15. Moreover, there is re-classification or sub-classification in case of the generating company which may also consist of the captive generating plant. Further, the classification among the licensees are sub-classified as distribution licensee, transmission licensee and trading licensee.

25.16. The functions and duties of CTU/STU and transmission licensee are different and distinct from trading licensee as well as distribution licensee and also generating companies. The transmission licensees are mandated to develop, plan and create transmission system and allow utilisation of transmission system on non-discriminatory basis. The STU, CTU and transmission licensee are not eligible to carry out the activity of trading. The transmission system created by STU, CTU or transmission licensee is mandated to allow the open access users who may be distribution licensee, consumer, generating company or CGP or trading licensee on payment of transmission charges and in accordance of terms and conditions specified by the Appropriate Commission.

25.17. The functions, duties, obligations, rights of distribution of electricity falls under Part VI of the Act, wherein it is provided that the duty cast upon the distribution licensee is to develop the distribution system in the area of supply. Further, it is also provided that the distribution licensee to allow non-discriminatory open access on distribution system to the consumers, licensees, generator, etc. as case may be. Moreover, the distribution licensee is also duty bound for supply of electricity whenever an application is made by the consumers, accordingly they shall provide the same within period of 30 days except in the exceptional cases as per the provisions of Act. Failure to on the part of the said duty, the distribution licensee be penalised and the same may be extended to Rs. 1000 per day. The supply of electricity to the consumer by the distribution licensee is a regulated activity and the tariff recoverable by the distribution licensee from the consumers are

determined and decided by the appropriate State Commission. The aforesaid tariff is derived by the State Commission with due consideration of power procurement cost of the licensee, transmission cost, capital cost, etc. Thus, the supply of electricity to the consumer is a regulated activity and the distribution licensee is not entitled to recover any amount other than the tariff determined by the Commission. The distribution licensees are also mandated to provide quality of power supply in an efficient and economical manner to the consumers and in case of any failure to do so, the distribution licensees are subjected to penalty as per the Regulations. In the State of Gujarat, GERC (Performance and Standard for supply) Regulations, 2005 are notified by the Commission for the purpose of standards needed to be maintained by the licensee.

25.18. The duty cast on the distribution licensee are quite different and distinct from other entities to seek open access on the transmission system created either by the CTU or STU or the distribution system developed by the distribution licensee and open access users, i.e. generating company, captive generating plants, licensee other than the licensee in area of the supply of the distribution licensees in whose area such open access is sought, by the licensee and the consumers on following reasons:

i. The distribution licensees are mandated to create the distribution system in its area of supply to the consumers on economical and efficient manner. It is the duty of the distribution licensee to provide power supply within one month from the date of application given by a person in its area of supply subject to some exceptional cases where the Appropriate Commission grants time for the extension in the aforesaid time period. In case of other entities i.e., captive generating plant, generating company, or other licensee, the aforesaid concession is not assigned to them.

ii. The distribution licensees have Universal Service Obligation for arranging the power required by end users from any possible source and it cannot claim that the supply of power is not available and not dependent on only one source of supply from generator. Further, the supply to the distribution licensee is subject to merit order despatch from the generator as decided by the Commission for efficient and economical power procurement. Such supply is

from multiple sources received by the distribution licensee. The aforesaid concession is carved out for the distribution licensees in order to serve its consumers for access to the entire Intra-State system. In case of other entities who avail the open access to supply electricity to the consumer in the area of distribution licensee are required to enter into a bilateral contract pursuant to mutually agreed terms as recognized under Section 49 of the Act, which is neither mandatory nor compulsory duty cast for supply of the electricity other than the distribution licensee to the consumers. The other entities who avail the open access on transmission or distribution system on point to point basis i.e. from identified generating sources to the identified premises of the end user consumer.

iii. The transmission system created by the STU/ transmission licensee with consideration of the load/power flow on such system carried out for the transmission of electricity from different sources, which is ultimately utilised by the end users i.e. consumers situated in the area of distribution licensee, the distribution licensee become obligated for entire revenue requirement of the transmission licensee which subject to reduction of the amounts that may be recovered from other open access users i.e. long-term, medium-term or short-term and the quantum of revenue receivable from such other open access users i.e. long-term, medium-term or short-term being very small portion of the total revenue requirement of the transmission licensee or STU.

iv. The aspect of surrender or relinquishment of transmission system etc. are available to open access users whereas the distribution licensee have no such benefit. The obligations for utilisation of transmission system by the distribution licensee is continuing in nature and they have the liability to meet towards the entire revenue requirement of STU/transmission licensee.

v. The existing entire Intra-State transmission system is developed in the State over the years with consideration of requirement of distribution licensee to supply power to its consumers located in area of its supply. The concept of open access has been introduced in the Statute i.e. the Act, is a new concept providing benefit of purchase of power from other sources by the consumers

of the distribution licensee in whose area of supply of electricity, such consumer premise is situated. Further, the open access is available to the limited consumers as per the Regulations notified by the Appropriate Commission, which in the case of Gujarat Commission, the consumers who have the contract demand of 100 kVA and more, the said condition is not applicable to the captive consumers. The aforesaid conditions are kept in the Regulations with consideration of the availability in the network of transmission and distribution systems as well as the liability of duties of distribution licensee to supply to the consumers in efficient and economical manner. The said conditions are not applicable to the other entities. The transmission system is created thus mainly for serving the consumers of the distribution licensee and the major portion of the revenue requirement of the transmission system, establishment, operation, maintenance and upgradation borne by the distribution licensees.

vi. The requirement/utilisation of transmission system and distribution system in the State may be on long-term, medium-term and/or short-term basis from time to time depending on load in the system and power flow, part ways the generating stations operating in the State, procurement of power from outside the State as the case may be. Ignoring the rights of the distribution licensees of having such priority affects the discharge of the functions envisaged for the distribution licensees under the Act.

vii. The distribution licensees have Universal Service Obligations in terms of Section 42 and 43 of the Act. Their supply is also subject to maintaining Standard of Performance notified in the Regulations. Moreover, failure to its duty cast upon them by the Appropriate Commission and provisions of Act, they are liable to be penalised for such failure. There is no such duty cast on other suppliers who supply the electricity to the consumers in the area of supply of the licensee. The supply by other entities is governed by the Agreement between the two parties.

viii. In case of the consumers receiving the power from other sources than the distribution licensees in whose area of supply they are eligible for obtaining non-discriminatory open access on the distribution system and/or

transmission system as per the provisions of the Regulation notified by the Commission. Further, the supply of electricity to such consumer is based on the agreed rate between the supplier and consumer.

25.19. From the aforesaid observations, the following emerge:

1) The Electricity Act itself provides the classification in the Statue with regards to the different entities as stated above.
2) The distribution licensees provides non-discriminatory open access on distribution system to various entities like consumers, generator, CGP, Government, traders/trading licensee, other distribution licensees as per the provisions of Regulations notified by the appropriate State Commission.
3) The transmission licensees provides non-discriminatory open access on transmission system to various entities like consumers, generator, CGP, Government, traders/trading licensee and distribution licensees as per the provisions of Regulations notified by the appropriate State Commission.
4) The open access granted on the transmission system or distribution system to the beneficiaries is non-discriminatory.
5) The function and duties of the distribution licensee qua generating company, CGP, Intra-State trading licensee and consumers are different and distinct from each other.

25.20. From the aforesaid, it is clear that the classification made in the Act with consideration of function and duties of the different entities, i.e. Consumers' captive generating plant, transmission licensee and distribution licensee. The function and duties of classified entities are different and distinct. Therefore, it is separate category as and when the open access is granted to the aforesaid entities on the transmission and/or distribution system provided in the Regulations by this Commission.

25.21. Therefore, the contentions of the Petitioners are not acceptable as recorded in earlier paras, where it is clarified that Section 2(47) states the definition of open access does not provide for absolute non-discriminatory provision treating everyone as equal. Further the said provision provides that the open access be

governed by in accordance with the Regulations notified by the Appropriate Commission. As recorded in earlier para Sections 42 read with Section 43 provides, the duty cast upon the distribution licensees to supply the electricity to the consumer/person situated in the area of supply within the prescribed time. Also, duty is cast on them that they have to develop the efficient and economical distribution system for supply of electricity. Failure to do so, the distribution licensee is subject to be penalised. The aforesaid provisions are not applicable to other entities. The Article 14 of the Constitution of India recognise the classification based on intelligible differentia and distinguishing rationale if any made out based on the objectives of the legislation. Such classification is valid. It is a fact that the statute i.e. the Act enacted by the Parliament consists of different entities i.e. transmission licensee, distribution licensees, trading licensees, captive generating companies and consumers. Moreover, the objects and duties, rights and obligations of the aforesaid entities are different and distinct from each other. The distribution licensees are mandated to develop efficient and economical distribution system and provide the supply of electricity to the consumers in its area of supply within stipulated time frame. Similarly, the transmission licensees are also mandated to develop transmission system with consideration of requirement of flow of power system from different sources, their path ways etc. so that the electricity generated from different sources within the State or outside sources be transmitted to the different entities i.e. distribution licensees, and other entities who supply the electricity to the end consumers. The function, obligations and duties of other entities i.e. generating company, CGP and other licences who supply electricity to the consumers situated in the area of distribution licensees are different and distinct from the supply of electricity by the distribution licensee of that area.

25.22. The Petitioners have referred Section 62 (3) of the Act and submitted that the differentiation permissible as per the provisions of the Act is based on the load factor, power factor, voltage, total consumption of the electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply, and the purpose for which the supply is required. Therefore, the discrimination made in the open access customers/consumers by introduction of priority where the distribution licensees

have been given highest priority over LTOA, STOA and MTOA is against the said provision of the Act. The aforesaid contentions of the Petitioners and others are not acceptable and valid on following reasons:

(i) Sub-section 62(3) is a part of determination of tariff carried out by the Appropriate Commission and contains provisions related to tariff of the electricity determination by the Commission for any consumer. While, in the present case the subject matter is pertaining to Sections 2(47), 39, 40, 42, of the Act. The subject matter is with regard to utilisation of transmission system and/or distribution system allowed to access by the different entities i.e. generating company, licensee, CGP, consumer etc. Section 62 (3) recognises that undue preference may not be given to any consumer of electricity. However, the said Section recognises that the differentiation made on various grounds which include the nature of supply and purpose of supply etc. The open access provided under Regulation 19 is with consideration of the function and duties provided under the Act to different entities and the differentiations amongst such entities with regard to their duties and responsibility to supply electricity to the consumers.

(ii) The classification is made in the Regulation with consideration of the provision of the Act, scheme and objective of the Act, the functioning of the distribution licensee vis-à-vis open access users.

25.23. The Petitioners have relied on the decision of the Hon'ble Supreme Court in case of ***Maharashtra Forest Guards and Foresters' Union Vs. State of Maharashtra reported in (2018) 1 SCC 149***, but the same is not helpful to the Petitioner in the facts and circumstances of the present case.

25.24. In the aforesaid judgment the Hon'ble Supreme Court has held that it is well settled proposition that there can be a classification based on the educational qualifications if so warranted by the circumstances. In the aforesaid case, based on educational qualification a class within a class has been created violating the guarantee of equality by restricting the participation in LDCE only in graduates.

25.25. The challenge made in the present Petition with regard to the priority given to the distribution licensees in comparison to other open access users i.e. LTOA, MTOA and STOA is only restricted priority. It is not a case where the other entities are denied open access on transmission system in the Regulations. The priority was given on the transmission and distribution system with consideration of the functions, duties, obligations of the different entities who are eligible for open access. The function and duties of distribution licensees are quite different and distinct from the other entities who are eligible for open access. The classification made in the Regulations in granting priority to the open access customers is not violation of Article 14 of the Constitution of India. It is based on reasonable classification and intelligible differentia. The provision for providing priority amongst the open access customers is not a case of denial of open access to the other entities stated in Sr. No. 2, 3 and 4 of the Regulation 19 (1)(b) to (e) of the GERC Open Access Regulations, 2011.

26. We have also carefully perused the Judgements referred by the Respondents with regards to the classification made based on the intelligible differentia, which are as under:

(a). State of West Bengal v. Anwar Ali Sarkar AIR 1952 SC 75

In the aforesaid decision the Hon'ble Supreme Court held that the State in exercise of Governmental power makes law operating differently on different groups for classes of persons within its territory to attain particular ends and given effect to its policies and it must possess for that purpose large powers of distinguish and classifying persons for things to be subject to such law. The classification necessary implies discrimination between persons classified and those who are not members of that class. The class are cast duties and burdens different from those resting upon the general public. The idea of classification is that of inequality so that it goes with saying that the mere fact of inequality in no manner determines the matters of constitutionality.

(b). Kallakkurichi Taluk Retired Officials Association, Tamil Nadu and others v. State of Tamil Nadu (2013) 2 SCC 772.

The Government is not a simple thing it encounters and must deal with the problems which comes from the person in an infinite variety of lessons. The classification is recognition of those relations and in making it a legislature must be allowed a wide latitude of discrimination and judgments. The classification based on those lessons need not be constituted by an exact or scientific exclusion or inclusion of persons or things.

(c). Murthy Match Works v. CCE, (1974) 4 SCC 428

In the aforesaid decision Hon'ble Supreme Court held that the State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects. Every differentiation is not a discrimination. The classification is if founded on a pertinent and real differences as distinguish an irrelevant one. A large latitude is allowed to the State for classification upon reasonable basis and what is reasonable is a question of practical details and variety of factors which the court will be reluctant and ill equipped to investigate. A power to classify being extremely broad and based on diverse consideration of executive pragmatism, the judicature cannot be rush in where even the Legislature warily treads.

(d). Budhan Choudhry v. State of Bihar, (1995) SCR 1045

In the aforesaid decision the Hon'ble Supreme Court held that Article 14 forbids class legislation. However, it does not forbid reasonable classification for a purposes of legislation.

(e). Mohan Kumar Singhania v. Union of India, 1992 Supp (1) SCC 594

In the above decision, the Hon'ble Supreme Court held that there should not be discrimination between one person and another as regards to the subject matter of the legislation, their position is the same. It is also held the differential treatment does not per se constitute violation of Article 14 and denies equal protection only when there is no rational or reasonable basis for the differentiation. Article 14 permit classification founded on intelligible differentia having rational relationship with the object sought to be achieved by the Act, Rules, Regulations in question. The Government is legitimately empowered to frame rules of classification for securing

the requisite standards of efficiency in services. Article 14 does not provide for an absolute equality of treatment to all persons in utter disregard in every conceivable circumstances of the differences.

(f). Indra Sawhney V. Union of India reported in (1992) Supp. (3) SCC 217.

In the aforesaid judgment, relied by the Respondent pleading that sub-classification made in the class by the Government with consideration of policy decision etc. with consideration of facts, then same it is not invalid. Hon'ble Supreme Court in above judgment with regard to Question No. 5 as to whether the backward classes can be further divided in to backward and more backward categories are concerned, the Hon'ble Supreme Court opined that there is no constitutional or legal bar to a State categorizing the backward classes as backward and more backward. The court held that such categorisation is not invalid. It is also held that above both categories grouped together and reservation is provided, the inevitable result would be that gold smiths would take away all reserved posts leaving none for vaddes. In such conditions the State may think for categorisation amongst the backwards to ensure that more backward obtain the benefits intended to them. Where to draw line and how to effect the sub-classification is a matter for the Commission and the State and so long is a reasonably done the court may not intervene the categorization among backward classes where the sub-classification if made are on reasonable basis.

26.1. We have carefully considered the decisions of Hon'ble Supreme Court wherein it is held that the classification, if made on the basis of intelligible differentia is legal and valid.

27. In view of the above, the Petitioners have failed to show that this provisions are discriminatory. We note that the functions and duties of the distribution licensees are quite different and distinct from other entities who are eligible for open access and the classification made in the Regulations in granting priority to the open access customers is based on reasonable classification and intelligible differentia and is therefore, cannot be called unlawful discrimination. The provision for providing priority amongst the open access customers is also not a case of denial of open access to the other entities. Therefore, we decide that the issue raised by the Petitioners objecting to the highest priority given to the distribution licensees in

Regulation 19 of GERC Open Access Regulations, 2011 being discriminatory is not acceptable and therefore the same is rejected.

Accordingly, we decide that there is no need for amending Regulation 19 of the GERC Open Access Regulations, 2011.

ISSUE NO. - 2

28. Now we deal with the issue No. (2) pertaining to the provisions of Regulation 21 of the GERC Open Access Regulations requires to be amended for dealing with setting-off of LTOA charges against the MTOA and/or STOA charges in terms of CERC Sharing Regulations, 2010.

28.1. The Petitioners have submitted that the LTOA customers are required to pay the charges for utilisation of network even though the same is not utilised and whenever the LTOA customer/consumer is not utilising the same open access and desires to utilise the same network through MTOA or STOA basis, they are required to pay additionally for the MTOA or STOA charges over and above LTOA charges even though there being no system strengthening or augmentation carried out by STU or transmission licensee in the network/transmission corridor.

28.2. Further, as submitted, the revenue of GETCO/STU is determined by the Commission under Sections 61, 62, 64 and 86 of the Act and the transmission tariff recovered from the beneficiaries of such system, i.e. LTOA, MTOA and STOA customers who have booked the transmission corridor which is utilised to meet the cost of the transmission system and therefore, there should not be any over recovery. Moreover, the sharing of transmission charges is based on capacity utilised in the transmission system of GETCO, which is a single integrated network within the State. The cost of entire network is recovered from beneficiaries by allocating LTOA, MTOA and STOA under open access by GETCO through transmission tariff. However, in certain cases, users of transmission system apply for open access and get more than one type of open access involving the same transmission capacity. In such a case, when more than one type of open access for same capacity is allowed then such user cannot be burdened to bear transmission charges for such different categories of open access simultaneously.

28.3. Further as submitted that the mechanism of charging for utilisation of transmission network provided in Regulation 21 of the Regulations is erroneous and there is double charging from the users of transmission system for the same capacity because whenever the capacity granted to them under LTOA remains unutilised and the user intends to utilise the same under MTOA/STOA wherein the transmission system users do not exceed the capacity of open access booked by it under LTOA still separate charges are levied for the MTOA/STOA transaction against the unutilised capacity.

28.4. Further, the CERC has in its CERC (Sharing of Inter-State Transmission Charges and Losses) Regulation, 2010 made amendment and provided that the generators who have been granted long-term access to a target region shall be required to pay POC injection charge for the approved injection for the quantum remaining after off-setting the charges for Medium-Term Open Access and/or Short-Term Open Access. Similar amendment was also made in Clause 5 of Regulation 11 of the Principal Regulations providing that the quantum of medium-term open access to any region availed during a month by Designated ISTS Customer (DIC) having long-term access to a target region without identified beneficiaries shall be adjusted against the long-term access of such DIC, limited to granted quantum of short-term open access. The Statement of Reasons (SoR) issued by the CERC while amending the Regulations clearly states that the basic principle for providing netting/setting-of the MTOA charge against the LTOA charges, in a particular target region, is that open access customer should not be subjected to double charging for the same quantum of power. The aforesaid provision is based on the settled commercial principle that an entity cannot be charged twice for the same service. The rationale behind the netting/setting-of mechanism is to avoid double levy of transmission charges for the same quantum of power availed under LTOA and MTOA/STOA, which is against commercial principles. In support of the said submission the Petitioners and others have relied on a decision of Hon'ble Supreme Court in case of Mahaveer Kumar Jain vs. Commissioner of Income Tax Jaipur reported in (2018) 6 SCC 527.

28.5. That Section 61(b) of the Electricity Act provides that the State Commissions are guided by the principles and methodology established by the CERC. Section 61(b)

provides that the transmission of electricity has to be conducted on commercial principles whereas the consequence of the existing Regulations where double charging of transmission tariff for the same capacity is there, has no commercial sense. Moreover, the Commission has to give adequate reasons for deviation, if any, made by it from the CERC Regulations.

28.6. Further, it is submitted that the Commission has in its Order dated 27.12.2019 passed in Petition No. 1776 of 2019 held and recorded that the Commission has adopted the principles and methodology of CERC Regulations on Deviation Settlement Mechanism (DSM). Hence, similar treatment ought to be given for Open Access Regulations notified by the Commission by way of granting set-off principles envisaged under the CERC Sharing Regulations, 2010.

28.7. While undertaking the determination of Tariff by the Commission, it is necessary to refer Section 61 of the Act, which mentions regarding the 'Tariff Regulations'. On reading of the aforesaid provisions, the following principles can be culled out:

(a) The principles and methodology prescribed by the CERC are guiding factors for all the State Electricity Regulatory Commissions in the country.
(b) The determination of tariff including for transmission of electricity has to be based on the commercial principles.

28.8. Clause 5 of Regulation 11 of the CERC Sharing Regulations, 2010 was based upon commercial principles that there should not be double charging of tariff for transmission of power. The provisions of the Act do not provide that the transmission licensee be allowed to collect double transmission charge for the same quantum of power flow in the same region. Sections 38, 39, 40 and 42 of the Act qua Open Access provide that such access has to be non-discriminatory. There can be no occasion where any open access customer is charged transmission and/or wheeling charges twice for the same quantum of power.

28.9. With regard to the contention of the Respondents that since the issue pertaining to Regulation 21 is pending for adjudication before the Hon'ble Supreme Court and therefore this Commission ought to await the outcome of the said proceedings before seeking to amend its own Regulations is concerned, the Hon'ble APTEL has

rejected the plea of the Respondent GETCO in Appeal No. 262 of 2019 vide its Judgment dated 02.03.2020. Therefore, there is no restriction upon the Commission in order to pass any amendment in the existing Open Access Regulation. Moreover, the contention of the Respondents that the existing Regulations recognise three separate periods of Open Access, viz. Long-term, Medium-term and Short-term and therefore, for each type of open access it is necessary to file separate application by the Applicant stating the period of open access, capacity booked, locations i.e. injection point and drawl point, which are essential prior to grant open access is inappropriate. The Regulations provides for payment of transmission charges for each open access as per the capacity booked by the Applicants and once the open access is granted, the capacity gets reserved for long term and medium term open access for the Applicant irrespective of whether such user avails the same or not or utilises the booked capacity. The said issue also came before the Hon'ble APTEL in Appeal No. 6 of 2015, where Hon'ble APTEL upheld the same vide its Judgment dated 13.10.2015, which was thereafter challenged before the Hon'ble Supreme Court by filing Civil Appeal No. 14062 of 2015, wherein the Hon'ble Supreme Court in its Order dated 23.02.2018 has held that it has not found any ground to interfere with the Judgment dated 13.10.2015 of Hon'ble APTEL. Thus, the aforesaid aspects were already decided by the Hon'ble APTEL and upheld by the Hon'ble Supreme Court in their aforesaid judgments.

28.10. Per contra, the Respondents contended that when any open access customer seeks multiple open access, it requires to file separate application with relevant details. Each such application filed with nodal agency be treated as separate application and the therefore, transmission charge is required to be paid for each of the open access separately as determined by the Commission. Therefore, there is no double charging or arbitrariness in the existing Regulations because once separate MTOA or STOA application is made, then payment of charges for short term and/or medium term open access is separate whenever the same is approved separately than LTOA.

28.11. It is further contended that the submissions by the Petitioners and others that the same capacity is utilised in the MTOA or STOA against the LTOA granted is not correct. In fact, the capacity utilisation of transmission network and distribution network is different and distinct. Moreover, once, the LTOA is obtained by the

generator or consumers, it requires to pay LTOA charges. It is not interchangeable with transmission payable for short term/medium term open access. Therefore, the submission of the Petitioners and others that open access allows its members to access the entire transmission system in the State is incorrect and it has already been rejected by the Hon'ble APTEL in its decision dated 31.03.2010 in Appeal No. 104 of 2009. Since, separate open access applications entail separate charge as per the provisions of Open Access Regulations, there is no double charging as sought to be claimed by the Petitioners.

28.12. The Judgments relied on by the Petitioners on double taxation are distinguishable and are not applicable. The said Judgments also recognise that the legislature can specifically provide for double taxation.

28.13. There can be no swapping or inter-mixing of the rights under the long term access where application/request for short term/medium term access or any claim that once charges towards the long term access have been paid, then the open access users can have liberty to set-off such charge against short term/medium term open access. The effect of such claim would jeopardise and render the operation and maintenance of the Intra-State transmission system in chaotic condition and there will be applications seeking for open access for different delivery points from time to time by long term access users under the guise of seeking medium term or short term open access.

28.14. The comparison of Intra-State Open Access governed by SERCs with Inter-State Open Access regulated by the CERC is not proper. Moreover, it is also an admitted fact that CERC Regulations are not binding on the State Commission. Even, the CERC methodology for computation of transmission charge is different and distinct termed as 'Point of Connection' (PoC) charge instead of 'Point-to-Point' connection charges followed by the Commission. In computation of PoC, CERC not only considers the utilisation of the transmission lines from point of connection to point of delivery but also alternative route of pathways. Further, CERC regulates the transmission of electricity on the Inter-State transmission network, which are mostly from one State periphery to the other State periphery or from generating

station to State periphery. The PoC charges are determined for different nodes with consideration of separate charge for injection and drawl.

28.15. The licensees are regulated entities and do not recover more than their Annual Revenue Requirements approved by the Commission and therefore, no undue benefit accrues to them. The licensees are recovering charges in accordance to the Regulations and there is no case of any licensee recovering the tariff twice or double charging. Even, the Hon'ble High Court of Gujarat has in its Judgment dated 07.08.2016 in SCA No. 9138 of 2016 recognised that the recovery of charges made under the Open Access Regulations as legal and valid. The recovery of STOA charges/LTOA charges made against the transmission charges for LTOA as per Regulations 72.4 of GERC (Multi Year Tariff) Regulations, 2016.

28.16. The reliance of the Petitioners on the decision of the Commission dated 27.12.2019 in Petition No. 1776 of 2019 is not correct. The aforesaid Order relates to implementation of Deviation Settlement Mechanism, where the Commission at an earlier stage itself has already specifically linked the UI charges, and therefore, any amendment to UI by CERC would be applicable. The issue in the aforesaid Petition is completely different than the issue raised in the present Petition.

28.17. There is no violation of Section 61 (b) or the principle that transmission is to be conducted on commercial principles. Hon'ble High Court of Gujarat has upheld the existing Regulations and therefore, the contention that the existing Regulations have no commercial sense and permitting double charging is not correct.

28.18. Based on the above, the Respondents have contended that the plea of the Petitioners is not valid and legal and the same may not be permissible.

29. We have considered the submissions made by the parties. The issue raised by the Petitioners for amendment in the existing Regulation 21 on the ground that, (i) it is not in consonance with CERC Regulations, (ii) the Commission is bound by the CERC Regulations as per Section 61 (a) and (b) of the Act, (iii) The Hon'ble APTEL has in its Judgment/Order dated 02.03.2020 in Appeal No. 262 of 2019 directed not to await the decision of Hon'ble Supreme Court in pending Civil Appeal against the High Court judgment and there is no restriction on the Commission to pass any

amendment in the existing Open Access Regulations. (iv) There is dual charging from the open access customer who are availing LTOA and later on demand for MTOA or STOA against unutilised capacity.

29.1. As the Petitioners have sought amendment of Regulation 21 of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011. It is necessary to refer the same and reproduced below:

"21. Transmission Charges

Open Access customer using transmission system shall pay the charges as stated hereunder:

(1) *For use of inter-State transmission system:*
As specified by the Central Commission from time to time.

(2) *For use of intra-State transmission system:*

(i) By Long-Term and Medium-Term Open Access Customers:

The Total Transmission Cost (TTC) as determined by the Commission in the Annual Transmission Tariff Order of the STU shall be shared by all long-term and medium-term open access customers on monthly basis (including existing Distribution Licensees) in the ratio of their allotted capacities, in accordance with the following formula:

Monthly Transmission Tariff (MTT) = TTC/(ACs x 12) (in Rs./MW/month);

Where;

TTC = Total Transmission Cost determined by the Commission for the transmission system for the concerned year (in Rs), and

ACs = sum of capacities allocated to all long-term and medium-term open access customers in MW.

Provided that Monthly Transmission Tariff shall also be shared by a Generating Company if power from such Generating Company is sold to a consumer outside the State of Gujarat, to the extent of capacity contracted outside the State:

Provided further that the transmission tariff payable by any long-term or medium-term open access customer utilizing the transmission system for part of a month shall be determined as under:

Transmission Tariff = TTC/(ACs x 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 where a dedicated transmission system used for open access has been constructed for exclusive use of an open access customer, the transmission charges for such dedicated system shall be worked out by transmission licensees for their respective systems and got approved by the Commission and shall be borne entirely by such open access customer till such time the surplus capacity is allotted and used by other persons or purposes.

(ii) By Short-Term Open Access Customers:

Transmission Charges payable by a Short-Term Open Access customer shall be at a rate one-fourth of the transmission charges applicable to the Long-Term / Medium-Term customer, as described above.

Transmission charge payable by Short-term open access customers

¼ × Rate of transmission charge payable by long-term / medium-term open access customers

Provided that the Transmission charges payable by Short–term open access customers for use of the system for part of a day shall be as follows:

(a)	*Upto 6 hours in a day in one block*	*=*	*(1/4) × short-term open access rate)*
(b)	*More than 6 hours and upto 12 hours in a day in one block*	*=*	*(1/2) × short-term open access rate)*
(c)	*More than 12 hours upto 24 hours in one block*	*=*	*short-term open access rate*

Provided that transmission charges for short-term open access shall be payable on the basis of maximum capacity reserved for such customer."

29.2. The aforesaid Regulation provides for recovery of long-term open access charges, medium-term open access charges and short-term open access charges. The said Regulations provides the formula for recovery of monthly transmission charges. The formula provided in the Regulations for long term and medium term open access customers states the same are based on the transmission capacity in MW booked by the open access customers. The said Regulations provides for the recovery for short term open access charges are different with regards to recovery of charges on the basis of utilisation period by the short term open access customer.

29.3. In the aforesaid Regulations, the Commission made amendments on 04.03.2014 and 12.08.2014 which are reproduced below:

Amendment Dated 04.03.2014

These Regulations be called as the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) (First Amendment) Regulations, 2014.

"Notification No. 1 of 2014

In exercise of Powers conferred by Sections 39, 40, 42 and 181 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, the Gujarat Electricity Regulatory Commission hereby amends Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 (hereinafter referred to as "The Principal Regulations") namely:

1. *Short Title, Extent and Commencement*
   - *(1) These regulations be called as the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) (First Amendment) Regulations, 2014.*
   - *(2) These regulations shall come into force from 1st April, 2014.*
   - *(3) These regulations extend to the whole state of Gujarat.*

2. *Amendment of Regulation 3(s) of the Principal Regulations:*
   The definition of Short-Term Open Access shall be substituted as under:
   "Short-Term Open Access" means open-access for a period upto one month at a time."
3. *Amendment of Regulation 21 of the Principal Regulations:*
   (i) Regulation 21(2)(ii) of the Principal Regulations shall be substituted 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 = 24 × TTC / (ACs× 8760) (In Rs./MW/day)

   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 maximum capacity reserved for such customers."

Amendment Dated 12.08.2014

These Regulations may be called the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) (Second Amendment) Regulations, 2014.

"Notification No. 3 of 2014

In exercise of Powers conferred by Sections 39, 40, 42 and 181 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, the Gujarat Electricity Regulatory Commission hereby amends Gujarat Electricity Regulatory Commission (Terms and Condition of Intra-State Open Access) (First Amendment) Regulations, 2014 (hereinafter referred to as "The Principal Regulations") namely:

1. *Short Title, Extent and Commencement*
   1. *These regulations may be called the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) (Second Amendment) Regulations, 2014.*
   2. *These regulations shall come into force from the date of its publication in Gazette.*
   3. *These regulations extend to the whole state of Gujarat.*

2. *Amendment of Regulation 21 of the Principal Regulations:*
   Regulation 21 (2) (ii) of the Principal Regulations shall be substituted 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."

29.4. In the first amendment the Commission has amended the recovery of open access charges 04.03.2014 while in the Second amendment the Commission has changed the mechanism for recovery of open access charges for short term open access customer based on the utilisation of energy by the short term open access customer. Thus, the recovery of short term open access charges mechanism is different and distinct from the recovery of charges from the medium term and long term open access customer.

29.5. It is also necessary to refer the following provisions of the GERC open Access Regulations, 2011.

Regulation 3(l), (m), r(s), 5(4).

"(l)—'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.

(r) 'Reserved Capacity' means the power transfer in MW between the specified point(s) of injection and point(s) of drawal allowed to a short-term customer on the transmission/distribution system depending on availability of transmission/distribution capacity and the expression "reservation of capacity" shall be construed accordingly;

(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.

5. Application procedure for Connectivity to intra-State transmission system:

(4) The application for connectivity shall contain details such as, proposed geographical location of the applicant, quantum of power to be interchanged that is the quantum of power to be injected in the case of a generating station including a captive generating plant and quantum of power to be drawn in the case of consumer, with the intra-State transmission system and such other details as may be laid down by the State Transmission Utility in the detailed procedure:

Provided that in cases where once an application has been filed and thereafter there has been any material change in the location of the applicant or change, by more than 10 percent in the quantum of power to be interchanged with the intra-State transmission system, the applicant shall make a fresh application, which shall be considered in accordance with these regulations.

……."

29.6. The aforesaid provisions provide that the Regulation recognise the period for three separate periods for open access, i.e. long term, medium term and short term. It is also provided that for different type of aforesaid open access a separate application is required to file stating the capacity of open access sought, injection point and drawl point, and period for such open access. Thus, it is the aforesaid Regulations provides that it is point to point open access. Any change in either injection point or drawl point, it may possible to change in path of the network associated for transmit and/or wheeling of the electricity. It is therefore, provided that any change in the injection point or drawl point an option of exit from the open access provided where

the applicants requires to pay the necessary relinquishment charges as provided in the Regulations.

29.7. The contention of the Petitioners that in case of non-utilisation of capacity in LTOA, such LTOA customer be granted permission of open access for utilisation of the under-utilised capacity through MTOA or STOA if allowed will lead to a situation where there will be multiple open access at a same time against the LTOA and there may be either different point of injection or drawls. Moreover, in such situation it is possible that different paths of transmission system and/or, distribution network system be utilised. Further, there may be different capacity that may be required to be allowed on different transmission and distribution network in addition to existing supply. Thus, the network involvement in such a case may be different and its impact on the network will also be different. Further, by granting open access through MTOA or STOA against the LTOA without making any payment will lead to situation to not recover charges against the MTOA or STOA. Further, it also leads to situation that the other open access customer who may desire to get open access of MTOA or STOA on the same transmission network or distribution network may be deprived from the utilisation of such open access customer who failed to utilise their capacity of LTOA booked by them. Moreover, non-recovery of transmission charges and wheeling charges against MTOA and/or STOA also lead to under recovery of the transmission tariff and/or distribution licensee tariff and the burden of such under recovery be socialised on other customers at the cost of the LTOA consumers who failed to utilised the capacity booked by it.

29.8. The open access obtained by the open access customer either through short term, medium term or long term access on the transmission or distribution system for that they are require to sign an agreement/contract, which are different and distinct from each other. Therefore, the charges payable for the short-term/medium-term or long term open access are different and distinct and it does not qualify as double charging because for each type of open access, it is necessary to sign separate contract and for each contract, capacity booked are different and distinct. Moreover, there may be different point of injection or drawl which needs utilisation of different path and quantum for supply/transmit of electricity. There may be multiple open access against the single open access of LTOA, if MTOA and STOA granted against

the unutilised capacity of LTOA. Further, it is an option to the LTOA open access users that the capacity which is booked for it for LTOA he may supply or transmit the electricity on the booked transmission or distribution system and its path either on medium term or short term supply without making any application for MTOA or STOA by keeping the injection point and drawl point same. Grant of MTOA or STOA against the unutilised capacity of LTOA open access granted to the open access customer also cause/affect to the other consumers or open access customer by way of denial of open access on such quantity of MTOA or STOA granted against unutilised LTOA capacity and also socialised the cost of transmission network/distribution network cost against the MTOA charge/STOA charge unrecovered from such beneficiaries. The adjustment sought against unutilised capacity or LTOA capacity of open access by way of short term or medium term open access by the Petitioners is not permissible for following reasons:

1) There are large number of open access applicants in the State who are either having captive generating plant or generating company or are trading licensee desires to supply electricity more than 1 MW in the State by utilisation of transmission and/or distribution network.
2) If the LTOA customer be allowed to utilise transmission or distribution network against the same LTOA by way of MTOA or STOA on either different point of injection or drawl it shall lead to shifting of aforesaid points and utilisation of different transmission and distribution network for open access without verification of the availability of capacity in the network. It would create chaos with consideration of number of such open access applicants. It will also affect the transmission planning of STU since there is no identified injection point or drawl point with correct quantum of energy generated and supplied, path of transmission network engaged.
3) It would affect the co-ordinated economical development of transmission network and transmission planning required to be carried out by the STU as per Section 39(2) (c) of the Act.

29.9. Based on above reasons, the amendment sought by the Petitioners for allowing MTOA and/or STOA against unutilised LTOA capacity is not permissible.

30. The Petitioners and others have relied on the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 which allows offsetting of charges. In support of the same they have also relied on the Statement of Reasons issued for the said Regulations. The Petitioners have relied on the Section 61(a) of the Act and submitted that the Commission is guided by the aforesaid Regulations and it is binding on the Commission.

30.1. The contention of the Petitioners on the ground that the CERC Regulations are binding on the Commission is not correct. Section 61 provides that the Appropriate Commission subject to the provisions of Act specify the terms and conditions of tariff determination. While specifying the same they shall be guided by the various provisions specified under clause (a) to (i) of the Section 61 the Act. It is also necessary to refer Section 61 (a) of the Act which state that the principle and methodology specified by the Central Commission for determination of tariff and transmission licensee. Section 61 (b) provides that generation, transmission, distribution of electricity are conducted on commercial principles.

30.2. Further, the word "guided" utilised in the Section 61 of the Act is not construed as binding. The word "guided" in legal parlance be defined as under:

"……To serve as a guide for; conduct or advise…."

30.3. It is incorrect to interpret the word 'guide' used in the Section 61 of the Act to mean 'binding'. Moreover, the Section 61(b) provides that while framing the Regulations it required to see that the generation, transmission, distribution and supply of electricity be carried out on commercial principles. Thus, the recovery of transmission charges needs to be carried out on basis of commercial principles and therefore, it is incorrect not to recover the charges for the services utilised by the beneficiaries. The contention of the Petitioners that the unutilised capacity under LTOA be adjusted against the MTOA or STOA, it leads to a situation that there may be no recovery of charges from such beneficiaries who are given the MTOA or STOA. Further, it also leads to a situation that there may be socialization of such charges on the other consumers who may be deprived from the benefit of MTOA, STOA and it may create discrimination amongst them.

30.4. The amendments made in the Central Commission's Sharing Regulations, 2010 and Statement of Reasons (SoR) issued for the same need to be referred which are reproduced below:

*"**11. Billing***

.....

(9) ……..

Provided further that a generator, who has been granted Long-term Access to a target region shall be required to pay PoC injection charge for the Approved injection for the remaining quantum after offsetting the charges for Medium term. Open Access. and Short-term open access:

"36.19 It was proposed in the draft amendment that the injection POC charge/ withdrawal POC charge for Short term open access granted to a DIC shall be offset against the corresponding injection POC and withdrawal POC charges to be paid by the DIC for Approved injection / Approved withdrawal based on Peak Injection / Withdrawal. Individual DICs are also to get adjustment in the light of methodology for preparation of Base Case and charges Incident upon these DICs where drawl was captured in Approved Withdrawal w.r.t. peak demand. The objective is to avoid double charging the Withdrawal DICs through STOA adjustment similar to the generators.

……..

36.21 As the monthly power supply position reports of CEA cover all types of transactions, in base case usage of each DIC captures all types of transactions (Long Term, Medium term & Short Term) and Deviation (UI), usage of transmission system is captured for all these transactions. The PoC charges computed for these DICs, specifically Withdrawal DICs are already captured. However, when these DICs enter into short term transactions-either bilateral or collective, they pay these charges in advance and without adjustment would amount to double charging. Although total STOA charges collected through these transactions are paid back to these DICs in proportion to PoC charges paid, but such returns do not have one to one correspondence. For example, one DIC in a particular region is engaged in STOA purchase, so in base case this usage is captured and State pays this in first bill. When during the month it performs STOA transaction(s), the charges are distributed to all DICs and only a fraction of amount comes back to this DIC. So the question is to what extent this relief is to be provided i.e. to the extent of LTA up lo which billing in done or to the extent of their net drawal from ISTS considered in base case.

……..

36.24 One more important issue needs to be underlined here. Because certain transmission usage is considered in computation based on LTA in target region and

in being adjusted, it does not create any right on transmission system. Only commercial adjustment is being done to avoid double charging and no right on transmission is being created. Right of transmission access is coming through LTA/MTOA/STOA and equivalent Power Purchase Agreement

……..

36.28 In the Q2 of 2014-15, the load of AP was 6428 MW and own generation 2355 MW. The net drawal considered in PoC Computation for the State was 4073 MW (6428-2355); which was almost equal to actual data of SEMs for interstate power. Hence even if the State is having LTA to the tune of 2933 MW, it actually needs to pay for drawal of 4073 MW from ISTS. As the software captures PoC Charges (Rs.) for 4073 MW. and any additional charges till 4073 MW may lead to double charging. Accordingly, it has been decided that adjustment for STOA/MTOA under this Regulation shall be given to the extent of net drawal (Withdrawal own injection affecting ISTS) considered in the base case for the application period Regulations are amended accordingly."

Moreover, reference also needs to be made to the following extract of the CERC Sharing Regulations, 2010, 5" amendment (hereinafter "Regulations, 2010"):

"4 Amendment to Clause (5) to Regulation 11 of the Principal Regulations:

Second proviso to clause (5) of Regulation 11 of the Principal Regulations shall be substituted as under:

Provided further that the quantum of Medium Term Open Access to any region availed during a month by a DIC having Long Term Access to a target region without identified beneficiaries shall be adjusted against the Long-term Access of such DIC limited to the granted quantum of Long Term Access."

"7. Amendments related to offset provided for charges paid under MTOA/STOA by LTA Customer

7.1 Second proviso to clause (5) of Regulation 11 of the Principal Regulations was proposed to be substituted as under:

Provided further that while billing transmission charges for next month, the quantum of Medium-term Open Access to any region shall be adjusted against the quantum of Long-term Access to the target region without identified beneficiaries limited up to quantum of Long Term Access."

7.2 The Commission had given the following rationale while proposing the above amendment:

5. The Regulations provides that a DIC with LTA to target region shall be given offset for STOA/MTOA to any region. However, it is required that more clarity is required in the same to clarify following.
(1) The offset shall be provided for the quantum only. A DIC may be paying an injection POC rate under LTA to target region which may be different from POC rates paid by it under STOA/MTOA. A DIC shall be provided offset in the LTA bill of next month for the quantum for which it has already paid under MTOA STOA in previous month.
(2) Such an offset shall be provided only if DIC which is paying charges for LTA under target region does STOA/MTOA which effectively implies it has paid both for LTA and MTOA/STOA. In case a DIC (or a trader on its behalf) has not sought STOA/MTOA and has not paid charges towards MTOA/STOA it shall not be given offset for same. Offset is to be provided only to entity which is paying charges for the same quantum twice."

7.4 Analysis and decision:

…….
7.4.3 We do not agree to suggestion of ESSAR Power, JITPL and SEL that offset should be on Rupee terms. The concept of offset has been introduced to make sure an entity is not billed twice for the same quantum of power. An MTOA transaction is with identified beneficiary for which Withdrawal PoC rates shall be applicable. A DIC with LTA to target region should be liable to pay Withdrawal charges in case it agrees into firm contract for part/full of its power with a firm beneficiary subject to terms of its contract with beneficiary related to liability of the charge. Hence for such a transaction LTA quantum to be billed should reduce by the quantum for which firm contract has been entered into. Hence offset shall be on quantum only.
7.4.4 Accordingly, Second proviso to clause (5) of Regulation 11 of the Principal Regulations shall be substituted as under:
"Provided further that the quantum of Medium-Term Open Access to any region availed during a month by a DIC having Long Term Access to a target region without identified beneficiaries shall be adjusted against the Long-term Access of such DIC limited to the granted quantum of Long Term Access."

"11. Transmission charges for Short Term Open Access

…..
(4) Transmission charges for Short Term Open Access, paid by a DIC with untied LTA shall be offset against the transmission charges payable by the said DIC for untied LTA in the following billing month."

2. Definitions

…..

dd)'Untied LTA' *means the quantum of Long Term Access granted to a DlC less the quantum for which buyers have been identified under Long Term Access or Medium Term Open Access or both;"*

7.3. Analysis and Decision
7.3.1. The Commission has reviewed and decided that the quantum for which buyers have been identified under Long-Term Access or Medium-Term Open Access or both would be considered under tied capacity and short-term transactions shall not be considered under tied capacity. Accordingly, definition of "Untied LTA" has been modified at Regulation 2(1)(dd) as follows:

*"'**Untied LTA**' means the quantum of Long-Term Access granted to a DIC less the quantum for which buyers have been identified under Long-Term Access or Medium Term Open Access or both;"*

Illustration
(a) If a generator with 1,000 MW LTA to target region enters into a PPA for 400 MW for a term of 4 months and obtains MTOA for the same, and also enters into another PPA for 500 MW with a term of 8 years, the "Untied LTA" for such a generator shall be taken as 100 MW.
(b) If a similar generator as in example (a) above, with 1,000 MW LTA to target region enters into a PPA for 400 MW for a term of 4 months and obtains MTOA for same, and also obtains STOA for 2 months in advance for 500 MW, the "Untied LTA" for such a generator shall be taken as 600 MW."

30.5. The Petitioners have also submitted that Regulation 42 of the GERC Open Access Regulations, 2011 provides as follows:

"42. Under-Utilisation or Non-Utilisation of open access capacity in intra-State transmission system
Long-term access: A long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long term access, by making payment of compensation for stranded capacity as follows:
(a) Long-term customer who has availed access rights for at least 12 years

(i) Notice of one (1) year – if such a customer submits an application to the State Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights, there shall be no charges.
(ii) Notice of less than one (1) year - If such a customer submits an application to the State Transmission Utility at any time less than a period of 1 (one) year prior to the date from which such customer desires to relinquish the access rights, such customer shall pay an amount equal to 66% of the transmission charges for the stranded transmission capacity for the period falling short of a notice period of one (1) year.

(b) Long-term customer who has not availed access rights for at least 12 (twelve) years - such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights: Provided that such a customer shall submit an application to the State Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights:

Provided further that in case a customer submits an application for relinquishment of long-term access rights at any time at a notice period of less than one year, then such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the period falling short of a notice period of one (1) year, in addition to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights:

(c) The discount rate that shall be applicable for computing the net present value as referred to in sub-clause (a) and (b) of clause (1) above shall be the discount rate to be used for bid evaluation in the Central Commission's Notification issued from time to time in accordance with the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by distribution Licensees issued by the Ministry of Power

(d) The compensation paid by the long-term customer for the stranded transmission capacity shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long-term customers and medium-term customers."

30.6. The aforesaid amendments were made by the CERC in its existing CERC Sharing Regulations, 2010 which pertain to methodology for computation of transmission charges on 'Point of Connection' charges on the pathway and transmission lines for the entire route, it consists of injection point of charge and withdrawal point of charge separately and the same may be different for different locations/nodes. The said Regulations are not for the point to point connection charge, which consist of involvement of transmission and distribution network. The network utilised is Inter-State transmission network i.e. from one State periphery to another State periphery like from generating station to State periphery and it is not for the premises where the electricity is finally used. The methodology for levy of transmission charge under CERC Regulations and GERC Regulations are different and distinct from each other.

30.7. The differences in the Regulations made by the CERC and GERC are stated below:

1) The Inter-State transmission is for transmission to State/Region periphery while the Intra-State transmission governed by GERC Regulations are within the State. The development of Intra-State system and Inter-State System are not comparable and the mechanism for charging for such network are not same but they are different also with consideration of their utilisation and payment by the beneficiaries.
2) The Regulations of CERC provide for determination of transmission charges of all users based on different methodology for determination of such charge while the Regulations for Intra-State System utilisation where the point to point transmission is followed.
3) The point of connection methodology as per CERC Regulations needs to study of path which the electricity will take, the sensitivity at the place of injection, drawl and other routes involved need to be considered, while determining the charges. It is dynamic concept. In the aforesaid mechanism the sensitivity at the place of injection, drawl and path involved and other routes needs to be evaluated. Moreover, the State periphery is considered as point of injection or point of drawl. The open access under the CERC Regulations is for target region and its different from the open access for the SERCs.
4) The methodology adopted by the CERC with consideration of Inter-State transmission where geographical area consideration is national/regional.
5) The CERC Regulations is on injection and withdrawal charges basis where the charges are determined for a region base on the actual load flow. The capacity actually being utilised play a role in determination of injection and withdrawal charges.

30.8. On the aforesaid reasons, the contention of the Petitioners to apply the changes made in the CERC Sharing Regulations, 2010 to the GERC Regulations are not valid.

30.9. We note that the transmission charges recovered by the transmission licensee and distribution licenses in the State are regulated activity. They are not entitled to recover more than their annual revenue requirement. The recovery of any charges

from MTOA or STOA be adjusted against the charges payable by the LTOA customers. Thus, there is no unjust enrichment by the licensee. If any, under recovery of charge from the MTOA or STOA be permitted than it is a case of under recovery for utilisation of transmission or distribution network and such recovery be passed on to other customers to neutralise the revenue of the licensee.

30.10. The Respondent No. 24 of the present Petition, who is one of the members of the Petitioner Association, had filed SCA No. 9138 of 2016 before the Hon'ble High Court of Gujarat and raised the said issue before the Hon'ble High Court. The Hon'ble High Court has rejected the plea of the Petitioners and upheld the Regulations of the Commission. The relevant portion of the said Judgment are reproduced below:

"…….

27. Yet another thing to be noted is that as per Regulation-42, a long term access customer can relinquish the access rights before expiry of the full term only upon making payment of compensation as provided in sub Regulation (1) of Regulation.

28. The penal charges to be levied in such cases is bifurcated in two parts. As per sub clause (a) if the customer has already availed access rights for a minimum of 12 years and such a customer submits application at least one year prior to the date on which he desired to relinquish the access, in such a case, there will be no charges for exiting. If the notice period is shorter than one year, the customer would pay 66% of the transmission charges for the stranded capacity for the period falling short of one year. In terms of sub clause (b) of clause (1) of Regulation 42, if the customer has not availed of access rights for a minimum of 12 years, he would have to pay 66% of the estimated transmission charges for the stranded capacity for the period falling short of 12 years of access rights. However, such a customer would have to either give at least one year notice of relinquishment, failing which, would pay additional charges at the rate of 66% for the period which falls short of 12 months of notice. Likewise, sub regulations (2) and (3) of Regulation 42 provide for charges to be levied from a customer who desires a premature relinquishment of medium term or short term open access rates.

29. In exercise of statutory powers, the GERC has framed the Tariff Regulation of 2011. In terms of Regulation 66.1, the annual transmission charges for each financial year would provide for the recovery of aggregate revenue requirement of the transmission licensee for the respective financial year as reduced by the amount of non-tariff income, income from other businesses and short term transmission charges of the previous year, as approved by the Commission. Aggregate revenue requirement would be calculated as provided in Regulation 71 and it would comprise of various components such as the return on equity, interest and finance charges, depreciation, operation and maintenance expenses etc. Regulation 74 provided for sharing of charges for intra-State Transmission

Network. Regulation 74.1 provided for determination of monthly transmission tariff and basically provided that the aggregate of the yearly revenue requirement for all transmission licensees, less the deductions, as approved by the Commission shall form the total transmission cost of the intra state transmission system to be recovered from the long term and medium term transmission system users in accordance with the formula provided therein. This formula took into account four factors viz. the total transmission cost of the year, number of transmission licensees, aggregate revenue requirement as approved by the Commission and the approved level of non- tariff income. This formula, in simple terms, would ensure spread-over of the total transmission cost for the year between long term and medium term users in proportion of their committed capacities.

30. The Tariff Regulation 2011 were replaced by Tariff Regulation of 2016 which also contains similar provisions for computation of the aggregate revenue requirement of the transmission licensee and spread-over of such charges between all long term and medium term access consumers in proportion of their capacity. Particularly, Regulation 72 pertains to sharing of charges for intra-state transmission network, a provision similar to Regulation 74 of the Tariff Regulation 2011.

31. On the basis of materials on record, we are called upon to judge the validity of the regulations in question. We may recall the agreement between the petitioner No.1-company and GETCO dated 21.12.2010 kept the name and location of the drawee customers open. Counsel for the petitioner sought to rely heavily on this factor to contend that the petitioner No.1 company was granted open access under this agreement anywhere in the State for a period of 25 years. In other words, according to him up to a maximum capacity of 270 MWs of transmission, the company could wheel its electricity generated at Bhadreshwar anywhere in the State. However, this contention begs the question of actually operationalization of this agreement. This agreement itself was subject to the regulations that the GETCO or GERC may frame. 2005 as well as 2011 Regulations both contained detailed procedure before a long term customer would be allowed to actually operationalize and put in effect the agreement for long term power transmission. This procedure invariably would require the power generating company to indicate the location and the load for transmission of electricity. Even otherwise, this is fully understandable methodology. The Respondents have pointed out from the literature on record that for providing long term access to a customer there would have to be augmentation of power transmission capacity which would require investment. Such capacity would be exclusively dedicated to the said customer and could not be diverted except for the period during non-use to any other customer. It would, therefore, bein-comprehensible if such long term power transmission arrangement could be operationalized without the end point being known. The logic behind not pinning down the customer to the end point ofpower transmission while executing an agreement has also been explained by the Respondents. In written submissions before the Gujarat Electricity Regulatory Commission, the GETCO had explained its position in this respect as under:

"Q.2 Details of the process adopted by the Respondent to grant such Long Term

Open Access and factors considered while granting the Long Term Open Access?

AND

Q.3 What the Point of Injection and Point of Drawl stated in the Long Term Open Access Application?

32. Without identifying the Point of Drawl, the Point of Drawl to be decided at a later stage and even at the time when the commercial operation of the power plant begins. Such a facility is provided both in the inter-state transmission system operated and maintained in Power Grid and other Inter State Transmission Licensees as well as in the Intra State Transmission System maintained by the State Transmission Utility, mainly as it is not possible for the power generator to identify the beneficiaries to whom the electricity will be sold, particularly, in regard to the entire capacity of the power plant. At the same time, it is not possible for the generating station to wait for applying for open access until the identification of the beneficiaries for purchase of power and/or till the commercial operation to book the long term open access as the beneficiaries may invest substantially in the generation station and at the time when they apply for open access at a later stage, the long term open access may not be available. It is therefore, an universal practice in India to allow a generating company to identify the Point of Injection and without identifying the point of Drawl to apply for open access. In such cases, a generating company will be liable to pay all the Open Access Charges applicable."

33. The GETCO thus recognized that it would not bepossible for the power generator to identify the beneficiaries to whom the electricity would ultimately be sold at an early phase. At the same time, it is not possible for the generating station to wait for applying for open access till the identification of the beneficiaries for the purpose of power or till the commercial operation to book long term open access as the beneficiaries may invest substantially in the generating station and when they apply for open access at a later stage, long term open access may not be available. It was pointed out that under such circumstances, there was a universal practice to allow the generating company to identify the point of injection and without identifying the point of drawl to apply for open access.

34. This precisely seems to have happened in the present case. At the time of applying for open access, the petitioner No.1-company and GETCO executed an agreement. At that stage, the company was not required to provide the end point or the name of the consumer of the electricity. Nevertheless, before the actual transmission can take place, the company would have to apply, as provided under Regulation and one of the prime requirements of such an application would be to identify the drawl point and the consumer.

35. Second significant feature of the regulations which we perused is that the long term and medium term access consumers are charged on separate basis than the short term or at least it was so at the relevant time. Monthly charges would be levied from the LTA consumer. Such charges would be worked out on the basis of a complex formula but which, in essence, first required the GERC to arrive at a total amount in a year the GETCO should be allowed to recover. This would be based on

total investment and other relevant factors such as depreciation, interest charges etc. Such total amount would be distributed on pro-rata basis amongst the long term and medium term consumers to be collected on monthly basis. The short term usage charges would be completely out of such calculation and, at one point of time, such charges were nearly 1/4th of the rates at which the long term and medium term consumers would be charged. In case, short term usage was for less than a day, the charges would be further reduced.

36. Yet another significant feature of the Regulation on record is that once having committed long term, medium term or short term access, consumers would be allowed premature exist only upon payment of certain compensation. In case of long term access consumers, if the period of utilization was more than 12 years and the advance notice was for a minimum of one year there would be no charges. If the notice period falling short of one year then the charges would be collected for such period which fall short of one year. A different formula would apply if the request for premature termination was made before the completion of 12 years period. In such a situation, the customer would pay substantially for non-utilization of the capacity.

37. All these terms and conditions contained in the agreement as well as the provisions in the regulations would lead to the inescapable conclusion that there would be no free migration of a customer from long term to medium term or short term access. Each arrangement came with its peculiarities, different investment, infrastructure and technical requirements and different bilateral commitments. Particularly, in case of long term open access, it was because that the customer was committing over a span of quarter of a century that the transmission licensee would augment its transmission capacity which would be dedicated to the particular long term access customer. Any premature termination of such a contract would leave such capacity investment and infrastructure facilities un- utilized. Therefore, the regulations made it difficult to bring about premature termination of such contracts. What in essence the petitioners' request is for temporary suspension of the long term transmission arrangement and to revert to medium term or short term arrangement as per the availability of customers for the power generator by the company. Any such free migration between the different plans long term, medium term and short term would throw the arrangement of the transmission company completely out of gear. The contention, that the petitioners are asked to pay transmission charges for the same capacity twice is not a valid one. Whether the petitioners should be asked to pay the transmission charges for its long term open access of full quota of 270 MWs without actual utilization or not is not a question before us. For whatever reason, if the petitioners feel that they cannot be asked to pay such transmission charges without its utilization, such a contention or a challenge is not raised before us. If, therefore, we proceed on such basis, as we are duty bound to do, the real question before us is, can the petitioners insist on utilization of the transmission capacity on medium term and short term basis without paying charges for such utilization? The answer, as discussed above, has to be in the negative. This is therefore, clearly not a case of collection of double charges for utilization of same capacity of transmission. It is the case where for whatever reason, the petitioners are unable to utilize its long term transmission capacity and desire to utilize a part of it by way of medium term or short term arrangement for

which the Respondents are levying applicable charges which, in our understanding, they are authorized todo.

38. Regulations under challenge are statutory in nature. Being statutory provisions we must start with the presumption of constitutionality which can be rebutted only if valid grounds are made out. We are conscious that a subordinate legislation does not enjoy the same level of immunity as an enactment of the act of parliament or State legislature. In addition to being questioned as opposed to any of the provisions of the constitution including the fundamental rights, such legislation can also be challenged as being opposed to the parent act under which they are enacted as also being unreasonable or arbitrary.

13. In this context, we may refer to the observations made by Division Bench of this Court in case of ***Aditya Birla Nuvo Ltd., Unit Indian Rayon & Anr vs. Municipal Corporation of City of Surat and Ors.*** *reported in* ***2003(54) (1) GLR 304*** *as under:*

14. "With this background, we need to examine the validity of the amended rule 2(20) of the Octroi Rules. We are conscious that in the present petition, we are examining validity of statutory provision. We are also conscious that burden lies on the person who challenges a statutory provision to establish that the same is ultra vires.

15. In this respect we may refer to the decision of the Apex Court in case of Public Services Tribunal Bar Association v. State of U.P. and another reported in AIR 2003 Supreme Court 1115. It was observed that it is imperative upon the Courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. It was observed that the burden of proof is upon the shoulders of the incumbent who challenges a statutory provision. In case of Mohd. Hanif Quareshi and others v. State of Bihar reported in AIR 1958 Supreme Court 731, the Constitution Bench of the Supreme Court observed that the presumption of constitutionality attaching to all enactments is founded on the recognition by the Court of the fact that the legislature correctly appreciates the needs of its own people. We are not oblivious to the fact that this decision was overruled in the case of State of Gujarat v. Mirzapur Moti Kureshi Kasab Jamat and others reported in AIR 2006 Supreme Court 212 but on another issue. In case of the State of Jammu & Kashmir, v. Triloki Nath Khosa and others reported in AIR 1974 Supreme Court 1, yet another Constitution Bench of the Supreme Court referring to and relying on the decision in case of Mohd. Hanif Quareshi and others (supra), reiterated this principle. In para. 24 of the judgement, it was observed that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principle. In a recent decision in case of State of Madhya Pradesh v. Rakesh Kohli and another reported in (2012) 6 Supreme Court Cases 312, this well settled principle of presumption of constitutionality of statutory provision enacted by State or Central Legislature was reiterated.

16. Such principle of presumption of constitutionality also applies to a piece of

delegated legislation. In case of St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and another reported in (2003) 3 Supreme Court Cases 321, it was observed that "It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and other invalid, the Courts must adopt that construction which makes it valid..."

17. We must however, recall that under challenge before us is not a legislation of the parliament or State Legislature but a rule enacted by the State in its delegated powers of legislation. We highlight this because it is well recognised that delegated legislation does not enjoy the same immunity as the legislation of the Parliament or the State Legislature. Parameters for examining the validity of the legislation either of the Centre or the State Legislation are somewhat different from the parameters on which the statutory provisions enacted under delegated legislation can be judged. The grounds on which a statutory provision enacted by the State or Central Legislature can be struck down are lack of legislative competence or being in conflict with any of the provisions contained in fundamental rights or other articles of the Constitution. In case of State of Madhya Pradesh v. Rakesh Kohli and another reported in (2012) 6 Supreme Court Cases 312, the Apex Court observed that:

> *"This Court has repeatedly stated that legislative enactment can be struck down by a Court only on two grounds, namely (i) that the appropriate legislature does not have the competence to make the law, and (ii) that it does not take away or abridge any of the fundamental rights enumerated in part-III of the Constitution or any other constitutional provisions."*

18. It is often suggested that a law enacted by the parliament or the State Legislature can be struck down only on one ground namely that of legislative competence. In such expression, both the above-noted parameters are included. If the State or the Central Legislation does not have competence to enact a law as per the list contained in Schedule VII, such a case would fall squarely within the expression of lacking in legislative competence. Equally if such statutory provision is opposed to any of the fundamental rights contained in Part III of the Constitution or is in conflict with other provisions contained in the Constitution, it would be impermissible to the parliament or to the State to enact such a provision and could thus also be stated to be without legislative competence. Besides these categories sometimes, the statutory provision being irrational, arbitrary, come up for discussion. However, such ground also has to be examined within above two parameters. The Apex Court in case of State of A.P. and others v. Mc. Dowell & Co. and others reported in (1996) 3 Supreme Court Cases 709, observed that:

> *"In India, the position is similar to the United States of America. The power of the Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by the Parliament or the Legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in*

Part-III of the Constitution or of any other constitutional provision. There is no third ground."

The Apex Court thereafter explaining the previous decision in case of State of Tamil Nadu and others v. Ananthi Ammal and others reported in (1995) 1 Supreme Court Cases 519 observed that:

"The use of the word "arbitrary" in Para-7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provision of the Land Acquisition Act and ultimately it was found that Section 11 insofar as it provided for payment of compensation in instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression "arbitrary" was used inPara-7."

19. While examining the vires of a rule enacted under the powers of delegated legislation, however the scope of challenge is wider. In addition to above two well recognized grounds on which legislation of parliament or of State can be challenged, a rule framed under delegated legislation can also be called in question on the ground that it is ultra vires the Act or that it is wholly arbitrary or irrational. In this regard we may refer to some of the decisions of the Apex Court.

(1) In case of Indian Express Newspapers (Bombay) Private Ltd. and others v. Union of India and others reported in (1985) 1 Supreme Court Cases 641, the Apex Court observed that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. It was held and observed as under:

"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock. L.J. In Mixnam's Properties Ltd. v. Chertsey Urban District Council thus :

The various special grounds on which subordinate legislation has sometimes been said to be void...can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a bye-law is not the

antonym of "unreasonableness" in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires", ... if the courts can declare subordinate legislation to be invalid for "uncertainty" as distinct from unenforceable ... this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain."

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the constitution"

2) In case of Supreme Court Employees' Welfare Association v. Union of India and another reported in (1989) 4 Supreme Court Cases 187, the Apex Court in para 62 observed that delegated legislation or a subordinate legislation must conform exactly to the power granted.
3) In case of J.K. Industries Limited and another v. Union of India and others reported in (2007) 13 Supreme Court Cases 673, the Apex Court referring to and relying on decision in case of Indian Express Newspapers (Bombay) Private Ltd. and others (supra) observed as under:

"63. At the outset, we may state that on account of globalization and socio-economic problems (including income disparities in our economy) the power of Delegation has become a constituent element of legislative power as a whole. However, as held in the case of Indian Express Newspaper v. Union of India reported in (1985) 1 SCC 641 at page 689, subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is inconsistent with the provisions of the Act or that it is contrary to some other statute applicable on the same subject matter. Therefore, it has to yield to plenary legislation. It can also be questioned on the ground that it is manifestly arbitrary and unjust. That, any inquiry into its vires must be confined to the grounds on which plenary legislation may be questioned, to the grounds that it is contrary to the statute under which it is made, to the grounds that it is contrary to other statutory provisions or on the ground that it is so patently arbitrary that it cannot be said to be in conformity with the statute. It can also be challenged on the ground that it violates Article 14 of theConstitution."

39. We may recall the petitioners have challenged Regulation 21 of the Regulation of 2011, Regulation 74 of the Tariff Regulation 2011 corresponding and Regulation 72 of the Regulation of 2016. The combined effect of these regulations,

in essence, is to arrive at a sum which the transmission licensee would be allowed to recover from its long term and medium term consumers and then to proportionately distribute such charges amongst the customers on the basis of the capacity. These regulations per say do not even provide for collection of double charges even if may use such expression rather loosely. Combined effect of an agreement between the parties and the applicable regulations is to prevent premature termination of power transmission commitment on long term basis.

40. Even the counsel for the petitioners agreed that the State Commission would be guided but not governed by the Central Commission polices. The decision of the Central Commission not to chase for short and medium term access in certain situations would not therefore be applicable to State Commission, more so when the situations are notsimilar.

41. In the result, petition fails and isdismissed."

30.11. In the aforesaid decision the Hon'ble High Court has recorded that the recovery of transmission charges from open access consumers are against the ARR of the GETCO and wheeling charges are considered against ARR of distribution licensee. Therefore, there is an adjustment at macro level for recovery of transmission charges for MTOA and STOA and it is not as if the licensee would retain the transmission charge for itself. The contention of the Petitioners is that OPGS Power Limited that they are required to pay transmission charges is not a valid one. The Petitioners insisting utilisation of transmission capacity on medium term and short term basis without paying charges for such utilisation against non-utilisation of long term access is not valid for which the licensee is authorised to do so. The challenge of Regulation 21 of GERC Open access, Regulations 2011 and Regulations 74 of tariff Regulations 2011 and Regulation 72 of MYT Regulations 2016 combine effect of these Regulations to arrive at some which the transmission license would be allowed to recover from the long term and medium term open access and then proportionate distribute the such charges amongst the customers who booked the capacity in the transmission system .The aforesaid Regulations do not even provide for collection of double charges. It is also decided that in case of long term open access the transmission licensee would augment its transmission capacity which would be dedicated to the particular long term access customer any premature termination of such contract would leave the capacity investment and infrastructure facility unutilised. Therefore, the Regulations made it difficult for pre-mature termination of contract under such open access.

30.12. On the aforesaid reasons, the transactions of LTOA are different and distinct from the transactions of MTOA and STOA and therefore the terms and conditions of medium term and short term open access are applicable in such cases as per the Regulations notified by the Commission. It is also provided that in case of non-utilisation of the capacity by LTOA or MTOA they are eligible to relinquish/surrender the capacity booked by them as per the provisions of Regulation 42 of the said Regulations. On surrender of such capacity the LTOA customer not required to pay the transmission charge/wheeling charges.

30.13. In this regards, it is also necessary to refer the decision dated 31.03.2010 of Hon'ble APTEL in Appeal No. 104 of 2009. The relevant portion of the said Judgment/order is reproduced below:

27. The question for consideration is as to whether such a change of location and reduction in Open Access capacity in the existing lines is a relinquishment of the existing Open Access permission given to ONGC(R-2) within the meaning of Regulation 11. It is the specific stand of the Appellant both before the Commission as well as before the Tribunal that the Open Access has been granted to ONGC(R-2) by the letter dated 27.11.2000 for a specific line and now ONGC(R-2) has sought modification to the lines including reduction in the capacity of the existing Open Access lines and adding such reduced capacity for all other lines and this would amount to relinquishment of the rights under the Bulk Power transmission.

28. On the other hand, the stand of the ONGC(R-2) that so long as the total capacity for the Open Access that was granted, is retained, the mere change in the points of delivery within the Gujarat system would not amount to relinquishment as no part of the capacity has been reduced.

29. Accepting the stand of the ONGC(R-2), the State Commission has held that the Open Access is to the transmission system of the Appellant as a whole and not to the transmission line alone. Therefore, if there is a change in the points of delivery without there being a change in the total capacity, there is no relinquishment.

30. As noted above, Section 2(47) which defines Open Access as meaning non-discriminatory provision for the use of transmission lines or the distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation. Section 2(72) defines transmission lines. It means, high pressure cable and overhead lines transmitting electricity from (a) a generating station to another generating station and (b) a generating station to a sub- station. According to this definition, a transmission line is a point to point line to a generating station or to a sub-station. Thus, it is clear the Open Access is point to point in the transmission system i.e. for a transmission line and not for the entire transmission system.

31. As we have stated earlier, Section 39 refers to non- discriminatory Open Access to its transmission system in the context of a State Transmission utility providing transmission. Similarly, Section 40 refers to transmission system in the context of a transmission licensee maintaining many transmission lines forming part of the system. The above does not mean that there can be open access only to the entire system.

32. There has to be a purpose as to why Regulation 9 contemplates that the applicant in the application shall specify the point of injection and point of drawl. This is not an empty formality. The entire process deciding to grant Open Access is based on the point of injection and point of drawl. Even before the Electricity Act 2003, the open access to the transmission lines and distribution lines were provided in the point of injection and point of drawl. This would be clear from the approval letter dated 27.11.2000 which was granted by the Board only in respect of 6 transmission lines on which wheeling was allowed. This approval granted to ONGC(R-2) was on 6 specific lines with the point of injection, points of drawl and the capacity for which open access is sought.

33. As pointed out by the Learned Counsel for the Appellant it is a well-accepted practice in the electricity industry that open access is restricted to specified transmission lines with specific injection and drawl points. Thus, there is no vested right to open access over the entire transmission system of the licensee.

34. Since the open access customer has no right whatsoever to shift point of drawl under the Regulations, the request for substitution of the new points of drawl would amount to surrendering capacity of the open access between the two specified points and seeking open access for the different point to point transmission.

35. Prior to the constitution of the State Commission, the tariff or terms and conditions for the transmission of electricity or wheeling of electricity were decided by the erstwhile Electricity Board under the powers vested with the Board under the Electricity Supply Act. The Government of Gujarat also had the power and authority to issue policy directive such as Captive Power Policy. After the constitution of the State Commission the power to determine and to regulate tariff of electrical industry including for the transmission of electricity on the transmission lines are exercised by the Appropriate Commission alone. In exercise of the powers vested in it, the State Commission notified the Open Access Regulations governing the transmission and wheeling of electricity on the transmission lines and distribution system maintained by the Appellant and other electricity utilities in the State of Gujarat.

36. The above Open Access Regulation defines the criteria for being classified as long-term Open Access user and short-term Open Access user, the rights, privileges, benefits, etc. applicable to each of the above user. As per clause 24 of the Regulations all the existing users are deemed to be a long-term Open Access users. Therefore, the ONGC(R-2) was an existing user on the date when the Regulation came into force and accordingly it was to be treated as a long-term

Open Access user.

37. In terms of the Captive Power Policy earlier announced by the Government of Gujarat, the permission for wheeling of 1.9 MVA surplus CPP from the ONGC(R-2) at Ankleswar Asset to their own unit was granted. Subsequent to the above approval, erstwhile Gujarat Electricity Board accorded approval for wheeling to the specified six locations for a period of 10 years through their letter dated 27.11.2000. The arrangement for transmission wheeling of electricity as per the undertaking given by the ONGC(R-2) from the CPP of ONGC(R-2) located at Ankleshwar to the six identified places of consumption by the ONGC(R-2). The undertaking given by the ONGC(R-2) clearly means at clause no. 8 that the permission granted shall not be transferable.

38. Thus, the open access which the ONGC(R-2) is entitled to claim from the period from 01.04.2006 to the above six identified places and not to any other place. Any change or rationalization of the above open access including any addition or deletion of the locations can be only with the prior direction of the State Commission in accordance with the open access regulations.

39. Therefore, the order impugned does not satisfy the requirements as provided in the Open Access Regulations framed by the State Commission. Under those circumstances, we come to the conclusion that the change of locations at the point of drawl and the reduction in Open Access capacity in the existing lines would amount to relinquishment of the existing Open Access given to the ONGC(R-2) between the meaning of Regulation 11 and, therefore, the ONGC(R-2) has to file a fresh application seeking for the Open Access for the new locations. As far as the compensation is concerned, it is for the State Commission to decide as to whether the compensation is compulsory, and if it is decided so, quantum of the same taking into consideration the various circumstances.

30.14. In the aforesaid Judgment/Order, the Hon'ble APTEL has recognised the purpose of providing point of injection and point of drawl in the open access. Further, it is also recognised that any change in the point of injection and drawl it would require a separate open access.

30.15. Further, it is also necessary to refer the decision/Judgement of Hon'ble APTEL dated 13.10.2015 in Appeal No. 6 of 2015 where the Hon'ble Tribunal has upheld that whenever the capacity booked by the LTOA consumer and signed the BPTA it is liable to pay the transmission charges for the capacity booked by it irrespective of its actual use of it or not. Thus, once the LTOA has been granted the capacity is booked for the such customers by the transmission licensee for transmission of electricity on the transmission network. The relevant para of the said Judgement is reproduced below:

"11. Respondent no.2 has raised the issue of non-payment of transmission charges to the Appellant as there has been no use of the transmission system by the Respondent no.2 and further in the absence of any proof of stranded capacity on the transmission system. In the impugned order, the State Commission has not dealt with the above on the grounds that it is not necessary to deal with the same on account of extension of time till 31.12.2014 being allowed. The Respondent no.2 is bound by the terms and conditions of the BPTA. Under the BPTA Respondent no.2 reserved capacity of 275 MW on the Intra-State Transmission Network. Respondent no.2 has not terminated the BPTA or surrendered the capacity. The above capacity has been blocked for the Respondent no.2 by the Appellant and cannot be given to others. In terms of the Open Access Regulations, Respondent no.2 is liable to pay the transmission charges as determined by the State Commission based on per MW capacity booked irrespective of the actual use of the transmission line. Respondent no.2 is bound to pay the transmission charges as per the Regulation irrespective of whether it had used the transmission or not.

ORDER

12. In view of the above, the Appellant succeeds in this Appeal. The Appeal is allowed and the order dated 21.10.2014 passed by the Gujarat Electricity Regulatory Commission is set aside. The Respondent no.2 is directed to pay the transmission charges and other related payments applicable under the BPTA to the Appellant."

30.16. The said decision of the Hon'ble APTEL was challenged by filing Civil Appeal No. 14062 of 2015 where Hon'ble Supreme Court vide its order dated 23.02.2018 upheld the decision of Hon'ble APTEL.

30.17. The Petitioners have relied on the decision of Hon'ble Supreme Court in case of Mahaveer Kumar Jain Vs. Commissioner of Income Tax reported in (2018) 6 SCC 527 submitted that the Hon'ble Supreme Court has held that double taxation is not permissible. In the Open Access Regulations notified by the Commission, the charging of the open access charges from LTOA and MTOA or STOA for the unutilised capacity of LTOA is qualify as double charging which is prohibited by the Hon'ble Supreme Court. It is therefore necessary to refer the relevant portion of the said Judgment.

"…….
20) In the above backdrop, it would be appropriate to refer the decision of this Court in the case of Laxmipat Singhania vs. Commissioner of Income Tax, U.P. (1969) 72 ITR 291 at 294 wherein this Court has observed that
"7……. It is a fundamental rule of law of taxation that, unless otherwise expressly provided, income cannot be taxed twice".

21) Further, in a decision of this Court in Jain Brothers and Others vs. Union of India and Others (1970) 77 ITR 107 (SC), it has been held as under:-

"6. It is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted, they cannot be so interpreted as to tax the subject twice over to the same tax….. If any double taxation is involved, the Legislature itself has, in express words, sanctioned it. It is not open to any one thereafter to invoke the general principles that the subject cannot be taxed twice over."

22) The above referred cases make it clear that there is no prohibition as such on double taxation provided that the legislature contains a special provision in this regard. Now, the only question remains to be decided is whether in fact there is a specific provision for including the income earned from the Sikkim lottery ticket prior to 01.04.1990 and after 1975, in the income-tax return or not. We have gone through the relevant provisions but there seems to be no such provision in the IT Act wherein a specific provision has been made by the legislature for including such an income by an assessee from lottery ticket. In the absence of any such provision, the assessee in the present case cannot be subjected to double taxation. Furthermore, a taxing Statute should not be interpreted in such a manner that its effect will be to cast a burden twice over for the payment of tax on the taxpayer unless the language of the Statute is so compelling that the court has no alternative than to accept it. In a case of reasonable doubt, the construction most beneficial to the taxpayer is to be adopted. So, it is clear enough that the income in the present case is taxable only under one law. By virtue of clause (k) to Article 371F of the Constitution which starts with a non-obstante clause, it would be clear that only the Sikkim Regulations on Income-tax would be applicable in the present case. Therefore, the income cannot be brought to tax any further by applying the rates of the IT Act.

23) In view of the aforementioned discussions, we are of the considered view that once the assessee has paid the income tax at source in the State of Sikkim as per the law applicable at the relevant time in Sikkim, the same income was not taxable under the IT Act, 1961. Having decided so, the other issue whether the income that is to be allowed deduction under section 80 TT of the IT Act is on 'Net Income' or 'Gross Income', becomes academic.

24) In view of the above, the appeal is allowed."

30.18. In the aforesaid case the subject matter is pertinent to Income Tax Act, 1961 read with Sikkim State Income Tax Rules, 1955 where the Hon'ble Supreme Court has held that it is fundamental rule of taxation that unless otherwise expressly provided income cannot be taxed twice. It is also held that there cannot be double taxation if the legislature has distinctly enacted it. If any double taxation is involved the legislature itself has in express words sanctioned it. While in the present case the issue raised by the Petitioners with regards to recovery of charges against utilisation of LTOA, MTOA, and STOA by the licensees. The contention of the Petitioners is that whenever they failed to utilise the LTOA and in such situation the capacity remained idle and the open access customer seek the MTOA or STOA with

different either injection point or drawl point, they may not be charged by the licensee. Thus, the utilisation of transmission/distribution network though different and distinct from the LTOA the licensee shall not charge the transmission and/or wheeling charges. The aforesaid issue is different and distinct than the taxing against the Income Act readwith Sikkim State Income Tax Rules where the tax be levied on the income calculated under the said rules as per the Income Tax Act. It is not a case of utilisation of different network by the beneficiaries who required to pay different charges for such utilisation. Non charging of MTOA or STOA against the LTOA unutilised capacity leads to under recovery of the licensee. Thus, the reliance of the Petitioners on the aforesaid Judgement is not correct and the said judgement is not helpful to the Petitioner in the present case.

30.19. The Petitioners also relied on the Judgements dated 11.02.2008 passed in Appeal No. 95 of 2007 by the Hon'ble APTEL in the case of Uttar Pradesh Power Corp. Ltd. Vs. CERC. The relevant portion of the said Judgment is reproduced below:

"10. This Tribunal dealt with a similar issue involving capital cost in the appeal No. 102/05, NTPC vs. CERC and another involving the Tanda TPS which was acquired by the NTPC on 14.1.2000 from the UPSEB under the Uttar Pradesh Electricity Reforms (Transfer of Tanda Undertaking) Scheme 2000 framed under the Uttar Pradesh Electricity Reforms Act 1999. The appellant was the Respondent No. 2 in the matter and the exclusive purchaser of power from the Tanda TPS. The Tanda TPS was acquired for Rs. 607 crores. The NTPC claimed that the capital cost for determination of tariff should be taken as Rs. 1000 crores. The Commission reduced this by Rs. 175.19 crores on account of depreciation charges already paid by the UPSEB and UPPCL. NTPC challenged this decision in the appeal. We held in our judgment dated 6.6.07 that the accumulated depreciation of Rs. 175.91 crores had already been recovered from the consumers in the past through tariff and if such accumulated depreciation amount were again allowed to be recovered, it would amount to recovering the same cost twice and would be contrary to the intention of the scheme applicable for determining tariff.

11. The central issue in this case is whether the case of FGUTPS is distinguishable from the case of Tanda TPS either in facts or in law. Shri M.G. Ramachandran, learned counsel for NTPC says that the transfer price in the case of Tanda TPS was fixed by a scheme whereas in the case of FGUTPS the transfer price is fixed by the legislature in its legislative power. The question actually does not relate to the authority which fixed the transfer price. The question is how should the capital cost of the asset be assessed for the purpose of tariff fixation. In the case of Tanda TPS, the transfer was intended to dissolve the debt which the UPSEB owed on account of the station. The transfer price did not represent the capital cost. We found in our

judgment dated 6.6.2007 that the capital cost should have been the depreciated value as on the date of the transfer which had taken place immediately before the tariff exercise. The same principle should apply in this case. But what is submitted on behalf of NTPC is that the depreciated value as shown in the books of the FGUTPS did not fully indicate the capital cost on transfer as several elements of capital cost had not been accounted for in the figures of Rs. 643.84 crores. Our attention is drawn to the "terms & conditions of the transfer" which includes clause (f) which reads as under.

"(f) All rights/allocations/approvals regarding inputs such as land, water, environment & forest clearance, etc. for Stage-I & Stage-II of the FGUTPS which have been committed to the UPVUNL would stand transferred to NTPC without any additional liability to NTPC. Government of Uttar Pradesh shall issue supporting communications to the various organizations as and when requested by NTPC."

12. What stood transferred to NTPC was not merely the asset viz. the FGUTPS as it stood but also land, water, environment & forest clearance etc. for Stage-I & stage-II which the Government of UP had committed to UPVUNL. Thus the price of land and water already committed by the Government of Uttar Pradesh also went to NTPC. Obviously the price for the commitments was included in the transfer price. The depreciated book value of the station is only one of the components of the Rs. 925 crores. Our judgment dated 6.6.2007 does not indicate that the transfer price of Tanda TPS included factors other than the asset as it stood. Thus on facts the two cases are distinguishable."

30.20. In the aforesaid Judgement, the Hon'ble APTEL held at para 10 that in earlier Judgment dated 6.06.2007 held that the accumulated depreciation of Rs. 175.91 Crore have already been recovered from the consumers in the past through tariff and if such accumulated depreciation amount is again allowed to recover the same cost twice and would be contrary to intention of the scheme applicable for determination of tariff.

30.21. In the aforesaid case the issue was with regards to determination of tariff of generating company of Feroze Gandhi Unchachar Thermal Power Station (FGUTPS) arose against the CERC. The issue arose is with regards to how should the capital cost of the asset be assessed for the purpose of tariff fixation. While in the present case the issue is with regards to charging of open access charge on the MTOA and STOA customer for the utilisation of network. While the contention of the Petitioners and others that whenever the LTOA is obtained by the Open Access customers and they will not utilise the LTOA and continue to pay the open access charges in that case if the MTOA or STOA obtained by them which have different injection or drawl point, they should not be charged the MTOA or STOA charge. The

Regulations notified by the Commission provides that the STOA charges which are recovered from the open access customer are adjusted while determining the charges of the LTOA payable by the open access customer. Therefore, the facts and issues raised in the present petitions are different and distinct than the decision of Hon'ble APTEL in the aforesaid case. Hence, the same are not relevant in the present matter and hence the demand under this issue is rejected.

31. Based on the above, the amendment sought by the Petitioners seeking in Regulation 21 regarding the setting off of LTOA charges against the MTOA/STOA charges for the same capacity, is rejected.

ISSUE NO. – 3 and 4

32. Now we shall deal with the issue No. (3) pertaining to provisions of Regulation 42 of the Open Access Regulations with regard to relinquishment charges of long term open access and/or to allow replacement of open access user for already granted LTOA and issue No. (4) with regard to duration of LTOA period in Regulation 3(1)(l) jointly to decide whether it requires any amendment or not.

32.1. The Petitioners have submitted that the present Regulations are not balancing the interest of investors, generating companies and transmission utilities and STU. The provisions of Regulation 42 regarding payment for relinquishment charges for the capacity relinquished does not take into consideration any actual loss/financial burden to the transmission licensees or to the open access customers, if relinquishment is granted.

32.2. It is further submitted that if the transmission licensee has strengthened or augmented the transmission system for grant of open access, then only the proportionate cost could be recovered from the open access customer/generating company pursuant to relinquishment. In such a situation the licensee should substantiate it with documentation. However, if no strengthening/augmentation has taken place for grant of open access, then there is no logic to charge relinquishment charge.

32.3. The principle for imposition of relinquishment charge is based on the stranded transmission capacity of State transmission network of STU arising on account of surrendering or exit from the LTOA facility. Whenever, any LTOA beneficiary is unable to operationalise the LTOA and wants to avail MTOA or STOA for the same target region, in such cases, if the generator/beneficiaries relinquishes its LTOA capacity, there will be no transmission system of STU remaining stranded. In such situation, there is no need for any compensation / relinquishment charges for LTOA if he avails MTOA or STOA within the target region.

32.4. The Petitioner has also submitted that the minimum period of 12 years provided in the definition 3(1)(l) of the GERC Open Access Regulations with regard to LTOA should be reduced to 7 years in line with Clause 2.1(a) of the guidelines dated 19.01.2005 for determination of tariff by competitive bidding process for procurement of power by distribution licensee, where the long term procurement of electricity is reduced to 7 years. The aforesaid provisions are also incorporated by the CERC in its CERC (Grant of Connectivity, Long Term Access and Medium Term Access in Inter-State Transmission and Related Matters) (6th Amendment) Regulations, 2017. Even, MERC has also made amendment in Regulation 2 of their Principal Regulation i.e. MERC (Transmission Open Access) Regulations, 2019 and by first Amendment in the Principal Regulations, the period of LTOA is reduced to 7 years. The aforesaid provisions were made in the Open Access Regulation by CERC and MERC considering the present power scenario.

32.5. In reply to aforesaid submissions, the Respondents submitted that reduction in relinquishment period sought by the Petitioners and others cannot be allowed since any reduction in the relinquishment period from 12 years to 7 years or removal of relinquishment charges, may create a condition where the liability to pay the charges for the capacity booked by the LTOA and for whom the transmission network is planned and augmentation, strengthening was already carried out, will be passed on to the other open access customers and distribution licensee. Such open access customers or distribution licensees will then be required to pay the higher cost/transmission charges.

32.6. The licensees are not getting any undue benefit by way of recovery of relinquishment charges because the LTOA customers or MTOA customers, who book/reserve the transmission capacity for them for the specific quantum and period for access in the network for which either strengthening of the existing network or augmentation of the system or creation of new system is carried out by the licensees. Further, in case the period of LTOA, if reduced from 12 years to 7 years, then the entire cost of strengthening or augmentation of transmission network may not be possibly recovered from the beneficiaries of LTOA customers. In such a situation the recovery shall be made from the other customers of the distribution licensees or from other generators since the transmission licensee would not be able to recover the investment already made by it.

32.7. Any compensation made against the relinquishment of the capacity less than 12 years, if allowed, qualifies as change in the terms of the contract in relation to its duration. It may not only affect the operation of the system as above but also impact other users of the system. The sanctity of the contract is to be maintained by the parties. In support of the aforesaid submissions, the Respondents relied on the decision of the Hon'ble APTEL dated 15.04.2015 in case of Jeyswal Neco Urja Ltd. V/s. PGCIL & Others and the decision of the Hon'ble Supreme Court in case of GUVNL V/s. Solar Semiconductor Power Company (India) Private Limited and Anr. reported in (2017) 16 SCC 498.

32.8. The Respondent also contended that the Hon'ble High Court of Gujarat in its Judgment dated 07.10.2016 in SCA No. 9138 of 2016 held that the relinquishment charges are payable for relinquishment or surrender of open access. It is also contended that the issue of allowing MTOA while LTOA is not operationalised in terms of CERC Regulations is not applicable because if LTOA itself is not available then MTOA may not be granted and therefore, this issue would not arise in any case.

32.9. The Open Access Regulations do not permit system strengthening or augmentation work for Short-Term and Medium-Term open access and accordingly it may result in denial of short term and medium-term open access on account of system constraints in the transmission system.

32.10. The duration of seven years for long-term open access proposed by the Petitioners is not sufficient to recover the capital cost and debt servicing from the open access customer for whom the system is built or augmented and will lead to stranded asset after seven years without recovery of charges for whom the system is created. It will also create difficulty to make realistic projections and business plan by the licensee and shall lead to a situation of stranded capacity or under recovery of revenue against the asset created by the licensee. The reason for keeping 12 years for the LTOA is based on the loan repayment period which is generally period for repayment of debt.

32.11. We have considered the submissions made by the parties. The Petitioners and others have proposed an amendment in the Regulation 42 and Regulation 3(1)(l) of the GERC Open Access Regulations, 2011. The amendment prayed for reduction in the time frame defined in the Regulation that long-term access means 'use of Intra-State transmission and/or distribution system for a period exceeding 12 years to 25 years.' The definition of 'long term open access' is provided under Regulation 3(1)(l) and Regulations 42 is dealing with relinquishment of open access in the GERC Open Access Regulations, 2011.

32.12. Regulations 42(1)(a)(i) provides that when LTOA customers avail the open access for at least a period of 12 years, he is eligible to relinquish its capacity by issuing notice prior to one year of the date of relinquishment and in such case LTOA customer shall not be required to pay any charges.

32.13. Regulation 42(1)(a)(ii) provides that the LTOA customer who has availed open access for at least 12 years shall issue a notice for relinquishment of its capacity specifying the date from when the period of relinquishment starts prior to one year. Such customer shall require to pay an amount equal to 66% of transmission charges for the stranded capacity for the period falling short of the notice period of one year.

32.14. Regulation 42(1)(b) provides that whenever LTOA customer who has not availed the open access for at least 12 years, in that case such customer shall require to pay an amount of 66% of the estimated transmission charges with consideration of net

present value method for the stranded transmission capacity for the period falling short of 12 years of open access rights.

32.15. It is also necessary to refer the definition of Medium-Term Open Access defined in the Regulation 3(1)(m) stating that Medium-Term Open Access on transmission or distribution system is for a period exceeding 3 months but not exceeding 3 years. Similarly, it is also necessary to refer definition of Short-Term Open Access defined in Regulation 3(1)(s) stating that Short-Term Open Access is for a period up to one month at a time but not exceeding a period of 6 months in a calendar year.

32.16. The Petitioners and others have also raised the additional issue with regard to replacement of open access users for already granted LTOA stating that the Commission may allow the LTOA open access users, the same transmission capacity without attracting levy of relinquishment charges by way of allowing another open access user who can avail the LTOA granted within the same transmission capacity. In such event, the transmission licensee would continue to recover transmission charges for the same transmission capacity which was granted to erstwhile LTOA users. This would be beneficial to the open access consumers in the prevailing dynamic market conditions.

32.17. The Open Access Regulations provide for system study for any augmentation, expansion or upgradation works to be carried out for long term open access. The Open Access Regulations do not permit system strengthening or augmentation works for Short Term and Medium-Term Open Access. There cannot be any expansion or upgradation based on the system constraints resulting in denial of Short-Term and Medium-Term open access. The aforesaid provisions are made because the investment in transmission and distribution network is substantial. The licensee would be able to recover such investment over a period of time. The charges payable by the Open Access customer is the only way to service the capital cost incurred by the licensee. Making such huge investments to cater for short term or medium term open access demand would leave the licensee in a lurch as they may not be able to recover transmission or wheeling charges for such expansion after the period of open access. Further, reduction in the period of open access under LTOA to 7 years is not sufficient to ensure that the licensee would be able to

service the capital cost and debt servicing from the open access customer for whom the system is created. The burden of un-recovered cost may then pass on other customers of the State which is unjust.

32.18. Now, we deal with the issue with regard to reduction in minimum duration of LTOA prayed by the Petitioners stating that the LTOA period be reduced from 12 years to 7 years as it is difficult for LTOA consumers to tie up their capacity for such long period considering the rapidly evolving market situation. The power procurement by the State utility is carried out from 25 years to shorter or medium term contract due to uncertainty prevailing in the Sector. Therefore, the period of 12 years defined in the Open Access Regulation needs to be reduced to 7 years. It is also in line with the long term contract provided in the Guidelines for Determination of Tariff by Competitive Bidding Process for procurement of power by distribution licenses dated 19.01.2005. Considering the same, the CERC has reduced the LTOA period from 12 years to 7 years by way of 6th amendment in the CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State transmission and related matters) Regulations, 2017.

32.19. The Petitioners contended that the reduction in LTOA period would help in creating transmission system for catering/availing LTOA as well as facilitating scheduling under MTOA and STOA and the same will also increase due to availability of the margins in the system. Due to decrease in LTOA consumers because of availability of reliable and cheaper power in MTOA/STOA, the planning for augmentation of the transmission system and new transmission corridors shall become difficult. Considering the above, the Petitioners have submitted that the LTOA period may be reduced to 7 years from 12 years.

32.20. The Respondents contended that the Open Access Regulations do not permit strengthening or augmentation work for STOA and MTOA. The investments made in the transmission and distribution system creation is substantial. The licensee would require to recover the investment over a period of time. The charges payable by the open access customer is the only avenue for recovery of capital cost by way of services. In case of creation of asset for medium term of short term open access demand the recovery of asset cost by the licensee is not possible.

32.21. The duration of 7 years is not sufficient to ensure that the license would be able to service the capital cost and debt servicing from the open access customer for whom the system is built in such situation the burden of uncovered cost would pass on to the consumers at large in the State which is unjust, unfair and arbitrary.

32.22. The Open Access customers also have the option to opt short term or medium term open access to fulfil their requirements, if they are not able to tie-up the capacity for 12 years. Simply, non-tie up of capacity for period of 12 years is not a valid reason to reduce the period of LTOA.

32.23. It also affects the transmission / distribution licensees to make realistic projections and business plan because if the period for LTOA be reduced to 7 years, which is not sufficient to meet out the obligation of debt servicing. Moreover, the unutilised transmission/distribution system network will also be affected due to under recovery of the cost incurred by the licensees. The reliance on the CERC Regulations by the Petitioners are not applicable to the Intra-State Regulations notified by the SERCs and the same is upheld by Hon'ble High Court of Gujarat in the case of OPG Power Ltd. vs. GERC and others. It is also against the provisions of Section 61(c) and (e) of the Act which provides for economic and efficient utilisation of assets.

32.24. We also note that the transmission system and/or distribution system are created by the licensees requires to recover the cost by way of servicing charge. The same are recovered from LTOA consumers, if the period of LTOA reduced to 12 years to 7 years in that situation the transmission or distribution licensee will not able to recover their full cost to meet out the debt services.

32.25. The reliance of the Petitioners on the competitive bidding guidelines dated 19.01.2005 is concerned the said guidelines are pertaining to the procurement of power by the distribution licenses from the generator through competitive bidding process. The said guidelines pertaining to procurement of power and is not pertaining to Open Access Regulations. There is no bar that the licensees will procure the power more than 7 years the said guidelines are not for the consumers of the private generator or traders selling power to the consumer directly or bilateral contract. The distribution licensees which are procuring the power from

the generating company are having long term contracts on the transmission system of STU or licensees. Since, the distribution licensees have Universal Service Obligation to supply the power to their consumers and therefore, in order to meet out its Universal Service Obligation, the distribution licensees procure the power and supply the same to the consumers of its license area. In such situation the licensees which will procure the power from the generation company for the shorter period of 7 years instead of 12 years as they may also continue to utilise the network of the STU of transmission licensees even after completion of the 7 years to meet out the power requirement of the consumers of its licensee area through other sources. Therefore, the utilisation of network will not become stranded whenever the distribution license procure power under competitive bidding process. Moreover, they are paying the transmission cost or the distribution cost by recovering the same from the consumers of the State as determined by the Appropriate Commission. Hence, the contention of the Petitioners that the period of LTOA may be reduced based on the procurement of power by the distribution licensee proposed under competitive bidding guidelines of Ministry of Power has no linkage with the issue of period of open access or LTOA provided under the GERC Open Access Regulations, 2011.

32.26. We have considered the submissions made by the parties The Petitioners have contended the LTOA granted to the open access customers may be allowed for utilisation of same transmission capacity without levy of relinquishment charges for other open access users who can avail of transmission capacity for which LTOA is granted. The transmission licensee would able to receive the transmission charges against such LTOA granted. However, the Petitioners have not substantiated its claim with the supporting details because as stated in earlier para the open access in transmissions network is granted with consideration of point of injection and point of drawl and with consideration of load flow study etc. carried out by the licensees. The Petitioners have merely stated that the said transmission systems for the LTOA, may be permitted by allowing the replacement of the customer already granted LTOA with other open access users for the same transmission capacity without attracting the levy of relinquishment charges. However, in the absence of any details with regards to aforesaid contention, like the point of injection, point of

drawl, transmission network involved etc., it is premature to decide the same. Hence, in the absence of the details we are not inclined to decide the aforesaid issue.

32.27. It is a fact that the long-term open access granted to the open access customer in the transmission system or distribution system is with consideration of availability of the capacity in the system. In case of non-availability in the existing system, the licensee shall require to augment the capacity or they may require to create new transmission system or distribution system for the transmission or wheeling of the energy between the injection point and drawl point, as the case may be. In the aforesaid conditions, the transmission licensee or distribution licensee is required to create assets for granting access on the network for the Long-Term Open Access customer(s), for which they are required to incur the cost for such network. It is essential for the licensee to recover such cost from the beneficiary for whom the network has been either created or augmented with consideration of the life of such asset. It is an admitted position that the assets are created by the licensee or generating company with consideration of 30% equity and 70% debt. Any variation in the aforesaid parameters, the same are allowed by the Appropriate Commission with consideration of the provisions of Tariff Regulations notified by the Commission. The recovery of debt may be considered as a part of tariff chargeable on the beneficiary with consideration of repayment of debt by the licensee or generating company is 12 years. Thus, the recovery of debt is required to be made by the licensee on basis of tenure for repayment of that debt. As the transmission or distribution assets are created by the licensee for the benefit or utilisation of the open access customers, they are liable to pay the cost of the assets created for them by the licensee so that the licensee shall not be required to pay any amount from its account or from the consumers of the licensee. In case the open access customer is allowed to relinquish its capacity prior to the date of the completion of life/asset or the period of debt repayment the said amount be recovered from other customers of the licensee as the revenue of licensee is neutral in terms of the Tariff Regulations. If the recovery is not made from the open access users for whom the transmission or distribution capacity was created, in that case the asset created for such LTOA consumer becomes stranded and unutilised for the licensee. The licensee is required to make the debt repayment and therefore it is recovered from other long-term

open access beneficiaries including the distribution licensee and other LTOA customers. Such customers are compelled to pay higher transmission or wheeling charges towards the non-utilisation of network by the LTOA customer, for whom such network was created. Hence, we are of the view that the debt repayment for the asset created by the licensee needs to be recovered from the LTOA customer for whom such asset is created. Therefore, the relinquishment period be aligned with the loan repayment period by the licensee. In such situation 30% equity deployed by the licensee is also eligible for the return at the rate specified in the MYT Regulations and the burden of the same be passed on to the consumers.

32.28. The request of the Petitioners and Others to reduce the LTOA period from 12 years to 7 years will lead to the following:

1) The licensees may unable to recover the investment made by them fully from the persons for whom such network was created.
2) The other beneficiaries of open access are compelled to pay higher charges during the period of stranded capacity if relinquishment of network is allowed prior to 12 years.
3) The planning for creation of transmission system and distribution system may be affected and it affects strengthening or augmentation work for other open access customers.
4) The burden of unutilised capacity cost is passed on to the retail consumers of the licensees which is not reasonable and also against the provisions of Section 61(c) which states that the tariff shall be encouraged on the basis of competition, efficiency, economical use of resources, good performance and optimum investment. It is also against the provision of 61(d) which states that the recovery of cost of electricity in a reasonable manner and safeguard the consumer interest. It is also against the provision of Section 61(e) which provides for rewarding efficiency in performance.
5) The projections and business plans of the licensees for creation of transmission system and/or distribution system become difficult due to non-utilisation of assets created by them and simultaneously there are demands for creation of new assets for the LTOA customers for different injection point on drawl point, where it would necessitate creation of such assets.

32.29. The contention of the Petitioners that the CERC has made amendment CERC (Grant of connectivity, Long -Term Access and Medium-Term Open Access in Intra-State Transmission and Related Matters) Sixth Amendment, 2017 when the LTOA period has been reduced from 12 years to 7 years. We note that the aforesaid Regulation of CERC is pertaining to the 'PoC' where the point of injection and point of drawl and paths involved for such transaction, sensitivity analysis based charges are levied. Moreover, it applies to the Inter-Region, Inter-State network which is different and distinct from the approach followed and allowed in the Intra-State network by the transmission and distribution licensees on their network, which is based on point of injection and point of drawl and path involved in such network may be quite different and distinct than the network charges recovered under CERC Regulations. It is also pertinent to note that the aforesaid issue was raised by the OPG Power Pvt. Limited who is Respondent No. 24 in the present Petition before the Hon'ble High of Gujarat by filing SCA No. 9138 of 2016 and challenged the Regulations of the Commission on the ground that the Commission is guided by the CERC Regulations and the same Regulations are binding to this Commission. The contentions of the Petitioners in the aforesaid case were rejected by the Hon'ble High Court and upheld the Regulations of the Commission. The relevant portion of the said judgment is already referred above.

32.30. The contention of the Petitioners that reduction in the time of LTOA from 12 years to 7 years be granted on the ground that there is uncertainty of the signing of agreement with the procurer. Moreover, there are changes of unutilised capacity due to various reasons which are beyond the control of the seller/procurer. In this regards we note that an option of MTOA is available to the open access consumer for the period from 3 months to 3 years. The same may also be renewed by such open access as and when the period of open access is completed by filling of fresh application for open access. It will helpful to the such LTOA customers and able to utilise the network and avoid the failure of utilisation of network which may they have pleaded in case of LTOA. On reduction of LTOA period from 12 years to 7 years or 5 years lead to situation that the transmission network and/or distribution network created for utilisation of open access users from point of injection to point of drawl by way of augmentation or creation of new assets remain idle and it would

affect to the other LTOA users, including the distribution licensees to pay higher charges for such unutilised assets created for the LTOA consumers. It affects the consumer tariff which is against the spirit of the Act to promote efficiency and recovery of charges on commercial principle basis and also against the spirit of protection of the consumers' interest.

32.31. The Petitioners and others have further submitted that even MERC has amended the Regulation 2 of the Principal Regulations and introduce the period of LTOA as 7 years by way of first amendment in the MERC Transmission of open access Regulations 2019. The relevant portion of the said Regulation are reproduced below:

> *"2. Amendment 2 of the Principle Regulations*
> *The following definition shall be amended in Regulation 2 of principle regulations ……..*
> *17. Long Term Open Access or LTOA means the right to use the intra-state transmission system for an exceeding 7 years."*

32.32. The contention of the Petitioners and others that in the current power market scenario, it is almost impossible for a generator to find a buyer who is committed to take power for a period more than 12 years. It is also contended that the Commission in its Order dated 22.12.2020 passed in Suo-Motu Petition No. 7 of 2020 wherein it is stated that it may be difficult to the utilises to make realistic projection and business plan for the 5-year control period in view of the prevailing circumstances at present.

32.33. The contention of the Petitioners with regards to decision of MERC for reduction in LTOA period from 12 years to 7 years does not clarify the issues raised by the Respondents. It is silent on the aspect of the under recovery of transmission charges or distribution system utilisation charge created or LTOA open access users. Further, the reliance of the Petitioners on the order dated 22.12.2020 passed in Suo-Motu Petition No. 7 of 2020 is concerned, the Commission passed the aforesaid Order with regards to filing of application for determination of Aggregate Revenue Requirement (ARR) and tariff for FY 2021-22 as the MYT Regulations for the period 2021-26 was not finalised by the Commission. Though, the draft Regulations were issued. There are various reasons due to which the aforesaid Regulations were not

finalised. The Commission is mandated to determine the tariff/ARR of the licensee generating company every year as per the provisions of the Act and orders of the Hon'ble APTEL. Moreover, during the year FY 2020-21, there is COVID pandemic which affect the demand supply and cost and revenue of the licensees and generating companies. In such condition the projections which are made in the MYT Regulations as well as Tariff filing by the license / generating company are difficult to made on realistic basis. Further, due to change in the demand and supply and its effect on the consumption/sale of the power also effect the business plan if any made out by the licensee with consideration of the base year of FY 2020-21. Therefore, the Commission has in para 7 of the said order recorded as under:

"7. Further, the Commission is also of the opinion that it may be difficult for the utilities to make realistic projections and business plan for the 5- year control period in view of the prevailing circumstances at present."

32.34. The aforesaid decision of the Commission in Suo-Motu Petition No. 7 of 2020 is with reference to different context and not with reference to the open access. Therefore, the contention of the Petitioners on aforesaid aspects are not connected with the subject matter of the present Petition and therefore not accepted and the same is rejected.

33. Based on the above, the submissions of the Petitioners have no merit and hence not accepted for the present. We accordingly decide that no amendments in the Regulation 42 and Regulation 3 (1) (l) of the GERC Open Access Regulations is required.

ISSUE NO. – 5

34. Now we deal with the issue No. (5) pertaining to provisions of Regulation 13 and 14 of the GERC Open Access Regulations requires amendment for allowing LTOA and MTOA customers to change their drawl points without cancellation of open access.

34.1. The Petitioners have submitted that as per existing provisions of Regulations 13 and 14 of the GERC Open Access, Regulations, 2011 changes in drawl point(s) for open access, once it is granted to both under LTOA and MTOA, are not allowed and

thereby there is no flexibility available to open access customers in the present Regulations.

34.2. Such denial or non-grant of change of drawl point(s) create practical difficulty for the open access consumers since open access transaction specifically in long term access entail a period of 12 years to 25 years. In the current market scenario, the demand of consumer may not remain constant for prolonged period and therefore, it is difficult to draw power at consumer place during the period of 12 years to 25 years. Therefore, the flexibility may be granted for allowing changes of the drawl point in LTOA or MTOA cases, for optimum utilisation of existing capacity of transmission as well distribution system.

34.3. By allowing flexibility in the Regulations for change of drawl points, the STU and distribution licence shall not be affected in any manner since they will continue to recover the transmission charge and wheeling charge for utilisation of such asset. The use of transmission grid is permitted to the distribution utility without any specific identification of injection and drawl point. Therefore, since the open access is non-discriminatory as provided under Section 2(47) and Section 39 of the Act, the flexibility in drawl point needs to be granted to other open access consumers.

34.4. Per-contra the Respondents have objected the aforesaid flexibility in the Regulations on the ground that the said contentions are not raised by the Petitioners in the original Petition and it was raised in its arguments and written submissions only. On that ground alone, the aforesaid submissions of the Petitioners are not admissible and cannot be allowed.

34.5. The proviso to Regulation 13(2)(a) of the Open Access Regulations provides that a fresh application is required to be filed in case of change of location of drawl point(s) as well as change in capacity beyond 10%. However, the Petitioners want to change the Regulations so that change in drawl points need to be allowed to them in the same application which means that instead of 10%, 100% capacity is allowed, which is not permissible since it affects the transmission system and distribution system planning and also affects by way of non-recovery of charges or under recovery of the charges.

34.6. We have considered the submissions made by the parties. As the issues are raised with regard to Regulation 13 and 14 of the GERC Open Access Regulations, 2011, it is necessary to refer the same as reproduced below:

13. Procedure for Long-Term Access

(1) ***Involving inter-State transmission system:*** *Notwithstanding anything contained in clauses (2) and (3) herein below, procedure for inter-State long-term Access shall be as per Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 or its statutory re-enactments as amended from time to time:*
Provided that in respect of a consumer connected to a distribution system seeking inter-State long-term access, the SLDC, before giving its consent to the CTU as required under the Central Commission's Regulations, shall require the consumer to submit the consent of the distribution licensee concerned.

(2) ***Involving only intra-State transmission system:*** *Subject to the provisions of clause (1) herein above, intra-State long-term Access involving Intra-State transmission system shall be in accordance with the provisions of sub-clause (a) to (l) herein below.*
(a) *The application for grant of long-term access shall contain details such as name of the entity or entities from whom electricity is proposed to be procured or to whom to be supplied along with the quantum of power and such other details as may be laid down by the State Transmission Utility in the detailed procedure:*
Provided further that in cases where there is any material change in location of the applicant or change by more than 10 percent in the quantum of power to be interchanged using the intra-State transmission system, a fresh application shall be made, which shall be considered in accordance with these regulations.

(b) *The applicant shall submit any other information sought by the nodal agency including the basis for assessment of power to be interchanged using the intra-State transmission system and power to be transmitted to or from various entities or regions to enable the nodal agency to plan the intra-State transmission system in a holistic manner.*
(c) *The application shall be accompanied by a bank guarantee of Rs 10,000/- (ten thousand) per MW of the total power to be transmitted. The bank guarantee shall be in favour of the nodal agency, in the manner laid down under the detailed procedure.*
(d) *The bank guarantee of Rs. 10,000 /- (ten thousand) per MW shall be kept valid and subsisting till the execution of the long-term access agreement, in the case when augmentation of transmission system is required, and till operationalization of long-term access when augmentation of transmission system is not required.*
(e) *The bank guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the long-term access rights are relinquished*

prior to the operationalisation of such rights when augmentation of transmission system is not required.

(f) *The aforesaid bank guarantee will stand discharged with the submission of bank guarantee required to be given by the applicant to the State Transmission Utility during construction phase when augmentation of transmission system is required, in accordance with the provisions in the detailed procedure.*

(g) *On receipt of the application, the nodal agency shall, in consultation and through coordination with other agencies involved in intra-State transmission system to be used, process the application and carry out the necessary system studies as expeditiously as possible so as to ensure that the decision to grant long-term access is arrived at within the timeframe specified in clause 3 of Regulation 12 herein above:*

Provided that in case the nodal agency faces any difficulty in the process of consultation or coordination, it may approach the Commission for appropriate directions.

(h) *Based on the system studies, the nodal agency shall specify the intra- State transmission system that would be required to give long-term access. In case augmentation to the existing intra-State transmission system is required, the same will be intimated to the applicant.*

(i) *While granting long-term access, the nodal agency shall communicate to the applicant, the date from which long-term access shall be granted and an estimate of the transmission charges likely to be payable based on the prevailing costs, prices and methodology of sharing of transmission charges specified by the Commission.*

(j) *The applicant shall sign an agreement for long-term access with the State Transmission Utility in case long-term access is granted by the State Transmission Utility, in accordance with the provision as may be made in the detailed procedure. While seeking long-term access to an intra-State transmission licensee, other than the State Transmission Utility, the applicant shall sign a tripartite long-term access agreement with the State Transmission Utility and the intra-State transmission licensee. The long–term access agreement shall contain the date of commencement of long-term access, the point of injection of power into the grid and point of drawal from the grid and the details of dedicated transmission lines, if any, required. In case augmentation of transmission system is required, the long-term access agreement shall contain the time line for construction of the facilities of the applicant and the transmission licensee, the bank guarantee required to be given by the applicant and other details in accordance with the detailed procedure.*

(k) *Immediately after grant of long-term access, the nodal agency shall inform the State Load Despatch Centre so that it can consider the same while processing requests for grant of short-term open access, received under these regulations.*

(l) *On the expiry of the period of long-term access, the same shall stand extended on a written request by the consumer, to the Sate Transmission Utility, submitted at least six months prior to such expiry, mentioning the period for which extension is required:*

Provided that in case no written request is received from the consumer within the timeline specified above, the said long-term access shall stand terminated on the date upto which it was initially granted.

(3) ***Within the same distribution system:*** *The procedure specified in clause (2) above shall, mutatis mutandis, apply to cases of long-term access when the point of injection and the point of drawal are located in the same distribution system.*

14. Procedure for medium-term open access

(1) ***Involving inter-State transmission system:*** *Notwithstanding anything contained in clauses (2) and (3) herein below, procedure for inter-State medium-term open access shall be as per Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 or its statutory re-enactment as amended from time to time:*

Provided that in respect of a consumer connected to a distribution system seeking inter-State medium-term open access, the SLDC, before giving its consent to the CTU as required under the Central Commission's regulations, shall require the consumer to submit the consent of the distribution licensee concerned.

(2) ***Involving only intra-State transmission system:*** *Subject to the provisions of clause (1) herein above, intra-State medium-term open access involving intra-State transmission system shall be in accordance with the provisions of clause (a) to (f) herein below.*

(a) *The application for grant of medium-term open access shall contain such details as may be laid down under the detailed procedure and shall, in particular, include the point of injection into the grid, point of drawal from the grid and the quantum of power for which medium term open access has been applied for.*

(b) *The start date of the medium-term open access shall not be earlier than 5 months and not later than 1 year from the last day of the month in which application has been made.*

(c) *On receipt of the application, the nodal agency shall, in consultation and through coordination with other agencies involved in intra-State transmission, process the application and carry out the necessary system studies as expeditiously as possible so as to ensure that the decision to grant or refuse medium-term open access is made within the timeframe specified in clause (3) of Regulation 12 herein above:*

Provided that in case the nodal agency faces any difficulty in the process of consultation or coordination, it may approach the Commission for appropriate directions.

(d) *On being satisfied that the requirements specified under clause (2) of Regulation 10 are met, the nodal agency shall grant medium-term open access for the period stated in the application:*

Provided that for reasons to be recorded in writing, the nodal agency may grant medium-term open access for a period less than that sought for by the applicant:

Provided further that the applicant shall sign an agreement for medium-term open access with the State Transmission Utility, in accordance with the provision as may be made in the detailed procedure. While seeking medium-

term open access to an intra-State transmission licensee, other than the State Transmission Utility, the applicant shall sign a tripartite medium-term open access agreement with the State Transmission Utility and the intra-State transmission licensee. The medium–term open access agreement shall contain the date of commencement and end of medium-term open access, the point of injection of power into the grid and point of drawal from the grid, the details of dedicated transmission lines required, if any, the bank guarantee required to be given by the applicant and other details in accordance with the detailed procedure.

(e) *Immediately after grant of medium-term open access, the nodal agency shall inform the State Load Despatch Centre so that it can consider the same while processing requests for short-term open access received under these regulations.*

(f) *On expiry of the period of the medium-term open access, the medium term consumer shall not be entitled to any overriding preference for renewal of the term.*

(3) ***Within the same distribution system:*** *The procedure specified in clause (2) above shall, mutatis mutandis, apply to cases of medium-term open access when the point of injection and the point of drawal are located in the same distribution system.*

34.7. The Regulation 13(2) states the procedure for LTOA. It provides that whenever the Intra-State LTOA is desired by the applicant, it requires to submit an application giving the details of the entity from whom the electricity is proposed to be procured or to be supplied along with quantum of power, duration and other details as per the procedure laid down in the Regulations.

34.8. The first proviso to Regulation 13(2)(a) of the said Regulations provides flexibility to LTOA that whenever there is any change in location or the quantum of power more than 10% of open access quantum, in that case, such LOTA shall require to file fresh application for the Open Access. The aforesaid provision was made in the Regulations with the consideration that the open access is granted as per the GERC Open Access Regulations on transmission and distribution system where the point of injection and point of drawl are identified by the open access customer. This is so because the open access in the State is allowed on point to point basis and therefore, the transmission system or distribution system which involves a specific path from point to point. Any change in the location of injection point or drawl point or path shall have an impact on the transmission system or distribution system.

34.9. The contention of the Petitioners and others that the flexibility may be given to LTOA and MTOA customers for changing drawl point(s) in the LTOA and MTOA

already granted will lead to a situation that there will be no fixed drawl or consumption point where such power is to be supplied. Normally, a system study is carried out prior to grant of transmission open access or distribution open access and based on such system study, augmentation, strengthening or creation of new transmission system or distribution system is done, if required. If we allow the contention of the Petitioners without carrying out system study, the assets of transmission and distribution system be either overloaded or underutilised pursuant to any change in drawl point(s). Further, it will also affect other STOA or MTOA customers who wants specific points of drawl on the system where LTOA wanted to shift. Further, the restriction created due to allowing flexibility to LTOA or MTOA customers in drawl points may lead to non-recovery of STOA charges by allowing the other customer on the transmission distribution system where the spare capacity is available and it create the under recovery of charge for the utilisation of network. This also create as condition that the other LTOA consumer or MTOA consumers shall require to pay higher charges as the charges recover from the SOTA consumers are deducted from LTOA charges or MTOA charges payable by such consumers.

34.10. Therefore, grant of flexibility in drawl points shall affect the transmission licensee in carrying out proper planning and maintaining the system considering the load flow study carried out by them and under-utilisation or overloading of transmission and distribution assets.

35. Based on the above, the amendments sought by the Petitioners in Regulation 13 and 14 of GERC Open Access Regulations is not acceptable. We therefore, decide that no amendments are required in the said Regulation 13 and 14 in respect of flexibility in drawl point(s) for allowing LTOA and MTOA customers to change the same without cancellation of open access.

ISSUE NO. – 6

36. Now we deal with the issue No. (6) pertaining to provisions of Regulation 28 of the GERC Open Access Regulations requires amendment in respect of transactions from Power Exchange.

36.1. The Petitioners have submitted that Regulation 28 deals with the 'Scheduling' permits open access transactions under Power Exchange without specifying the injection point and drawl point under collective transactions. While in case of the bilateral transactions, it is compelled to provide the aforesaid details which can be denied by the licensee/nodal agency stating that there is constraint in transmission and/or distribution system. Therefore, the open access customers prefer to purchase power from the power exchange rather than purchasing from generating company or licensee under bilateral transactions.

36.2. It is also submitted by the Petitioners that the open access from the power exchange should be allowed during the peak hours and off peak hours as the purchase of power during the aforesaid period is easy. The rates of power purchase are also lower during off-peak hours. The procurement of power during peak or off peak hours, the distribution licensee does not face any load management issue.

36.3. In response to aforesaid submissions of the Petitioners, the Respondent contended that the functioning of the power exchange is regulated by the CERC. Availing of open access by the customer is a commercial act and it has to consider the charges payable for the open access as per the provision of the Regulations of the Appropriate Commission. The payment of open access charges consists of the scheduling charges which are not subject to the contract for open access, either through power exchange or bilateral arrangement between the parties.

36.4. The Petitioners have changed their arguments at later stage in the written submission which should not be permitted. The submissions of the Petitioners that the collective transactions are being allowed under open access while the bilateral transactions are denied is not valid. There is no discrimination made by the Respondent SLDC while granting open access either under collective transactions or bilateral transactions. The denial in the open access is as per the provision of the Regulations. Further, it case of any upstream congestion/constraints existing in transmission/distribution network, in that case only the open access is denied. There are no supportive documents submitted by the Petitioners in support of the aforesaid issue or allegation. There is no discrimination made by the Respondent

SLDC while granting the open access under bilateral transactions or collective transactions.

36.5. We have considered the submissions made by the parties. The Petitioners have referred the Regulation 28 of the GERC open Access Regulations, 2011 and contended that the collective transactions are allowed when the power is procured from the exchange while the bilateral transactions is denied on the ground of system constraints which defeats the purpose of open access. The Petitioners have not submitted any supporting documents in support of the aforesaid allegations. Further, there is no instance or case given by the Petitioners, where for the said transmission network or distribution network, where the collective transactions sought by the open access customer(s) is allowed by the SLDC and bilateral transactions between generator and consumer is denied for the same network. The denial of open access, if any, made out by the SLDC is on the grounds of transmission constraint(s) in upstream which is technical ground and there is no feasibility for transmission of power due to congestion in the network.

36.6. The Regulation 28 provides regarding scheduling requirements for carrying out open access. As per aforesaid Regulation, it is recognised that whenever there are Inter-State Open Access transactions, the scheduling of Inter-State transactions shall be governed by the Central Commission. The procurement of power from power exchange by the open access customer, falls under the category of collective transactions and the same is governed by the CERC Regulations and not GERC Regulations.

36.7. It is also provided that for all Intra-State open access transactions in respect of consumer load of 4 MW and above and all generating stations irrespective of their capacity shall be scheduled by Gujarat SLDC. While in case of open access customers having load less than 4 MW, in that case no scheduling is required. The proviso to Regulation 28 (3) provides that when there is open access from the generating station, traders or other distribution licensee, supply of power to the consumer of the licensee, the same shall be subjected to scheduling requirements as per the Orders of the Commission.

36.8. The aforesaid Regulations states about the scheduling to be carried out by the open access customer, SLDC or the entity who is authorised for scheduling as per CERC Regulations. The said Regulations does not provide regarding reasons/grounds for about the denial of open access. There is no discrimination provision made in the aforesaid Regulations, where the open access is denied by the SLDC on ground of bilateral transactions and preference be given to the collective transactions.

36.9. The Petitioners failed to demonstrate that either the Petitioners or their members were denied the open access on the grounds of discrimination with supporting documents or any instance of discrimination amongst bilateral and collective transactions on same network simultaneously.

36.10. The contention of the Petitioners with regard to transactions from the power exchange or collective transactions which are allowed open access without stating the injection point and drawl point is not correct because in collective transactions also an injection point and drawl point are fixed. The collective transactions are within control of NLDC and RLDC, who are regulating the transactions of open access as per the CERC Regulations, while in case of bilateral transactions in the State being different and distinct from the collective transactions and the same are governed and monitored by the SLDC. Thus, the contentions of the Petitioners on the aforesaid issue are not acceptable and the same are rejected.

37. Based on the above, the amendments sought by the Petitioners in Regulation 28 of GERC Open Access Regulations is not acceptable. We therefore, decide that no amendment is required in the said Regulation 28 in respect of transactions from Power Exchange.

ISSUE NO. – 7

38. Now we deal with the issue No. (7) pertaining to provisions of Regulation 22 of the GERC Open Access Regulations requires amendment in respect of Scheduling and System Operation Charges.

38.1. The Petitioners submitted that the impact of the aforesaid Regulations is such that the Captive Generating Plants are being billed twice, once at the injection end and

other at the withdrawal end, even though there is the wheeling of power carried out for captive consumption by the generator, they have to pay the Scheduling charges for each and every transaction irrespective of the fact that they schedule the power as agreed in the agreement. The Scheduling charge and System Operation Charges should be paid only once during the entire duration of open access.

38.2. It is also prayed that the Scheduling and System Operation Charges may be revised to Rs. 1000 per day per transaction instead of Rs. 2000 per day per transaction as currently provided in the Regulations.

38.3. Per contra the Respondents have contended that the contention of Petitioners that there is double billing made to the captive consumers is not correct. The charges levied by the SLDC at the rate of Rs. 2000 per day per transactions is as per the Regulations notified by the Commission. The Scheduling charges are charged on the basis of per transaction and therefore, for one transaction the same is levied one time and not separately for injection and drawl point. The Scheduling charges which are determined by the Commission are on 'per day per transaction basis' and therefore, they cannot be considered the same for different transactions of open access as well as the same cannot be levied irrespective of the different period of open access.

38.4. It is also contended that the amount specified by the Commission is reasonable and their impact is less compared to higher charges i.e. Rs. 3000 per day per transaction in other States. Hence, there is no requirement of any change or clarification by the Commission regarding the provision relating to payment of Scheduling charges.

38.5. We have considered the submission made by the parties. The argument advanced by the Petitioners with the following prayers:

1) Captive users are levied Scheduling charges separately for the injection point and drawl point and thus there is dual charging levied on them.
2) There should be no separate levy of Scheduling charges for each and every transaction.

3) In case of single consumer, the Scheduling charges and System Operation Charges should need to be paid once for the entire duration of operation of open access rather than for each and transaction separately.

38.6. Since, the issue is pertaining to Regulation 22 of the GERC Open Access Regulation, 2011 it is necessary to refer to the same, which is reproduced below:

"22. Scheduling and system operation charges
Scheduling and system operation charges shall be payable by the Open Access customers at the following rates:

(1) In respect of inter-State open access
(a) *Long-term access and Medium-term open access*
(i) *Regional Load Despatch Centre fees and charges including charges for the Unified Load Despatch and Communication Scheme as specified by the Central Commission under section 28(4) of the Act.*
(ii) *State Load Despatch Centre fees and charges as specified by the Commission under sub-section (3) of section 32 of the Act.*
(b) *Short-term open access*
(i) *Regional Load Despatch Centre and State load dispatch centre fees and charges as specified by the Central Commission.*

(2) In respect of intra-State open access
(a) *Long-term access and medium-term open access*
Long-term access and medium-term open access customers shall be liable to pay SLDC fees and charges determined by the Commission under sub-section (3) of section 32 of the Act.
(b) *Short-term open access*
A composite operating charge @ Rs. 2,000/- per day or part of the day shall be payable by a short-term open access customer for each transaction to the SLDC or as determined by the Commission from time to time.
The operating charge includes fee for scheduling and system operation, energy accounting, fee for affecting revisions in schedule on bonafide grounds and collection and disbursement of charges."

38.7. As per Regulation 22 (2) (a) of the GERC Open Access Regulations, 2011, Long-Term and Medium-Term open access customers shall be liable to pay the SLDC Fees and Charges determined by the Commission under Section 32(3) of the Act. The Commission is determining the said charges on annual basis.

38.8. As per Regulation 22(2)(b) of the GERC Open Access Regulations, 2011, the Short-Term open access customers are liable to pay Rs. 2000 per day or part of the day for each transaction to the SLDC or as may be decided by the Commission from time to

time. The aforesaid charges are composite operating charges which include the fees for Scheduling and System Operation, energy accounting fee, revision in schedule on bonafide grounds and collection and disbursement of the charges. The said charges are recovered by the SLDC towards various services as enumerated above provided to customers with regard to Open Access.

38.9. The contention of the Petitioners that there is double charging/billing of the charges levied by the SLDC is not substantiated by them with supporting documents. Further, the claim of the Petitioners that the Scheduling charges are levied at the injection point and drawl point separately in case of Captive Generating Plant holders is also not correct and valid and permissible as per the said Regulation 22 of the GERC Open Access Regulation, 2011. The Scheduling and System Operation Charges are liable on 'per transaction basis' and not separately for injection and drawl point as disputed by the Petitioners. The Respondent SLDC has also admitted on affidavit that such charges recovered by them on per transaction basis which are as per the provisions of the Commission's Open Access Regulations 2011.

38.10. The Scheduling charge cannot be the same for the entire period of open access. The same are on 'per day per transaction basis' because the scheduling & system operations and other activities associated with it are required to be made out as per the transactions and accordingly, the SLDC shall be required while undertaking its functions to carry out various activities stated supra for each transaction. Hence, the contention of the Petitioners that there can be only one charge for the entire open access period is not valid and acceptable. Therefore, the said contention is rejected.

38.11. The submission of the Petitioners that the Scheduling and Operation Charges need to be reduced from Rs. 2000 per day per transaction to Rs. 1000 per day per transaction is not supported by any valid reasons. The charges recovered by SLDC towards Scheduling and System Operation Charges are also factored in the total ARR of the SLDC. Hence, prior to making any change in the Scheduling and System Operation Charges, it requires to be verified from the supporting documents, which are not provided by the Petitioners. In absence of the same, it is premature to decide the same.

39. Based on the above, the amendments sought by the Petitioners in Regulation 22 of GERC Open Access Regulations is not acceptable. We therefore, decide that no amendment is required in the said Regulation 22 of reducing the Scheduling and System Operation Charges.

ISSUE NO. – 8

40. Now we deal with the issue No. (8) regarding appropriate provision in the GERC Open Access Regulations for providing Rebate on Demand Charges to the Captive consumers taking open access and issue of Standby (Start-up) power.

40.1. The Petitioners and others have contended that the Captive Generating Plant (CGP) holders' may set-up their captive power plant within the State and/or outside to meet significant portion of their energy requirements. Though CGP holders are maintaining their full contract demand with the distribution licensee, because the open access granted in the State is within contract demand with the licensee. The open access customers meet their demand from their CGP, but they are compelled to pay demand charges for the contract demand made with the licensee. There is no provision in the existing Regulations allowing the consumers reduction in contract demand when power is availed through open access.

40.2. The Commission may amend the Regulations and introduce provision for reduction in contract demand of the CGP holders where the consumers meet its contract demand with power from open access. The Commission may make amendment in the Regulations providing that where the open access customers who are having contract period of 3 years or above may be given a partial rebate of about 70% of their contract demand if they meet their contract demand through open access.

40.3. The Petitioners also requested that the captive users may be allowed to avail stand-by power from the grid in case of shut down of their captive generating plant.

40.4. Respondent ONGC contended that as per the tariff schedule for supply of electricity minimum demand charges payable by the consumers are 85% of the contract demand. Therefore, though the captive generating plants who meet significant portion of their demand from their CGP they are required to pay huge amount

towards demand charges. There is no provision for allowing CGP holders to reduce their contract demand in case power is availed by them through open access. A mechanism of rebate may be introduced for the open access consumers who meet their power requirement through open access from their CGP.

40.5. The Respondents contended that the prayer made by the Petitioners and others with regard to contract demand charges when they are availing open access is not legal and valid. The issue of rebate relates to distribution companies and not GETCO. The charges payable towards open access to STU shall not be adjusted against demand charges or shall have any relation with contract demand of the consumers with the distribution licensee. The aforesaid subject matter is not having any relation with Open Access Regulations. There is no specific requirement under open access for reduction in the contract demand as the contract demand licensee and open access are different and distinct subject. The charges payable for one cannot be considered for reduction charges in the other.

40.6. The Petitioners and others have requested for stand-by power supply to the open access customers without any contract demand with the licensee. The drawl of power can be allowed only if the power is scheduled or as a consumer/distribution licensee. The drawl of power from the Grid without identifying source would cause disruption is not permissible. There cannot be drawl without corresponding injection.

40.7. We have considered the submissions made by the parties. The issue raised by the Petitioners and others with regard to (i) allow reduction in contract demand of the captive consumers, (ii) rebate in contract demand charges for the captive users who meet their demand from their own source of power through open access; and (iii) provision for stand-by power supply, and accordingly, make amendment in the Regulations.

40.8. We note that the Open Access Regulations notified by the Commission under Section 181 read with Section 39 (2)(d), 40 (1) (c) and 42 of the Act. The said Regulations provides for non-discriminatory Open Access on the transmission and distribution system availed by the licensee and the open access customers who are also

generating companies, licensee or consumers while the contract demand made by the consumers of the distribution licensee in whose area such consumers are situated. As recorded in earlier para, the distribution licensees are having Universal Service Obligation to provide electricity to the consumers within a period of one month from the date of application and/or exceptions granted within the time limit under the earlier Act. The licensee shall be required to built-up network for providing such power supply to the consumers in its licence area. Moreover, the distribution licensee shall also be required to procure the power from the seller and to supply its consumers. The distribution licensee is also required to obtain the open access on the transmission system to bring the power from the generating station, CGP or licensee injection point to the drawl point sub-station of GETCO/ STU and from their places the said power is supplied to the consumers. Thus, the distribution licensee is required to pay charges for power procurement, transmission charges and its losses and also bear the loss on distribution network and charges for supply of electricity from the end of transmission network to the place of the consumers. The said charges are recovered by the licensee by way of tariff determined by the Commission. The Commission allows recovery of such charges by way of fixed cost and energy charges. Hence, as and when the consumers seek demand from the distribution licensee it is liable to pay the fixed charge and energy charges as determined by the Commission for its contracted demand. Any rebate or reduction in contract demand/fixed charges to its consumers leads to situation that such cost will be passed on to other customers which is against the spirit of the Act. Moreover, if the same is not passed on to other consumers the distribution licensees are deprived of the recovery of the cost of supply incurred by them.

40.9. We also note that the contract demand with the licensee of the consumers is governed under Section 50 of the Act, The Commission has notified GERC (Electricity Supply Code) Regulations 2015 providing for the contract demand of the consumers. The said Regulations provide mechanism for increase/decrease in the contract demand of the consumers. Therefore, the issue pertaining to reduction in contract demand prayed by the Petitioners in the present Petition is beyond the scope of the present Regulations. Further, the Commission decides that the demand

charges are payable by the consumers against the contract demand with the licensee as decided in the Tariff Orders passed by the Commission, wherein, the Commission decides the tariff / rates, contract demand charges, energy charges, rebate, penalty etc. for different category of consumers after considering the tariff proposal submitted by the licensee and comments / suggestions / objections of the stakeholders thereon. Hence, on that ground also the prayer of the Petitioners is not permissible for amendment of the present Regulations.

40.10. The Petitioners and other customers have prayed for allowing stand-by power supply (start-up power) to the open access customers and the customers may be allowed to avail/draw power as stand-by supply from the Grid, whenever their Captive Generating Plant (CGP) is under shut down. In so far as this issue is concerned, the Commission has notified in its Regulations that the Open Access customers/consumers are eligible to obtain power for 42 days during the year from the Grid as a stand-by supply. The relevant portion of the said Regulation is reproduced below:

> *"26. Standby charges for drawal of power by open access customer from distribution licensee*
>
> *In cases of outages of generator supplying to open access customer under open access, standby arrangements should be provided by the distribution licensee for a maximum period of 42 days in a year, subject to the load shedding as is applicable to the embedded consumer of the licensee and the licensee shall be entitled to collect tariff under Temporary rate of charge for that category of consumer in the prevailing rate schedule.*
>
> *Provided that in cases where temporary rate of charge is not available for that consumer category, the standby arrangements shall be provided by the distribution licensee for a maximum of 42 days in a year and on payment of fixed charges of 42 days and energy charges for that category of consumer in the prevailing rate schedule:*
>
> *Provided also that open access customers would have the option to arrange standby power from any other source."*

40.11. From the above, it is clear that the Commission has already provided provisions for stand-by supply in its Regulation to the generator/Captive Generating Plant whenever their plant is shut down. It is also necessary to note that whenever any drawl from the Grid is carried out the same is subject to scheduling under the Open

Access Regulations as such drawls are also necessary to regulate/control with consideration of Grid operation and maintenance on real time basis. The issue of providing stand-by supply is not part of the original Petition filed by the Petitioners. The issue is raised for the first time during the hearing by the Petitioners and others. Thus, the issue is beyond the scope of original Petition because the Respondents were not given an opportunity to comment on it and pleaded for it on that ground also the aforesaid issue is not tenable.

40.12. Considering the above, the submission made by the Petitioners and others are not acceptable and therefore, rejected.

41. Based on the above, the insertion of provision/Regulation sought by the Petitioners in the GERC Open Access Regulations for 'Rebate on demand charges to the captive consumers taking Open Access is not acceptable. We therefore, decide that no insertion/amendment is required in the Regulations on this aspect.

ISSUE NO. – 9

42. Now we deal with the issue No. (9) regarding insertion of appropriate provision in the GERC Open Access Regulations for independence and ring fencing of SLDC.

42.1. The Petitioners have raised the issue that the SLDC in the State functioning as an extension of transmission licensees. SLDC and GETCO have same Board of Directors. The holding company of GETCO, GUVNL is also holding company for the distribution licensee for the State. Hence, the Commission may issue appropriate directions in the order to secure independence of SLDC by segregating SLDC from GETCO and constitute separate entity with its shares to be directly held by Government of Gujarat instead of GUVNL. Similar, segregation of NLDC and RLDC is already executed by the Govt. of India and Power System Operation and Control Ltd. is being made totally independent of PGCIL.

42.2. In support of the aforesaid submission the Petitioners relied on the decision of CERC dated 17.06.2008 passed in Petition No. 8 of 2008 in case of Maharashtra State Electricity Power Trading Company Limited (MSEPTCL) rejecting the application for licence sought by them. The said order of the CERC was also challenged before

the Hon'ble APTEL in Appeal No. 182 of 2008 where Hon'ble APTEL in its Judgment dated 29.04.2009 upheld the decision of the CERC. From the aforesaid decision it is quite evident that ring fencing of SLDC has been judicially recognised. The CERC has vide its statutory advice dated 11.08.2009 also categorically advised that SLDC management and controlling interest be separated from. Business of distribution and transmission of activity.

42.3. In response of aforesaid submissions, the Respondent contended that the said issue is not within the scope and jurisdiction of this Commission. The creation of GETCO, GUVNL, distribution licensee corporates have been under the Gujarat Electricity Reforms notified by the Government of Gujarat.

42.4. The first proviso of Sub-section 2 Section 31 of the Act recognise the state Transition Commission utility shall operate the SLDC until such time the State Government designate any other Government Company of any authority or corporation as SLDC. Till any notification of operation of SLDC by a company is to be company of Govt. of Gujarat till such time STU shall operate the SLDC. Thus, only authority to decide the aforesaid issue is with the Government of Gujarat.

42.5. There is no mandate in the Electricity Act 2003 and rules made under it to the effect that the functions of State Load Despatch Centre should be given to or carried out by an entity other than an entity which is discharging the function of STU. There is no bar in the Act that STU and SLDC to be group company of distribution licensee or trading licensee. The said issue is beyond the scope of Open Access Regulations.

42.6. The contention of the Petitioners with regards to separation of CTU from PGVCIL or that of POSOCO had been made by the Government of India and not Central Commission.

42.7. The allegation made by the Petitioners in the aforesaid issue are vague and without any substance. The judgment relied by the Petitioners relates to the grant of trading licensee to a person who is group company as STU/SLDC. It has no relevance to STU and SLDC being separated. There is no observation in this regards. There is no issue of grant of licence in the present case.

42.8. We have carefully considered the submissions made by the parties. The issue raised by the Petitioners pertaining to ring fencing of SLDC/separation of SLDC from GETCO and GUVNL and distribution licensees. It is necessary to refer Section 131 of the Act which provides unbundling of erstwhile State Electricity Board. The same is reproduced below:

"Section 131. (Vesting of property of Board in State Government): ---

(1) With effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of this Act, is published or such further date as may be stipulated by the State Government (hereafter in this Part referred to as the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board (hereinafter referred to as the Board) shall vest in the State Government on such terms as may be agreed between the State Government and the Board.

(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies, in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be :

Provided that the transfer value of any assets transferred hereunder shall be determined, as far as may be, based on the revenue potential of such assets at such terms and conditions as may be agreed between the State Government and the State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be.

(3) Notwithstanding anything contained in this section, where: -
(a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, the scheme shall give effect to the transfer only for fair value to be paid by the transferee to the State Government;

(b) a transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties and even if such persons or third parties have not consented to it.

(4) The State Government may, after consulting the Government company or company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, referred to in sub-section (2) (hereinafter referred to as the transferor), require such transferor to draw up a

transfer scheme to vest in a transferee being any other generating company or transmission licensee or distribution licensee, the property, interest in property, rights and liabilities which have been vested in the transferor under this section, and publish such scheme as statutory transfer scheme under this Act.

(5) A transfer scheme under this section may-

(a) provide for the formation of subsidiaries, joint venture companies or other schemes of division, amalgamation, merger, reconstruction or arrangements which shall promote the profitability and viability of the resulting entity, ensure economic efficiency, encourage competition and protect consumer interests;

(b) define the property, interest in property, rights and liabilities to be allocated–

(i) by specifying or describing the property, rights and liabilities in question; or
(ii) by referring to all the property, interest in property, rights and liabilities comprised in a described part of the transferor's undertaking; or
(iii) partly in one way and partly in the other;

(c) provide that any rights or liabilities stipulated or described in the scheme shall be enforceable by or against the transferor or the transferee;

(d) impose on the transferor an obligation to enter into such written agreements with or execute such other instruments in favour of any other subsequent transferee as may be stipulated in the scheme;

(e) mention the functions and duties of the transferee;

(f) make such supplemental, incidental and consequential provisions as the transferor considers appropriate including provision stipulating the order as taking effect; and

(g) provide that the transfer shall be provisional for a stipulated period.

(6) All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by the Board, with the Board or for the Board, or the State Transmission Utility or generating company or transmission licensee or distribution licensee, before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by the Board, with the Board or for the State Government or the transferee and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or instituted by or against the State Government or concerned transferee, as the case may be.

(7) The Board shall cease to be charged with and shall not perform the functions and duties with regard to transfers made on and after the effective date.

Explanation - For the purpose of this Part, -

(a) "Government company" means a Government Company formed and registered under the Companies Act, 1956.

(b) "company" means a company to be formed and registered under the Companies Act, 1956 to undertake generation or transmission or distribution in accordance with the scheme under this Part.

42.9. As per the aforesaid provisions, the Government is empowered to unbundled the entities from the State Electricity Board.

42.10. It is also necessary to refer Section 31 of the Act relates to constitution of State Load Despatch Center. The same is reproduced below:

"Section 31. (Constitution of State Load Despatch Centres): ---

(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purposes of exercising the powers and discharging the functions under this Part.

(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:

Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity."

42.11. The aforesaid provisions provide that it is the function of State Government to establish the SLDC or discharge the functions stated in the Act. It is also provided that the SLDC shall be operated by the Govt. Company or any authority or any corporation establish or constituted under the State Act as may be notified by the State Government. The first proviso provides that until government company or any authority notified by the State Government, the STU shall operate the SLDC. There is no time limit provided up till which period the STU shall operate the SLDC. The Second proviso provides that SLDC shall not engage in the business of trading of electricity. Thus the restriction on SLDC is with regards to trading activity and no other activity.

42.12. The Petitioners relied on the judgment of CERC dated 17.06.2008 in Petition No. 8 of 2008 in case of Maharashtra State Electricity Power Trading Company Limited (MSEPTCL) rejecting the application for licence sought by them. The relevant portion of the said Order is reproduced below:

"*22. In the present case, the applicant, incorporated on 29.11.2007 to carry on the business of purchase and sale of electricity is a wholly owned subsidiary of MSEB Holding Co. Limited. Similarly, the transmission company, which is notified as the STU and also operates the SLDC, is also the wholly owned subsidiary of MSEB Holding Co. Ltd. Therefore, control of MSEB Holding Co. Ltd. over the applicant and the transmission licensee is pervasive. The applicant and the transmission licensee are inextricably intertwined and are to be seen as part of their holding company. When the transmission company and the trading company are owned by one entity and controlled by the Board of Directors headed by one person, the dividing line between them gets obliterated. There is every likelihood of the holding company, of which the applicant and the transmission licensees are the subsidiaries, influencing their decisions. In this view of the matter, in the light of law laid down by the Hon'ble Supreme Court, in particular in Life Insurance Corporation of India vs Escorts Ltd and others (supra) we are justified in lifting the corporate veil and to hold that they are de facto the limbs of one and the same entity. The fact that Shri Ratho is the Managing Director of both the companies, MSEB Holding Company Limited and the transmission company, and he is also Director & CEO of the applicant, only reinforces the above conclusions since he has been vested with the power of decision making in all the three companies.*

23. The Act categorically prohibits the State Transmission Utility and the State Load Despatch Centre from engaging in the business of trading in electricity. The main purpose of the of trading in electricity and to ensure impartiality in their functioning. The STU and the SLDC have crucial roles in implementing non-discriminatory open access under the Act. The functions assigned to these entities under the law are such that there should be no semblance of their discriminating against any one. Law thus attaches paramount significance to the independence of the STU and the SLDC in their operation and has made provisions prohibiting trading by these statutory entities. We have held that the applicant and the STU (which is also operating the

SLDC) are the integrated organs of one concern, MSEB Holding Co. Ltd. Under these circumstances, grant of licence for trading to the applicant will be violative of the spirit of law, that is, the provisions of the Act which interdict undertaking of trading by the STU and the SLDC. In view of the statutory provisions as contained in the Act, the applicant cannot be considered for grant of license for trading in electricity.

24. The application accordingly stands rejected."

42.13. In the aforesaid Order the CERC has held that the applicant MSTCL and STU are integrated organ of one concern. MSEB holding company Ltd. and therefore, the licence for trading prayed by the MSETCL was not granted and the same is rejected. Thus, the issue before the CERC in the aforesaid Petition is different and distinct than the issue in the present Petition since the issues in the present Petition are pertaining to amendment in the Open Access Regulations.

42.14. The decision of the Hon'ble APTEL in Appeal No. 182 of 2008 where Hon'ble APTEL in its Judgment dated 29.04.2009 upheld the decision of the CERC is concerned is also related with the issuance of trading license. The relevant portion of the said Judgment is reproduced below:

"Findings & Conclusion

17. Considering the contentions of the learned counsel of the Appellant and Respondent No. 1, the Central Commission, documents submitted and written submissions made, we find that:

(a) It is not disputed that the scheme of the Act is to ensure that 'Maha Transco' is a Government owned company which is conferred the status of the State Transmission Utility (STU) and mandated to administer the functioning of State Load Despatch Centre (SLDC). The underline objective of the aforesaid arrangement is to mandatorily provide non-discriminatory open access to the transmission capacity of 'Maha Transco' to any licensee and generating companies on payment of transmission charges. The competing demands on limited resources of 'transmission capacity' by a number of licensees (viz. traders; distribution companies, transmission licensees) and generating companies for commercial transactions of electricity is also to be recognized.

(b) It is also not disputed that in order to ensure establishment of non-discriminatory, non-partisan, unbiased and independent decision making system uninfluenced by any commercial interest, the Act prohibits the STU, SLDC and transmission licensees from engaging in the business of trading in electricity. It is not enough for the decision making to be non-partisan and unbiased but should be so

perceived by the competing s for sharing of limited resource of transmission capacity. The Appellant necessarily has to compete with other traders, licensees, generating companies for allocation of transmission capacity. The Appellant's organizational relationship with the entities controlling the transmission capacity should not give perception to its competitors that the Appellant will receive a preferential treatment.

(c) In the instant case, MSEB Holding Company is not only having 'controlling interests' but wholly owns the Appellant, 'Maha Trading' thereby holding the absolute control over it. Also as per Articles of Memorandum of Association of the Appellant company, the CMD and Directors of the company are appointed by the MSEB, Holding Company and shall hold office at the pleasure of the Holding Company. We are of the opinion that even if Mr. Surbat Ratho, CMD of MSEB Holding Company ceases to be the CMD of the Appellant company, it will not have any significance impact on the degree of control the holding company exercises over the Appellant company. It is also noted that 'Maha Transco' (STU) which controls the functioning of SLDC is also wholly owned by MSEB Holding Company. Thus, MSEB Holding Company has absolute control over all subsidiaries including the Appellant company which is to be engaged in the business of trading in electricity. Since the business of trading in electricity is inevitably linked to the availability of transmission capacity, it is quite likely that discretion available with STU may be used in favour of the Appellant as it has significant pecuniary benefit. The wholly owned shareholder, MSEB Holding Company is bound to have an interest in ensuring that the business of Appellant company increases.

(d) In view of the foregoing it is within the realm of possibilities that the commercial performance of the Appellant Company could perhaps be enhanced by giving it preferential treatment over its competitors by the STU through MSEB Holding Company. This perception itself obviously vitiates the mandatory non-discriminatory open access that STU/SLDC is required to provide under the Act.

(e) We are of the opinion that the doctrine of lifting of corporate veil in the instant case by the Central Commission is justifiably applied."

42.15. In the aforesaid decision Hon'ble APTEL upheld the decision of CERC on the ground that the transmission licensee /SLDC shall not be eligible to carry out the trading activities. In the aforesaid case the STU/SLDC are also governed by the holding company MSEB Holding Company Limited.

42.16. The Petitioners have also raised the issue that in case of NLDC /RLDC, the Central Government has issued notification and created POSOCO by segregating it from CTU/power grid. The aforesaid submissions of the Petitioners admittedly prove that the function of NLDC and RLDC was separated by the Government of India from CTU/PGCIL in the case of National level LDC and Regional level LDC. Similarly, in

case of SLDC, such power is available to the State Government to segregate it from STU.

42.17. Hence, the submission of the Petitioners regarding independence and ring fencing of SLDC is beyond the scope/jurisdiction of the Commission.

ISSUE NO. – 10

43. Now we deal with the issue No. (10) regarding insertion of appropriate provision in the GERC Open Access Regulations in respect of 'Monitoring and Dispute Resolution Committee for Open Access'.

43.1. The issue for creation of Dispute Resolution Committee for open access raised by the Petitioners and others is premised on the ground that there are various grievances raised by the open access customers related to open access and multitude of Petitions pending before the Commission on the ground(s) of denial of open access. There is conflict of interest arising out of common ownership of GETCO and SLDC with DISCOMs. A committee needs to be constituted for monitoring the functions of the nodal agency for open access, pending and rejected applications and recommend changes in the Regulations as and when required. It will be helpful to reduce the burden on pendency of disputes before the Commission. The Committee may be constituted with one member each from GUVNL, representative of the Commission, representative of industrial consumer association and other consumer organisations such as captive generating plant and open access consumers. There are various difficulties faced by the open access consumers which lead to disputes such as:

(i) Upstream network constraint in the Intra-State transmission system,
(ii) Difference in consideration of State STU losses by SLDC and DISCOMs,
(iii) While giving credit to the consumers the Distribution companies consider the actual schedule at the receiving end of the consumer by a methodology where STU losses and distribution losses percentage are cumulatively adjusted instead of segregating STU losses and distribution losses percentage, which results in loss of approximately 5000 units per month,

(iv) Short-term open access is required to be obtained 4 days in advance. In case application is rejected by the authority and deficiency note is raised except due to system constraints and force majeure, the resolution of such dispute before the Commission takes long time.

(v) The discrepancy in calculation of transmission charges and denying open access on the ground of non-payment of transmission and other charges.

(vi) Curtailment of power based on priority to DISCOMs, LTOA, MTOA and STOA.

(vii) No unscheduled interchange benefit to consumer in case of under drawl of units due to any shut down/breakdown of their own plant/GETCO network even if GRID frequency is high/low.

43.2. The dispute be decided by majority voting in the committee. The ownership of the utilities of the State owned SLDC, STU and distribution licenses may be treated as single entity.

43.3. The Respondents submitted that the Petitioners had not advanced any arguments on the said issue during the hearing. Further, the Respondents submitted that there can be no such monitoring and dispute resolution committee for open access as sought by the Petitioners and the allegations made are vague since the Petitioners have failed to substantiate or demonstrate the same and chosen not to press the said aspect during the hearing. There is no merit in the aforesaid contention.

43.4. The Act provides SLDC and STU as statutory bodies and various functions are assigned to them. The various Regulations have also been framed by the Appropriate Commission for the same. This Commission has already framed Intra-State Open Access Regulations, 2011, wherein a mechanism is built in with regard to scheduling and despatch, computation of transmission capacity available for grant of open access. In case of any dispute or non-implementation of Regulations by any authority, the open access applicants/customers are eligible to approach the Commission for dispute resolution, which is statutory body constituted under the Act for resolution of such dispute. The said power cannot be delegated in any manner, to any committee.

43.5. The introduction of committee for dispute resolution is also incorrect and unbalanced. The representatives from each distribution licensees, transmission licensees and SLDC are necessary parties in the committee.

43.6. We have considered the submissions made by the parties. The Petitioners and others have raised for constitution of the committee under the Open Access Regulations which will deal with the issues arising during open access availed by the open access customers as stated above. It is necessary to refer the provisions of the Act, specifically Sections 38, 39 (2) (d), 40 (c), 42 (2) (3), 86 (1) (c), (1) (f) and 181 of the Act. On combined reading of the aforesaid provisions, it is clear that the transmission and distribution licensees are required to give non-discriminatory open access on their network i.e. transmission network and distribution network. Further, the function is assigned to the Commission to facilitate Intra-State transmission and wheeling of electricity. Moreover, it also provides that whenever any disputes arises between the licensee and generating companies, the same may be adjudicated by the Commission or to refer the same to arbitration. Thus, the aforesaid provisions which are statutory provisions clearly provide that the duty is cast on the State Commission to regulate the activities of transmission and distribution network/system open access. There are no provisions regarding such functions to be assigned to the Dispute Resolution Committee. The said prayer of the Petitioners and others is against the statutory provisions of the Act.

43.7. The Petitioners have alleged with regard to multitude of Petitions pending before the Commission on denial of open access on various grounds as stated above. However, the same are non-substantiated with the relevant details or documents. It is noteworthy that the creation of Appropriate Commission under the Act is with consideration to appoint experts from different fields to deal with the subject matter as independent body. The duty cast on the Commission is to promote competition, protect the consumer interest and rationalise the tariff etc. in the electricity sector. As the open access is one of the tools for creation of competition in the sector, the said function cannot be assigned to any committee with representatives from the licensees, generating companies, CGP holders, consumer organisation of industries and others.

43.8. The Petitioners have also alleged with regard to higher losses calculated and applied against the open access customers in the energy accounting. However, there is no such dispute that is ever brought before the Commission. The open access customers have an opportunity to raise the aforesaid issue before the SLDC, where the energy accounting is carried out. If such dispute is raised by the open access customers and the same is not resolved, then they have the liberty to approach the Commission.

43.9. The Commission has many times dealt with the issues with regard to denial of open access by the licensee / SLDC, which were raised before the Commission by the open access customers and also passed appropriate Order after following the process of adjudication etc.

43.10. There are allegations made by the Petitioners that there is discrepancy in the calculation of transmission charges by the SLDC/GETCO. However, the Petitioners have not provided any supporting documents and is merely a statement made by the Petitioners without any documentary support. Therefore, there is no substance in such allegations made by the Petitioners without supporting documents. Similarly, the Petitioners have also contended that the denial of open access is made by the licensee(s)/SLDC on the ground of non-payment of disputed bills of transmission charges. However, there is no such case mentioned by the Petitioners nor any reference has been given by the Petitioner.

43.11. With regard to other issues like curtailment of the power based on priority to DISCOM, LTOA, MTOA and STOA and the benefits against the unscheduled interchange charges to the customer in case of under-drawl of power from the grid due to shut down / break down of their plant / GETCO network, even if grid frequency is high/low is also not substantiated by submitting supporting documents. Thus, the aforesaid contention of the Petitioners is merely a statement and therefore, the same is not acceptable.

44. Based on the above, we are of the view that there is no requirement of provision in respect of 'Monitoring and Dispute Resolution Committee for Open Access' in the

GERC Open Access Regulations and accordingly, we decide that no amendment is required in the Regulations on this aspect.

ISSUE NO. – 11

45. Now we deal with the issue No. (11) regarding requirement of new provision in the GERC Open Access Regulations in respect of Transmission Planning and Network extension plan and its publication.

45.1. The Petitioners and others have submitted that the Open Access Regulations requires to have the provisions regarding mandate to the State Transmission Utility (STU) of Transmission Planning and Network extension plan and its publication.

45.2. The Open Access Regulations notified by the Commission do not provide for the sharing of information on future transmission planning and expansion carried out by the transmission licensee/STU. The trajectory or planning for strengthening and extension of transmission network in the State is a critical information, which impacts the decision of the open access customers/consumers with regard to location of their generating plant, apply for open access etc. The Commission, therefore, needs to mandate the STU/Transmission licensee to publish transmission system plan for next five years by September of every year, so that the stakeholders are apprised regarding network expansion, new transmission lines, substations, proposed strengthening scheme etc.

45.3. The Open Access Regulations do not impose any penalty on failure of transmission licensee to conduct system strengthening and capacity upgradation in line with the capacity addition and load growth in the State. It affects the open access by way of curtailment due to constraints in the network. Ultimately, the beneficiaries of such curtailment in Gujarat are the utilities itself, which are owned by a single holding company- GUVNL. Therefore, the Commission may consider inserting a provision in the Open Access Regulations to mandatorily conduct annual review of transmission capacity of the licensee and in event of failure to upgrade the transmission capacity then penalty may be imposed on them. The transmission licensees have various functions as enumerated under Section 39 and 40 of the Act.

45.4. The Respondents contended that the issues raised by the Petitioners have nothing to do with the Intra-State Open Access Regulations and has no relevance to the present proceedings.

45.5. The Respondents also objected to the aforesaid proposed amendments by the Petitioners and others stating that the transmissions system planning and related aspects are dealt in other Regulations of this Commission. It has no consequence with the grant of open access and thereby with the Intra-State Open Access Regulations, 2011.

45.6. The Respondents contended that the transmission system planning and related aspects raised by the Petitioners are beyond the scope of the Open Access Regulations. The Open Access Regulations provide for system study and based on the same for any expansion or upgradation work of network required to be carried out for granting LTOA. The said Regulations also provide that no augmentation or system strengthening work to be carried out while considering STOA and MTOA because the investment in transmission and distribution network is substantial and licensee would get the service of such investment over a period of time. The charges payable by the open access customer is only the avenue to service the capital cost. The investment made to cater to the demand of STOA or MTOA would leave the licensee in lurch, as they may not be able to recover transmission or wheeling charges for such expansion after the period of open access. The period of 7 years of LTOA proposed by the Petitioners and others is not sufficient against the tenure for repayment of loan and the licensee would not be able to service the capital cost and debt from the open access customer for whom system is built. In such a case the consumers at large in the State will be compelled to bear such cost which is arbitrary, unjust and unfair.

45.7. We have considered the submissions made by the parties. The contentions raised by the Petitioners and others stating that the capacity addition in the transmissions system by way of strengthening and upgradation of the existing system and creation of new transmission system needs to carried out STU/Transmission Licensee and any failure to do so creates curtailment in the transmission of electricity due to various system constraints. The licensee may be directed and mandated to conduct

annual review of transmission capacity and ensure that system strengthening and network upgradation is undertaken by the licensees as may be required. In case of failure in doing the same, the licensee needs to be penalised. In this regard it is necessary to refer Section 39 (1) (2) of the Act.

"Section 39. (State Transmission Utility and functions):
……
….. (2) The functions of the State Transmission Utility shall be –

(a) to undertake transmission of electricity through intra-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with -

(i) Central Transmission Utility;
(ii) State Governments;
(iii) generating companies;
(iv) Regional Power Committees;
(v) Authority;
(vi) licensees;
(vii) any other person notified by the State Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy: Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the State Commission:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use."

45.8. As per the aforesaid provisions, the transmission licensee shall comply with technical standards of operation and maintenance of transmission lines in accordance with transmission licence. The licensee has a duty to built, maintain and operate an efficient Intra-State transmission system. The creation of transmission system carried out by the licensee is for the long term open access customer and not for the short term and medium terms open access customer. Further, the recovery of transmissions charges towards the assets constructed, operated and maintained by the licensee from the LTOA is with the consideration of the useful life of assets created. The licensee shall be required to recover the debt services and expenses carried out by it for creation of such network. Any non-payment, under recovery or outstanding dues from the LTOA customers due to non-utilisation of network by them in that case the licensee shall be deprived of recovery of its legitimate transmission charges and more particularly servicing of debt will be affected. Moreover, such burden shall be passed on to the other consumers, which is against the spirit of the Act.

45.9. We also note that the issue raised by the Petitioners is about the verification of annual review of the transmission capacity carried out by the transmission licensee or it is not relevant as the same is beyond the scope of the open access provisions. There are limited provisions with regard to grant of open access and where any LTOA, if demanded by the applicant, in that case the transmission licensee is required to carry out the load flow study and thereafter based on same, if necessary, system augmentation has to be undertaken by creation of new transmission lines or existing capacity enhancement or strengthening the same. There is no provision for creation of new transmission capacity or system augmentation for MTOA or STOA. The aforesaid provisions are not a part of the Open Access Regulations but are part of the GERC Grid Code.

45.10. We have considered the submissions made by the parties. We also note that the transmission planning is carried out by the STU with consideration of the requirement for the evacuation of power or meeting load growth requiring load flow study, upcoming generation, load growth etc. in co-ordination with CTU, State Government, Generating companies, Regional Power Committee, Authority, Licensees and any person notified by the State Government. The planning of

transmission system is different and distinct from the open access on the transmission system. It gives only the future planning of the transmission system proposed by the STU in the State for development of efficient, coordinated and economical system for transmission of electricity in the State. Moreover, the transmission licensees/STU are also required to file the Tariff Petition before the Commission for determination of Tariff/ARR on annual basis as well as under the MYT Regulations. The Tariff Petition filed consists of the details of proposed transmission works to be carried out by the STU/licensee, which is also uploaded on the website. The stakeholders including open access customer(s) have an opportunity to submit their views or comments or suggestions on the same. The Commission after duly considering the submissions of the stakeholders and STU/transmission licensee decides the matter. Therefore, the contention of the Petitioners and others are not valid and correct and based on the above reasons, the same deserves to be rejected and are therefore, not accepted.

46. Based on the above, we are of the view that there is no requirement of any provisions in respect of 'Transmission Planning and Network extension plan and its publication' in the GERC Open Access Regulations and accordingly, we decide that no amendment is required in the Regulations on this aspect.

ISSUE NO. – 12

47. Now we deal with the issue No. (12) regarding amendment of Regulation 17 of the GERC Open Access Regulations in respect of 'Consideration of application from defaulters'.

47.1. The Petitioners have submitted that the provisions contained in Regulations 17 of the Open Access Regulations notified by the Commission grants the liberty to the nodal agency to reject application(s) seeking open access on the ground of non-compliance of provisions of the Regulations, specifically the payment of charges specified under the Regulations.

47.2. The word 'defaulter' used in the aforesaid Regulation is misinterpreted/misused by the STU, though the person/generating company may actually not be a defaulter. No chance for explanation is also given to the applicant.

47.3. The transmission licensee/ STU, may reject an application of an alleged defaulter on the pretext that a miniscule amount reflects as outstanding in the STU record. Prior to denial of open access on the ground of non-payment of charges under the Regulations without providing an opportunity of explanation to such defaulter may not permitted.

47.4. The Respondents submitted that the Open Access Regulations notified by the Commission provides specific process and procedure to deal with the open access applications. The submission by the Petitioners and others that open access needs to be allowed to applicants desirous of availing open access, despite non-compliance of the provisions of the Regulations, like non-payment of the dues of the licensees is not permissible. The Petitioners have raised unsubstantiated and speculative allegations against the licensees in respect of availing open access even when it has not made payment of various charges payable under the open access. The Petitioners are seeking for processing of open access applications despite the non-compliance with the provisions of the Regulations or pending dues is not acceptable because there cannot be default on payments and still seek processing of open access application and continue to avail the open access. In case of any charges which are raised by the licensee but are disputed by the open access customers, in that situation the open access customers can challenge the same before the appropriate forum and seek appropriate Order thereon. The prayer of the Petitioners on aforesaid issue, if allowed, then in that situation the open access customer may dispute each and every bill so as to avoid payment of relevant charges and yet continue to avail open access.

47.5. As the Petitioners have referred Regulation 17 of the GERC Open Access Regulations, 2011 and requested that the denial of the open access, if any, by the nodal agency on the ground of non-compliance of the provisions of Open Access Regulations by defaulter of the licensee needs to be amended so as to allow open access. It is necessary to refer the said provision of Regulation 17 which is reproduced below:

"17. Consideration of applications from defaulters
Notwithstanding anything contained in these regulations, the Nodal Agency shall be at liberty to summarily reject an application for Open Access on the ground of non-compliance of the provisions of these regulations, more specifically the provisions relating to timely payment of the charges leviable hereunder."

47.6. As per the aforesaid provisions, whenever, any person is in non-compliance of the provisions of Open Access Regulations or defaulter of timely payment of the charges leviable under the Regulations in that case the nodal agency shall be at liberty to summarily reject such application.

47.7. The Petitioners have contended that the licensees/nodal agency are empowered under the Regulations to reject the applications on the ground of default in the payment or non-compliance of Regulations by way of misusing/misinterpreting the word 'defaulter' in the aforesaid Regulation, without giving a chance to explain the same. The licensee/nodal agencies reject the application on pretext that minuscule amount is reflecting as outstanding in their record.

47.8. We note that in case the open access applicant is having any dispute with regard to any amount raised by the licensee or outstanding dues being incorrect, in that situation such customer/applicant has the liberty to approach the Commission challenging such decision of the STU/nodal agency. Further, even if any minuscule amount is reflecting as outstanding in their record, it qualifies as pending dues from the applicant/open access customer, irrespective of whether the amount is small or significantly higher which is not discriminated while deciding and declaring the 'default of payment' of the licensee/nodal agency or SLDC. The contention of the Petitioners that prior to rejecting any such application, an opportunity of hearing needs to be given to the concerned open access customers is not substantiated by the Petitioners with any instance/case alongwith its supporting documents that the licensee/STU/SLDC has rejected such application on the ground of non-payment of dues or defaulters of the licensees with this Petition. In such situation, it seems that the allegations made by the Petitioners and others are mere submissions without any substance in absence of supporting documents. The various charges payable by the open access customers under the Regulations otherwise needs to be adhered for

payment. The demand of the Petitioners is highly unreasonable and out of proportion which is required to be rejected summarily.

48. Considering the above, we are of the view that there is no substance in the aforesaid issue and not supported with any documents/case. The same is therefore, not admissible and hence we decide that there is no merit for any amendment.

ISSUE NO. – 13

49. Now we deal with the issue No. (13) regarding requirement of amendment of the GERC Open Access Regulations in respect of transmission charges for dedicated transmission lines.

49.1. The Petitioners submitted that the cost of dedicated transmission lines are borne by the generating company for the period prior to operationalisation of the LTOA and after operationalisation of LTOA. This results in generating company being saddled with huge financial implication. There are number of disputes going on regarding mismatch of commissioning of the generating station with the commissioning of dedicated transmission lines. The mismatch in creation of transmission lines and delay in commissioning of generating stations are related with Right of Way (RoW) issues, delay in obtaining clearances etc.

49.2. The Petitioners requested that where the dedicated transmission lines are created or under construction by STU / transmission licensee, the transmission charges for such lines shall be payable by the concerned generating company to the transmission licensees from the date of COD of the dedicated transmissions lines up to operationalisation of LTOA of the generating company. After operationalisation of the LTOA, the dedicated lines should be included in the POC pool and payment of transmission charges for the dedicated transmission lines should be governed accordingly.

49.3. In response to aforesaid submissions, the Respondents contended that it is the duty of the generating company under Section 10 and CGP holders under Section 9 to create the dedicated transmission lines up to the load centre or up to the sub-station from their generating station or Captive Generating Plant as the case may be. There

is no reason or logic for other beneficiaries in the State to bear the burden for such dedicated transmission lines. Such lines cannot be included into the pooled cost whereas, the Petitioners are seeking to pass on the burden of the Captive Generating Plant holders or generating company/beneficiaries of the generating company to the distribution licensees and its consumers and other general body of open access consumers, which is arbitrary and unjust.

49.4. We have considered the submissions made by the parties. The definition of Dedicated transmission lines, Captive Generating Plant (CGP), Generating companies and relevant Sections 9 and 10 of the Act are already referred earlier. Section 9 and 10 recognise that the CGP and Generating companies are required to establish, operate and maintain the dedicated transmission lines which is a transmissions line from the generating stations / CGP to the transmission lines or sub-stations or load centre as the case may be. Thus, it is a duty cast upon the CGP holder and generating company to set up, operate and maintain the dedicated transmission lines associated with their CGP or generating stations. It is constructed as a radial line emanating from the captive power generating unit to the interconnection point of the transmission system. Since, the same would not be required to be utilised by the distribution licensees and therefore, even strengthening of the line is not utilised by them. There is no reasons or logic for the other beneficiaries to bear the burden of such dedicated transmission lines. Therefore, the contentions of the Petitioners that the cost of such lines be included in the pooled cost is not valid and permissible but it is unjust and unfair because if the same is permitted, the burden of the O & M and creation of the dedicated lines be passed on to the general body of consumers of the State and other Open Access users. We also note that the dedicated lines are between the generation station to the transmission lines or sub-station or load centre. It is only utilised by either the generating station or the beneficiaries of such generating station. Therefore, the contention of the Petitioners is not acceptable and hence, we decide that the same deserves no consideration for amendment in the GERC Open Access Regulations.

ISSUE NO. – 14

50. Now we deal with the issue No. (14) regarding amendment of Regulation 37 of the GERC Open Access Regulations in respect of 'Payment Security Mechanism'.

50.1. The Petitioners have submitted that as per the provisions of Regulation 37 of the GERC (Open Access) Regulations, 2011, the LTOA and MTOA applicants are required to open/provide an irrevocable Letter of Credit in favour of the agency responsible for collection of various charges for the estimated amount of such charges for 2 months. The STU GETCO has been recovering the charges against the said Regulations by demanding irrevocable revolving Letter of Credit instead of irrevocable Letter of Credit from the applicants. The Commission may clarify regarding the aforesaid issue stating that the payment security mechanism provided in Regulations 37 is in the form of irrevocable Letter of Credit only and it has not to be irrevocable revolving Letter of Credit.

50.2. The Respondents contended that the security mechanism provided in the aforesaid Regulations would be necessarily by way of irrevocable revolving Letter of Credit to be provided by the open access customers since the said security mechanism is necessary for the entire term of the open access. As per the existing Regulation, the Commission has provided that the applicant for open access needs to open an irrevocable Letter of Credit in favour of the agency responsible for collection of various charges for the estimated amount of various charges for a period of two months although payment security for the estimated charges is required for the entire period of open access. If the Letter of Credit is not revolving and any bill raised by the agency is not paid or disputed requiring invocation of Letter of Credit then once the Letter of Credit is invoked, there is no further payment security mechanism for the balance term of the open access granted. This is not the intent of the Open Access Regulations. The formulation of the various Regulations is the prerogative of the Commission with consideration of exercise of its legislative functions which is also decided by the Hon'ble Supreme Court in it is Judgment in case of PTC India Limited Vs. CERC reported in (2010) 4 SCC 603.

50.3. We have considered the submissions made by the parties. The issue raised by the Petitioners is with regard to Regulation 37 of the GERC Open Access Regulations, 2011, which provides for payment security mechanism as under:

"37. Payment Security Mechanism
In case of long-term access and medium-term open access, the applicant for open access will open an irrevocable Letter of Credit in favour of the agency responsible for collection of various charges for the estimated amount of various charges for a period of two months."

50.4. The aforesaid Regulation pertains to payment security mechanism required to be provided by the Long term and Medium term open access customers. The said Regulation provides that LTOA and MTOA applicants/customers will open an irrevocable Letter of Credit in favour of the agency who is responsible for collection of various charges for the open access on estimated amount for a period of 2 months. The purpose of the said Regulation is to ensure recovery of various charges by the collecting agency from the LTOA and MTOA customers. The revolving Letter of Credit (LC), if not provided, then on invocation of LC, if done once, there will be no further payment security mechanism available for the remaining period of open access term of the MTOA or LTOA customer. In case of revolving Letter of Credit (LC), the collecting agency for open access charges shall not be deprived from collection of charges against the open access, from the MTOA/LTOA customers who failed to pay their charges against the bill(s) raised. It leads to no payment security mechanism available, once the irrevocable LC is invoked on account of failure of payment by the open access customer, which is against the intent of the provision in the said Regulation. Therefore, the contention of the Petitioners is not acceptable.

50.5. We are of the view that Revolving Irrevocable Letter of Credit from the open access customer is necessary for protecting the nodal agency for recovery of the charges from the open access users as part of the provisions of the Regulations notified by the Commission. In case of non-payment of the charges it results in non-recovery of the charges from the open access users and there will be under recovery of the relevant charges, which will not only affect the energy accounting carried out by the nodal agency but the charges shall also remain unrecovered by the concerned agency, which is not the intent of the Regulation. It is also the duty of the entity concerned, which has obtained/availed the open access, to pay the charges in accordance with the Regulations notified by the Commission. Further, in case of any dispute regarding the same, they are eligible to raise the same before the

appropriate authority/Commission. Hence, we are of the view that the aforesaid issue needs no further deliberation.

51. We note that after directions to join others into the present petition, Respondents No. 32, 34 and 40, joined in the petition and raised additional issues, which are not confined to the main petition. The Respondent Discoms have opposed the addition of new issues at the time of arguments and these issues have also not been deliberated on the merits in the present case. Therefore, without going into the technicalities, the aforesaid Respondents are given liberty to approach the Commission separately along with their issues, if they so desire.

52. After careful consideration of the entire submissions of the Petitioners and the contentions of the Respondents, we find no merit in the matter. We have carefully gone through the relevant provisions and the materials produced before us. The Petitioners have failed to substantiate their demand and also failed to convince the Commission on the issues raised. As discussed and decided above, this petition deserves to be dismissed.

53. We order accordingly.

54. With this order the present Petition stands disposed of.

Sd/-
[Mehul M. Gandhi]
Member

Sd/-
[Anand Kumar]
Chairman

Place: Gandhinagar
Date: 11/02/2021.