

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF APRIL, 2026



PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE C.M. POONACHA

WRIT APPEAL NO. 927 OF 2023 (GM-KEB)

BETWEEN:

1. KARNATAKA POWER TRANSMISSION
CORPORATION LIMITED
A COMPANY REGISTERED UNDER THE
PROVISIONS OF THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
KAVERI BHAVAN
BENGALURU - 560 009
2. STATE LOAD DISPATCH CENTRE, KPTCL
HAVING ITS REGISTERED OFFICE AT
NO. 28, RACE COURSE ROAD
BENGALURU - 560 009

...APPELLANTS

(BY SRI S. SRIRANGA, SENIOR ADVOCATE FOR
SMT. SUMANA NAGANAND, ADVOCATE)

AND:

1. M/S SHAMANUR SUGARS LIMITED
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
NO.374, 4TH MAIN, P.J. EXTENSION
DAVANGERE - 577 002
2. CENTRAL ELECTRICITY
REGULATORY COMMISSION



3RD AND 4TH FLOOR
CHANDERLOK BUILDING
36, JANPATH, NEW DELHI - 110 001

...RESPONDENTS

(BY SRI SHRIDHAR PRABHU, ADVOCATE FOR R-1 &
SRI PRADEEP NAYAK, ADVOCATE FOR R-2)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT, 1961 PRAYING TO SET ASIDE THE ORDER DATED 22/05/2023 PASSED BY THE LEARNED SINGLE JUDGE IN W.P. NO.46495/2012 AND CONSEQUENTLY ALLOW THE WRIT PETITION.

THIS WRIT APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU ,CHIEF JUSTICE
and
HON'BLE MR. JUSTICE C.M. POONACHA

C.A.V. JUDGMENT

(PER: HON'BLE MR. VIBHU BAKHRU ,CHIEF JUSTICE)

INTRODUCTION

1. The appellants have filed the present intra-court appeal impugning a judgment dated 22.05.2023 [hereinafter '**the impugned order**'] passed by the learned Single Judge of this Court dismissing the writ petition filed by the appellants— W.P.No.46495/2012 (GM-KEB).

2. Appellant No.1 - Karnataka Power Transmission Corporation Limited [hereinafter referred to as '**KPTCL**'], is a Government Company and its shares are held by the State of Karnataka. It is the State Transmission Utility as defined under Section 39 of the Electricity Act, 2003 [hereinafter referred to as '**the Act**']. KPTCL is engaged in the business of transmission of electricity in the State of Karnataka, and its functions are set out under Sections 39(2) and 40 of the Act. Appellant No. 2 - the State Load Despatch Centre [hereinafter referred to as '**SLDC**'], constituted under Section 31 of the Act. KPTCL operates the SLDC as per the first proviso to Section 31(2) of the Act. The primary function of the SLDC is to ensure integrated operation of the power system in the State of Karnataka.

3. Respondent No.1, M/s.Shamanur Sugars Limited [hereinafter '**SSL**'], is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Davangere, Karnataka. SSL is a generating company and has established a bagasse-based co-generation power plant with a capacity of 20 MWs. Respondent No.2 is the Central Electricity Regulatory Commission [hereinafter referred to as '**CERC**'], constituted under

Section 76 of the Act to discharge the functions enumerated under Section 79 of the Act.

4. The appellants had filed the writ petition, from which the present appeal arises, challenging an order dated 09.10.2012 (hereafter '**the CERC's order**') passed by the CERC in Petition No. 124/MP/2011. SSL had filed the said petition, *inter alia*, challenging the amended condition, Clause (m) (hereafter referred to as '**the impugned condition**' or '**the impugned clause**'), inserted by the SLDC in the Standing Clearance and No-Objection Certificate [hereinafter referred to as '**SC/NOC**'] issued to SSL for inter-State open access transmission. The CERC set aside the impugned clause and directed the appellants to settle the dues of SSL from January, 2010 onwards in accordance with Regulation 20 (5) of the CERC (Open Access in Inter-State Transmission) Regulations, 2008 [hereinafter referred to as '**the Open Access Regulations**']. The appellants, *inter alia*, contended that (i) the CERC lacks the jurisdiction to pass the said order; (ii) the SLDC's action in inserting the said clause was statutory in nature and not administrative ; and (iii) Regulation 8 of the Open Access Regulations is *ultra vires* the provisions of the Act. The learned Single Judge dismissed the writ petition by the impugned order. The learned Single Judge upheld

the CERC's order and further directed the State Government to establish a separate independent entity to function as the SLDC.

5. Before considering the import of the reliefs sought by the appellants in the writ petition and the challenge raised in the present appeal, it is relevant to set out the factual context in which the controversy involved in the writ petition and the present appeal arises.

PREFATORY FACTS

6. SSL commissioned a 2,500 TCD sugar plant along with a 20 MW bagasse-based co-generation power plant, which commenced commercial operations in September 1999. On 07.03.1998, SSL entered into a Power Purchase Agreement [hereinafter referred to as '**the PPA**'] with KPTCL for selling surplus power of 10 to 15 MWs to the State grid. The PPA was for a term of ten years.

7. The PPA came to an end in September 2009. Thereafter, SSL was under no obligation to sell power to KPTCL or its successors. SSL, after meeting its captive load, commenced selling its surplus power on short-term open access through bilateral sales and the Power Exchange to consumers outside Karnataka. Accordingly,

SSL applied for SC/NOC from the SLDC as mandatorily required for short-term open access under the Open Access Regulations.

8. The initial SC/NOC granted by the SLDC to SSL contained a clause, Clause (m), which reads as follows:

“(m) Payment will not be made if power is supplied in excess of 5% of the approved schedule by KPTCL/ESCOMs.”

9. SSL states that the said initial Clause(m) was broadly in consonance with the Open Access Regulations. It is further stated that in consideration of the support provided to the grid from September to December 2009, SSL received approximately ₹11,00,000/- as UI charges from the appellants. However, SSL contends that the calculation method was not shared with it. Additionally, SSL states that it did not receive the UI charges from January to March 2010.

10. In or about March 2010, SSL applied afresh for SC/NOC from the SLDC for selling power through the Power Exchange. The SC/NOC thereafter issued by the SLDC, with effect from 01.04.2010 contained the impugned clause, which reads as under:

“Clause (m) – for any excess generation, the rates fixed by KERC for old plants only will be paid and not as per UI rates. However, for shortfall in generation as

compared to the scheduled generation, the firm will pay UI rates.”

11. On 21.02.2011 (It is incorrectly mentioned as 09.05.2011 in the synopsis), SSL filed a petition, Petition No.124/MP/2011, before the CERC under Section 79(1)(f) of the Act read with Regulation 26 of the Open Access Regulations, *inter alia*, seeking the following reliefs:

"(a) declare that clause (m) Introduced as the additional condition in the standing clearance issued by the Respondent No. 2 to the. Petitioner from 1st April, 2010 (being Annexures B (colly)) are contrary to the CERC (short term open access transmission) Regulation 2008 and the CERC (Unscheduled Interchange charges and related matters) Regulations 2009; and

(b) direct the Respondent to compute the UI charges for the transactions made by the Petitioner from January, 2010 till date and settle the same in terms of the CERC (Unscheduled Interchange charges and related matters) Regulations, 2009, as amended from time to time;

(c) direct the Respondent to give detailed energy accounts and necessary supporting documents towards UI settlements to the Petitioner for each settlement period.

(d) Pass such other or further orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case."

RIVAL CONTENTIONS BEFORE CERC

12. The appellants contend that the said impugned condition was imposed to regulate injection and drawal of power by SSL, having regard to its history of drastic deviation from the approved schedule, resulting in sharp increases and decreases in grid frequency, in the interest of grid security and to curb 'gaming' activities. It is stated on behalf of the appellants that the generation pattern of SSL prior to the insertion of the impugned clause, was erratic and demonstrated gross negligence on SSL's part in following the approved schedule, thereby causing danger to the grid. The appellants also state that generators with an installed capacity of less than 25 MWs, such as SSL (with a capacity of 20 MWs), were not subject to the Regulations pertaining to Availability-Based Tariff (ABT) and were not required to compulsorily install SCADA (Supervisory Control and Data Acquisition), making monitoring of their injections and drawals through ABT impossible.

13. SSL, counters the said submissions and contends that the impugned clause is contrary to Regulation 20(5) of the Open Access Regulations and the CERC (Unscheduled Interchange Charges and Related Matters) Regulations, 2009 (referred to as

'the UI Regulations'). SSL contends that SLDC cannot impose conditions for determining tariffs and charges for power sold on inter-State open access; nor can it impose restrictions on UI charges receivable in the hands of the generator and link them to the tariff determined by the KERC. SSL further contends that the impugned clause is arbitrary, inasmuch as while the generator would be required to pay at the prevailing UI rate for shortfall in actual generation in relation to scheduled generation, it would receive a lesser rate — being the KERC rate for old plants — for over-injection, which was contrary to the symmetry envisaged by Regulation 20(5).

14. As noted above, SSL filed the petition before CERC. SSL contended that since its surplus power was being sold on inter-State open access to consumers outside Karnataka, the dispute fell within the jurisdiction of the CERC.

15. On being notified by the CERC about the said proceedings, the appellants entered appearance and filed their Statement of Objections dated 24.08.2011 before the CERC. It was the appellants' case that:

(a) the SLDC had been constituted under Section 31 of the Act, with duties and functions enumerated in Section 32 of

the Act, and its primary duty was to ensure integrated operation of the power system in the State of Karnataka;

(b) Section 33 of the Act provides that the directions issued by the SLDC are binding and are to be complied with by every licensee, generating company, generating station, sub-station and any other person connected to the grid;

(c) having regard to the history of SSL in deviating from the approved schedule of injection and drawal of electricity, the SLDC imposed the said condition to regulate injection and drawal of power so as to ensure grid safety and security;

(d) SSL had the tendency of drastic deviation from the approved schedule resulting in sharp increase and decrease in grid frequency; and

(e) the power generation pattern which resulted in the imposition of the additional condition was placed before the CERC.

16. The appellants also filed a statement before the CERC, wherein they further elaborated upon the pattern of deviations by SSL. They contended that there was absolute negligence on the part of SSL in not following the approved schedules, which resulted in random over-drawal and injection of power, endangering grid security. It was also pointed out that generators with a capacity of less than 25 MW were not subject to the Regulations pertaining to Availability-Based Tariff (ABT) and that SSL, being a co-generation plant of 20 MW capacity, did not fall under the purview of ABT/SCADA.

17. SSL filed a rejoinder to the Statement of Objections before the CERC, denying the allegations that it was not complying with the schedule and endangering grid security. It was contended by SSL that it had at all times tried to abide by the schedule approved by the SLDC and that the appellants had failed to present any sustainable reasoning for inserting the impugned condition or for non-payment of UI charges. SSL further contended that the data placed on record by the appellants was selective, covering only a chosen few days, and was therefore not reliable for ascertaining its conduct.

18. During the hearing on 20.12.2011, the CERC raised a query as to whether the State of Karnataka had implemented Availability-Based Tariff (ABT). The CERC further directed the appellants to file an affidavit on oath indicating under which provision of the Regulations the additional clause had been inserted and whether the KERC had framed any such Regulations.

19. Pursuant to the aforesaid direction of the CERC, the appellants filed an affidavit dated 05.01.2012, in which it was submitted that:
(i) the rationale behind inclusion of the impugned clause was to regulate injection and drawal of power by generators so as to effectively monitor the grid to ensure grid safety and security at all

times; (ii) SSL had a tendency to deviate drastically from the approved schedule resulting in sharp increase/decrease in the grid frequency; (iii) the SLDC was entitled to give directions under Section 33 of the Act for integrated grid operation and had taken precautionary measures to ensure that generators having obtained open access follow their schedule so as to ensure grid stability; (iv) the generation pattern of SSL prior to and pursuant to insertion of the impugned clause was annexed; and (v) as per the order of the KERC dated 20.06.2006 and the Grid Code issued by the KERC, all generators with installed capacity of 25 MW and above fall under the purview of ABT, and generators having an installed capacity less than 25 MWs are not required to compulsorily install ABT/SCADA. It was further submitted that there were numerous independent power producers within the State of Karnataka whose gross exportable capacity exceeded 700 MW, and if all variations in supply were not in keeping with schedules, it would have a disastrous effect on the stability of the grid.

CERC's ORDER

20. On 09.10.2012, the CERC passed the CERC's order in Petition No.124/MP/2011. The CERC, after considering the submissions of the parties, noted that in terms of Regulation 20(5) of the Open

Access Regulations, unless specified otherwise by the concerned State Commission, the UI rate for an intra-State entity shall be 105% (for over-drawals or under-generation) and 95% (for under-drawals or over-generation) of the UI rate at the periphery of the regional entity. The CERC observed that there was no intra-State ABT (Availability Based Tariff) in the State of Karnataka and that the KERC had not prescribed any limit for over-drawals or under-generation and under-drawals or over-generation by any intra-State entity. The CERC, therefore, held that the SLDC was bound to comply with the Open Access Regulations when issuing SC/NOC for open access in inter-State transmission of electricity, and that any deviation from Regulation 20(5) was a violation of the said Regulations.

21. The CERC further observed that the impugned condition (modified Clause (m) of the SC/NOC), which provided that any excess generation would be paid at the rates fixed by KERC for old plants only, had no basis and was arbitrary. The CERC noted that while the SLDC would receive UI charges for over-injection by the intra-State generators from the RLDC at the rate applicable to the prevailing frequency, it would make payments to the generators at the rates fixed by KERC for old plants, thereby making a profit on

account of the provisions of the amended Clause (m). The CERC also observed that the said provision was discriminatory, inasmuch as while the generator would pay at the prevailing UI rate for a shortfall in actual generation relative to scheduled generation, it would receive a lower rate than the UI rate for over-injection.

22. The CERC held that it is a settled principle of law that statutory regulations cannot be changed through administrative instructions and that in case of conflict between statutory regulations and administrative instructions, the former shall prevail. The CERC accordingly set aside the impugned clause and directed the appellants: (i) to align the SC/NOC for open access to inter-State transmission with the provisions of the Open Access Regulations and the UI Regulations framed by the CERC; and (ii) to settle the dues of SSL from January 2010 onwards in accordance with Regulation 20(5) of the Open Access Regulations, after sharing the relevant injection and drawal data with SSL.

WRIT PETITION – W.P.No. 46495/2012

23. Aggrieved by the CERC's order dated 09.10.2012, the appellants filed W.P.No.46495/2012 (GM-KEB) before this Court on 17.11.2012. The appellants contended that:

(i) the CERC failed to appreciate that the action of the SLDC in inserting the impugned clause was statutory in nature under Sections 32 and 33 of the Act and not administrative;

(ii) the CERC, being a statutory authority, could not sit in appeal over the statutory functions of another statutory authority, namely the SLDC, constituted under the very same enactment;

(iii) in case of conflict between statutory action and Regulations, the statutory action will prevail over the Regulations; and

(iv) the appellants also contended that the CERC had no jurisdiction to entertain the petition filed by SSL.

24. On 05.04.2013, the appellants were permitted, by order of this Court, to amend the Writ Petition so as to include an additional prayer, being prayer 1(a), seeking a declaration that Regulation 8 of the CERC (Open Access in Inter-State Transmission) Regulations, 2008 dated 25.01.2008 as *ultra vires* to the Act. The specific contention raised in support of the said prayer was that the said Regulation seeks to regulate the activities of the SLDC

de hors Sections 31 to 33 of the Act, and that the powers vested in the SLDC under Part V of the Act cannot be curtailed by the CERC through the device of subordinate legislation.

25. In the Writ Petition, SSL filed its Preliminary Statement of Objections, raising, *inter alia*, the following contentions: (i) the appellants had submitted to the jurisdiction of the CERC during the proceedings before it and had not challenged the CERC's jurisdiction at the initial stage; (ii) the appellants had an alternative and efficacious remedy by way of an appeal to the Appellate Tribunal for Electricity under Section 111 of the Act; (iii) a statutory body cannot seek quashing of a statutory provision in a parent Act or a subordinate legislation; and (iv) the CERC had rightly decided the matter before it. SSL relied upon the decision of this Court in **Karnataka Power Transmission Corporation Limited v. R.K. Powergen Private Limited**¹ and the decision of the Apex Court in **Uttar Pradesh Power Corporation Limited v. NTPC Ltd. and Others**², in support of its contention regarding the availability of an alternative remedy.

26. The CERC also filed its Statement of Objections. It was contended on behalf of the CERC that: (i) the CERC has the

¹ 2006 (2) KarLJ 608

² 2011 (10) SCALE 499

necessary powers to regulate all inter-State electricity transmission; (ii) the Open Access Regulations were validly framed under Section 178 of the Act and fall squarely within its scope; (iii) the KERC would have jurisdiction only in respect of intra-State transmission; (iv) when there is an inter-State element, the KERC, which exercises jurisdiction within the State of Karnataka, cannot have extra-territorial jurisdiction and it is for that reason that the CERC is vested with jurisdiction over inter-State transmission of power; and (v) the challenge to the *vires* of Regulation 8 of the Open Access Regulations was untenable and devoid of merits.

IMPUGNED ORDER

27. The learned Single Judge noted the following eight points for consideration:

- (i) Whether the CERC would have the power to regulate the transmission and distribution of power on intra-State lines?
- (ii) Whether the CERC would have the power to regulate the transmission and distribution of power on inter-State lines?

- (iii) Whether the disputes in the present matter could be raised under Section 79(1)(f) of the Electricity Act?
- (iv) Whether the SLDC can regulate inter-State electricity transmission by exercising its statutory powers?
- (v) Whether there is a conflict of interest between KPTCL and SLDC?
- (vi) Whether the order passed by the CERC in Petition No. 124/MP/2011 suffers from any illegality requiring interference at the hands of this Court?
- (vii) Whether the petitioners would have to be relegated to an appeal before the Appellate Tribunal in lieu of Section 111 of the Electricity Act?
- (viii) What order?

28. In regard to Points No. 1 and 2, the learned Single Judge referred to Sections 79 and 86 of the Act and held that from a comparison of the two provisions, it is clear that the jurisdiction of a State Commission is limited to the transmission of electricity within the State, that is, intra-State, whereas under Section 79 of the Act, the powers of the Central Commission relate to inter-State transmission, determination of tariff, and functioning of licensees.

The learned Single Judge held that the KERC would have power to regulate the transmission and distribution of power on all intra-State lines, while the CERC would have power to regulate the transmission and distribution of power on all inter-State lines, and as a corollary, the KERC would not have power to regulate inter-State transmission, which can only be regulated by the Central Commission.

29. With respect of Point No. 3, the learned Single Judge observed that the present dispute is one relating to inter-State transmission, inasmuch as the power/electricity is produced in the State of Karnataka and distributed outside the State of Karnataka. The learned Single Judge held that the CERC would have the powers under Section 79(1)(f) of the Act to adjudicate issues relating to inter-State transmission and distribution of electricity. The learned Single Judge further observed that the decisions relied upon by the appellants — **Indo Rama Synthetic Ltd.**³, **Kamachi Sponge & Power Corporation Ltd.**⁴, and **Sal Steel**⁵ — were all in matters relating to intra-State transmission, wherein the regulation and/or schedule formulated by the respective SLDC was within the State.

³ 2011 SCC OnLine APTEL 77

⁴ Appeal No. 120/2016

⁵ 2010 SCC OnLine Guj 3584

None of those decisions related to inter-State transmission; therefore, they would have no bearing on the present matter.

30. In respect of Point No. 4, the learned Single Judge, after examining Sections 31, 32 and 33 of the Act, held that the functions of the SLDC under Section 32 of the Act and the power to issue directions as provided under Section 33 of the Act, are restricted to intra-State transmission and do not extend to inter-State transmission. The learned Single Judge concluded that the SLDC cannot regulate inter-State electricity transmission by exercising its statutory powers under the Act.

31. With respect to Point No. 5, the learned Single Judge observed that in terms of Section 31 of the Act, a separate company is required to be established by the State to operate the SLDC. The learned Single Judge noted that despite the Act having come into force in the year 2003 and twenty years having elapsed there from, no action had been taken in that regard and the SLDC continued to operate under the State Transmission Utility. The learned Single Judge expressed the opinion that there is bound to be conflict between the State Transmission Utility and the functioning of the SLDC, and directed that the State establish a separate entity for operating the SLDC so that it can function independent of the State

Transmission Utility at the earliest, and at any rate within a period of six weeks from the date of receipt of the impugned order. The Registrar General was directed to forward a copy of the order to the Chief Secretary, Government of Karnataka.

32. With respect to Point No. 6, the learned Single Judge held that in view of the findings on the preceding points, the impugned condition imposed by the SLDC was bad in law and not authorised. The learned Single Judge observed that, since the dispute between the parties relates to inter-State generation, transmission, and distribution, the CERC, not the KERC, had the jurisdiction to decide the dispute. The learned Single Judge held that since the CERC had taken into consideration all the relevant aspects, there was no infirmity in the CERC's order.

33. With respect to Point No. 7, the learned Single Judge noted that the matter had been pending since the year 2012, had been taken up on merits, and all contentions which had been raised were considered. The learned Single Judge held that relegation of the petitioners (the appellants herein) to the Appellate Tribunal after a period of eleven years would amount to a travesty of justice, and accordingly declined to relegate the appellants to the statutory appellate remedy.

34. In view of the above, the learned Single Judge dismissed the Writ Petition.

35. It is material to note that the impugned order does not contain any finding with respect to the prayer seeking a declaration that Regulation 8 of the Open Access Regulations is *ultra vires* the provisions of the Act.

SUBMISSIONS

36. Sri S. Sriranga, the learned Senior Counsel appearing for the appellants, contended that the CERC's order was without jurisdiction and contrary to the provisions of the Act. He contended that the impugned condition was imposed by SLDC in exercise of statutory powers and therefore, the same could not be set aside by CERC, which is also another statutory body constituted under the Act. He also contended that in case of a conflict between any directions in exercise of statutory powers and the regulations, the statutory action would prevail.

37. Next, he submitted that the CERC could not set aside an action of another statutory authority under the Act. He further submitted that the regulations made by the CERC were *ultra vires* the Act, as they conflicted with the powers conferred on the SLDC under

Sections 31 to 33 of the Act. He also submitted that SSL had indulged in 'gaming', which would put the grid at risk. He contended that SLDC is responsible for the optimal scheduling and dispatch of electricity within a State and is required to monitor grid operations. It exercises supervision and control over the intra-state transmission system and is required to issue such directions as may be required. He submitted that the impugned clause has been imposed in exercise of such powers and thus, setting aside the same would in effect run contrary to the provisions of the Act.

REASONS AND CONCLUSION

38. At the outset, we may now note the reliefs sought by the appellants in the Writ Petition as also in the present appeal. In the Writ Petition No. 46495 of 2012 (as amended), the appellants sought the following reliefs:

“(a) Quash the order dated 09.10.2012 passed by the 2nd Respondent (CERC) in Petition No. 124/MP/2011 (Annexure-E);

(b) Declare that Regulation 8 of the CERC (Open Access in Inter-State Transmission)

Regulations, 2008 dated 25.01.2008 is *ultra vires* of the Act;

(c) Declare that the order dated 09.10.2012 passed by the 2nd Respondent in Petition No. 124/MP/2011 (Annexure-E) is without jurisdiction;

(d) Declare that the 2nd Respondent, in exercise of powers under Section 79 of the Act, cannot sit in appeal over the directions issued under Sections 31 and 32 of the said Act;

(e) Declare that the 2nd Respondent constituted under the provisions of the Electricity Act, 2003 cannot decide or declare the veracity of the decisions taken by another statutory authority i.e., the 2nd Petitioner (SLDC), which is also constituted under the provisions of the Act”

39. In the present appeal (Writ Appeal No. 927 of 2023 filed on 07.08.2023), the appellants pray that this Court be pleased to set aside the impugned order dated 22.05.2023 passed by the learned Single Judge in W.P. No. 46495 of 2012.

40. The principal questions to be addressed are:

(i) Whether Regulation 8 of the Open Access Regulations is *ultra vires* the Act?

(ii) Whether the CERC's order is without jurisdiction?

(iii) Whether the impugned condition is valid?

STATUTORY FRAMEWORK

41. Before proceeding further, it is necessary to briefly note the statutory framework governing the present dispute. The Act is a comprehensive enactment relating to, *inter alia*, the generation, transmission, distribution, trading and use of electricity.

42. In **PTC India Limited v. Central Electricity Regulatory Commission**⁶, the Supreme Court had observed:

“17. The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for “unbundling” of SEBs into separate utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory

⁶(2010) 4 SCC 603

Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.

18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare the National Electricity Policy as well as tariff policy for development of the power system based on optimum utilisation of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as the regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the tariff policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) of the 2003 Act (see also Section 66)."

43. Part V of the Act deals with the transmission of electricity. Whereas Sections 25 to 29 of the Act contain provisions concerning inter-State transmission, Sections 30 to 33 relate to intra-State transmission.

44. Section 31 of the Act provides for the constitution of State Load Despatch Centres. In terms of Section 31(1) of the Act, the State Government is required to establish a centre to be known as the State Load Despatch Centre for the purposes of exercising the

powers and discharging the functions under Part V of the Act. Section 31(2) of the Act provides that the SLDC 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, with a proviso that until such notification is issued, the State Transmission Utility shall operate the SLDC.

45. Section 32 of the Act enumerates the functions of the SLDC. Section 32(1) of the Act, posits that the SLDC shall be the apex body responsible for ensuring the integrated operation of the power system in a State. Section 32(2) of the Act provides that the SLDC shall, *inter alia*, be responsible for optimum scheduling and despatch of electricity within a State in accordance with the contracts entered into with the licensees or the generating companies operating in that State, monitor grid operations, keep accounts of the quantity of electricity transmitted through the State grid, exercise supervision and control over the intra-State transmission system, and be responsible for carrying out real-time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

46. Section 33 of the Act deals with compliance with the directions issued by the SLDC. Section 33(1) of the Act provides that the SLDC may give such directions and exercise such supervision and control as may be required for ensuring integrated grid operations and for achieving the maximum economy and efficiency in the operation of the power system in that State. Section 33(2) of the Act makes it obligatory upon every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system to comply with the directions issued by the SLDC. Section 33(4) of the Act provides a dispute resolution mechanism, stipulating that any dispute arising with reference to the quality of electricity or safe, secure and integrated operation of the State grid, or in relation to any direction given under sub-section (1), shall be referred to the State Commission for decision, with the proviso that pending such decision, the directions of the SLDC shall be complied with. Section 33(5) of the Act provides for a penalty not exceeding Rupees Five Lakhs for non-compliance with the directions of the SLDC.

47. The CERC is constituted under Section 76 of the Act. Section 79 of the Act enumerates the functions of the CERC, which include, *inter alia*: (a) regulating the tariff of generating companies owned or

controlled by the Central Government; (b) regulating the tariff of generating companies, other than those covered under clause (a), which enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.; (c) regulating the inter-State transmission of electricity; (d) determining tariff for inter-State transmission of electricity; (e) issuing licences to persons to function as transmission licensees and electricity traders with respect to their inter-State operations; and (f) adjudicating upon disputes involving generating companies or transmission licensees in regard to matters connected with clauses (a) to (d) above and referring any dispute for arbitration. Section 178 of the Act confers powers upon the CERC to make regulations consistent with the Act and the rules, so as to carry out the provisions of the Act.

48. The Karnataka Electricity Regulatory Commission [hereinafter referred to as '**KERC**'] is the State Commission constituted under Section 82 of the Act. The functions of the State Commission are enumerated under Section 86 of the Act and include, inter alia, determination of tariff for generation, supply, transmission and wheeling of electricity within the State, regulation of electricity purchase and procurement, facilitation of intra-State transmission

and wheeling of electricity, issuance of licences to persons with respect to their operations within the State, and adjudication of disputes between the licensees and generating companies. It is pertinent to note that the jurisdiction of the State Commission under Section 86 of the Act is confined to intra-State matters.

49. On 25.01.2008, the CERC notified the Open Access Regulations⁷, framed in exercise of powers conferred upon it under Section 178 of the Act. The said Regulations lay down the procedure and terms and conditions for the grant of open access to the inter-State transmission system. Regulation 8 of the Open Access Regulations provides for the SLDC's concurrence in bilateral and collective transactions. In terms of Regulation 8(2), a State utility or an intra-State entity proposing to participate in trading through a power exchange is required to obtain a no-objection or prior standing clearance from the SLDC. Regulation 8(3) of the Open Access Regulations sets out the procedure for obtaining such concurrence or no-objection, including timelines for the SLDC to process applications and grounds on which refusal may be communicated.

⁷CERC (Open Access in Inter-State Transmission) Regulations, 2008

50. Regulation 20 of the Open Access Regulations contains provisions for Unscheduled Interchange (UI) Charges. In terms of Regulation 20(4) of the Open Access Regulations, any mismatch between the scheduled and the actual drawal at drawal points and the scheduled and the actual injection at injection points for the intra-State entities is to be determined by the concerned State Load Despatch Centre and covered under the intra-State UI accounting scheme. Regulation 20(5) of the Open Access Regulations provides that unless specified otherwise by the concerned State Commission, the UI rate for an intra-State entity shall be 105% (for over-drawals or under-generation) and 95% (for under-drawals or over-generation) of the UI rate at the periphery of the regional entity. Regulation 20(6) stipulates that no charges, other than those specified under the said Regulations, shall be payable by any person granted short-term open access under the said Regulations.

CERC

51. Part X of the Act provides for the constitution, powers and functions of the Central Commission. Section 76 of the Act provides for Constitution of the CERC.

52. Section 79 of the Act sets out the functions of CERC. It is relevant to refer to the said section and the same is reproduced below:

"79. Functions of Central Commission. - (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause(a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in morethan one State;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses(a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i)to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :-

(i) formulation of National electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3."

53. Under Section 178 of the Act, CERC is also empowered to make regulations consistent with the Act and Rules generally to carry out the provisions of the Act. It is relevant to refer to Section 178 of the Act which is reproduced below:

"178. (Powers of Central Commission to make regulations).- (1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of following matters, namely:-

(a) period to be specified under the first proviso to section 14;

(b) the form and the manner of the application under sub-section (1) of section 15;

(c) the manner and particulars of notice under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;

(f) publication of alterations or amendments to be made in the licence under clause(c) of sub-section (2) of section 18;

(g) Grid Code under sub-section (2) of section 28;

(h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;

(i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;

(j) payment of the transmission charges and a surcharge under-sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(k) reduction 1[***] of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(l) payment of transmission charges and a surcharge under sub-clause(ii) of clause(c) of section 40;

(m) reduction 2[***] of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;

(n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(o) duties of electricity trader under sub-section (2) of section 52;

(p) standards of performance of a licensee or class of licensees under sub-section (1) of section 57;

(q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(r) the manner of reduction of cross subsidies under clause (g) of section 61;

(s) the terms and conditions for the determination of tariff under section 61;

(t) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(v) the manner of making an application before the Central Commission and the fee payable therefor under sub-section (1) of section 64;

(w) the manner of publication of application under sub-section (2) of section 64;

(x) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(y) the manner by which development of market in power including trading specified under section 66;

(z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;

(za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;

(zb) the rules of procedure for transaction of business under sub-section (1) of section 92;

(zc) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zd) the manner of service and publication of notice under section 130;

(ze) any other matter which is to be, or may be, specified by regulations.

(3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication."

54. In **PTC India** (*supra*), the Supreme Court has explained that the Act contemplates three kinds of delegated legislation. First, is Section 176 of the Act, which empowers Central Government to make rules to carry out the provisions of the Act and the State Governments are also empowered to make Rules under Section 170 of the Act. Second, is Section 177 of the Act by virtue of which the Central Electricity Authority is empowered to make regulations consistent with the Act and the Rules made thereunder. Third, is the power of the CERC to make regulations in exercise of powers under Section 178 of the Act. The State Electricity Regulatory Commissions are also empowered to make regulations under Section 181 of the Act.

55. The Supreme Court explained the role of the CERC as under:

"**53.** Applying the abovementioned tests to the scheme of the 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 the 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 dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178."

56. It is apparent from the above that the CERC performs its functions at four levels: administrative, legislative, advisory, and adjudicatory.

57. Bearing the aforesaid in mind, we may proceed to examine the import of the impugned condition; whether it is in conflict with the regulations made by CERC; and whether the regulations in question fall within the scope of functions of the CERC.

IMPUGNED CONDITION

58. As noted at the outset, the impugned condition, which is central to the present dispute, provides that *“for any excess generation, the rates fixed by KERC for old plants only will be paid and not as per UI rates. However, for shortfall in generation as compared to the scheduled generation, the Firm will pay UI rates.”* The import of this impugned condition is that it substitutes the UI charges payable to a generating entity for electricity, with rates fixed for old, depreciated plants. The principal controversy centres on whether the SLDC has jurisdiction to do so, given that SSL has used open access for inter-state transmission of electricity and the CERC has framed the Open Access Regulations and the UI Regulations.

UNSCHEDULED INTERCHANGE (UI) CHARGES

59. It is thus necessary to consider the nature of the UI charges and the CERC's jurisdiction to frame the regulations concerning UI charges.

60. In **Central Power Distribution Co. v. Central Electricity Regulatory Commission**⁸, the Supreme Court had explained the Unscheduled Interchange as under:

"10. In addition to two charges, a third charge contemplated in the ABT Scheme is for the Unscheduled Interchange of power (UI charges). UI charges are payable depending upon what is deviated from the schedule and also subject to the Grid conditions at that point of time. This element was introduced to bring about the effective discipline in the system. Under this system UI charges will be payable, if:

(i) a generator generates more than the schedule, thereby increasing the frequency;

(ii) a generator generates less than the schedule, thereby decreasing the frequency;

(iii) a beneficiary overdraws power, thereby decreasing the frequency;

(iv) a beneficiary underdraws power, thereby increasing the frequency."

11. It is thus clear from the above that UI charges are a commercial mechanism to maintain Grid discipline. UI charges penalise whosoever

⁸(2007) 8 SCC 197

caused Grid indiscipline, whether generator (NTPC) or distributor, is subject to payment of UI charges who are not following the schedule. UI charges are not payable if the appellants maintain their drawal of electricity consistent with the schedule given by themselves.
Therefore, there is no merit in the contention of the appellants that UI charges are by way of penalty."

[emphasis added]

61. The CERC has framed the UI regulations in exercise of the powers conferred upon it under Section 178 of the Act.

62. The CERC, in the Statement of Reasons explaining the various provisions of UI regulations 2009, has *inter alia* stated as follows:

"UI pricing is expected to serve the twin objectives of specifying settlement rate for deviations from schedules in normal operating range and ensuring 'grid discipline' on the one hand while ensuring maximisation of generation at optimal cost for grid participants on the other. Further, UI pricing mechanism should discourage grid participants from using UI mechanism as trading instrument."

63. The UI Regulations were also amended to provide for addressing the issue of 'gaming', which the learned senior counsel appearing for the appellants had stated was the principal reason for the SLDC insisting on imposing the impugned condition.

64. Regulation 2(ee) of the UI Regulations, which defines 'gaming' reads as under :

"(ee) 'gaming' in relation to these regulations, shall mean an intentional mis-declaration of declared capacity by any generating station or seller in order to make an undue commercial gain through Unscheduled Interchange charges."

65. Regulation 6 of the UI Regulation that provides for addressing the issue of gaming is set out below:

"6. Declaration, scheduling and elimination of gaming

The provisions of the Grid Code and the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations 2008, as amended from time to time, shall be applicable for declaration of capacity, scheduling and elimination of gaming.

The generating station, as far as possible, shall generate electricity as per the day-ahead generation schedule finalised by the Regional Load Despatch Centre in accordance with Grid Code. Provided that the revision in generation schedule on the day of operation shall be permitted in accordance with the procedure specified under the Grid Code.

"Provided that the revision in generation schedule on the day of operation shall be permitted in accordance with the procedure specified under the Grid Code and Central Electricity Regulatory Commission (Open Access in. inter-State Transmission) Regulations; 2008, as the case may be.

(5) In response to changes in grid frequency and inflow fluctuations, the hydro generating stations shall be free to deviate from the given schedule, without causing grid constraint, and compensation for the difference between the actual net energy

supplied and the scheduled energy (ex-bus) over a day shall be made by the concerned Regional Load Despatch Centre in the day-ahead schedule for the 4th day

(day plus 3)

(6) The Commission may, either suo motu or on a petition made by RLDC, initiate proceedings against any generating company or seller on charges of gaming and if required, may order an inquiry in such manner as decided by the Commission. When the charge of gaming is established in the above inquiry, the Commission may, without prejudice to any other action under the Act or regulations thereunder, disallow any Unscheduled Interchange charges received by such generating company or the seller during the period of such gaming."

CERC'S JURISDICTION - UI REGULATIONS

66. The question whether the CERC has the power to frame the UI regulations is no longer *res integra*.

67. In **Central Power Distribution** (*supra*), the Supreme Court had explained that under Section 79 (1)(h) of the Act, the CERC would have the power to specify the Grid Code and the various sections "*under the Electricity Act would clearly show beyond any doubt the powers of Central Commission and jurisdiction in regard to the Grid, the scheduling and dispatch*". The court had also held

that CERC was responsible for regulating the inter-State transmission of electricity.

68. We may note that the Supreme Court had framed the following questions for consideration:

"(A) Whether the application of availability-based tariff (ABT) in relation to Unscheduled Interchange (UI) charges, which otherwise is not a component of tariff in terms of Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and they are liable to be held as beyond the jurisdiction of the Central Electricity Regulatory Commission (CERC)?

(B) As such the impugned order passed by the Appellate Tribunal for Electricity has completely ignored the fact that CERC order, which was passed suo motu and ex parte, is non est and without jurisdiction?

(C) Can the availability-based tariff as established and provided in the order of CERC by its order dated 4-1-2000 be implemented under the provisions of the Electricity Act, 2003, particularly when there is no provision under the statute that allows CERC to levy Unscheduled Interchange charges? and

(G) Whether in the present facts and circumstances as regards the Simhadri SPTS Thermal Station of National Thermal Power Corporation (NTPC) which admittedly supplies power to the State Grid and has no connection with the management of the National Grid, can CERC in such circumstances exercise, particularly

when matters relating to the State Grid fall within the role and function of the State Electricity Regulatory Commission?

69. The said questions were answered in the following terms:

"(A) 22.1. The application of availability-based tariff and imposition of Unscheduled Interchange (UI) charges are essential part of the functions of the Central Commission under Section 79(1)(h) of the Electricity Act, 2003 which reads "to specify Grid Code having regard to the grid standards", and sub-section (2) of Section 28 read with Section 178(2)(g) dealing with the Central Commission's powers to frame Grid Code. The maintenance of Grid discipline envisaged under the Grid Code is regulated by the mechanism of ABT and UI charges. There is no basis for the appellant to contend that unless something is a part of tariff the Central Commission cannot exercise powers and functions. ABT and UI charges are commercial mechanism to control the utilities in scheduling, dispatch and drawal and UI charges are tariff or charges payable for deviations. In the facts and circumstances mentioned above the legal position is clear and there is no ambiguity in respect of the jurisdiction of the Central Commission.

(B) 22.2. The circumstances under which the order of the Central Commission was made, the previous orders passed by the Central Commission and the fact that the order challenged by the appellant was only an order fixing a prospective date for implementation of ABT in the case of generating station supplying to single State and not an order deciding the right or obligations. It is therefore not correct for the appellants to say that the order was passed ex parte or suo motu in violation of any principles of

natural justice or otherwise the order is bad or non est. As mentioned above after the order of the Central Commission was passed, the second respondent and the State Load Dispatch Centre (SLDC) in the State of Andhra Pradesh had deliberated on the steps to be taken for implementation. SLDC was acting on behalf of the appellants. The appellants and SLDC did not raise any objection or otherwise plead any difficulty in the implementation of ABT and UI mechanism at the relevant time. Even now, except for pleading hypertechnicalities, the appellants have not shown any legal prejudice they suffer on account of the implementation of ABT for the Simhadri generating station of NTPC. The question of law has been raised mechanically without any factual bearing or implication.

(C) 22.3. As already noticed, the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce. (See *Indu Bhushan Bose v. Rama Sundari Debi* [(1969) 2 SCC 289 : AIR 1970 SC 228] , *K. Ramanathan v. State of T.N.* [(1985) 2 SCC 116 : 1985 SCC (Cri) 162] , *V.S. Rice and Oil Mills v. State of A.P.* [AIR 1964 SC 1781] and *Deepak Theatre v. State of Punjab* [1992 Supp (1) SCC 684] .)

(G) 22.4. In the facts and circumstances as alluded, and as per the scheme of the Electricity Act, 2003 mentioned above, the Central Commission has the plenary power to regulate the Grid, particularly in the context of the Grid being integrated and connected across the region comprising of more than one State. The State Grid cannot be isolated and can be seen as independent from the region.

70. The Open Access Regulations have been framed for regulating access through the transmission system. The said regulations are also intrinsically linked with the maintenance of the grid as well as the object to facilitate trading in electricity. The Act mandates CERC to specify regulations for transmission, pricing, as well as the terms and conditions for regulating inter-State transmission.

71. It is apposite to refer to the following extract from the Statement of Reasons of the Open Access Regulations:

"1. Non-discriminatory access over the transmission system is a pre-requisite for power trading, bilaterally and through energy exchanges, on scheduled basis among utilities, permitted consumers and generators located in the different States or regions of the country. Not only does it enable better utilization of available resources but also facilitates the harnessing of untapped sources of power including captive, co-generation and merchant generating capacity. In a deficit scenario, it is desirable to tap all the possible sources of power.

2. In exercise of power conferred under Section 178 of the Electricity Act 2003 (the Act), the Commission had notified the Central Electricity Regulatory Commission (open Access in Inter-State Transmission) Regulations, 2004 (the regulations), which was operationalized with effect from 6.5.2004. The open access in transmission was introduced for the first time in the country. This enabled the trading of electricity to be carried out on scheduled basis in an orderly manner at a reasonable transmission cost. The Regulations

were amended in February 2005, based on the operational experience of the first order. Subsequently, a minor amendment was carried out in December, 2006 to prevent blocking of transmission capacity.

3. The Commission had issued guidelines for setting up of Power Exchange in February, 2007 and accordingly need had arisen to revamp open access regulations in order to accommodate collective transactions emanating from power exchange as well as conventional bilateral trading. Accordingly, new draft regulations on Open Access in Inter-State transmission were published on 18.12.2007 inviting comments from the stakeholders."

72. Section 42(2) of the Act mandates that the State Commission introduce open access in phases.

73. In **PTC India** (*supra*), the Supreme Court had observed that:

"22. One of the most important features of the 2003 Act is the introduction of open access under Section 42 of the Act. Under the open access regime, distribution companies and eligible consumers have the freedom to buy electricity directly from generating companies or trading licensees of their choice and correspondingly the generating companies have the freedom to sell."

74. The functions of the CERC include the function to regulate the inter-state transmission as well as determining the tariff for such inter-state transmission. Apart, from regulating the grid, the CERC is also empowered to make regulations for levy and collection of

fees and charges from generating companies, transmission utilities or licensees and also make regulations regarding transmission.

75. In terms of Section 178(1) of the Act, the CERC has the power to make regulations consistent with the Act and the Rules to carry out the provisions of the Act. Since, the CERC has plenary power in respect of the Grid, we are unable to accept that the framing of the Open Access Regulations is beyond the powers of delegated legislation vested with the CERC.

76. We consider it apposite to refer to the observations made by the Supreme Court in **Central Power** (*supra*)

"18. Under Section 79(1)(h) the Central Commission has the power to specify Grid Code. It also provides that the function of the State Commission to specify State Grid Code under Section 86(1)(h) should be consistent with the Grid Code specified by the Central Commission and therefore the power of the State Commission is subservient to the power of the Central Commission. Section 2(32) defines Grid as interconnected transmission lines. The expression used interconnected has a significant meaning. Sub-section (1) of Section 28 deals with the function of RLDC (Regional Load Dispatch Centre) to ensure integrated operation of the power system in the region concerned. The term power system is of wide import. It is not confined to inter-State transmission lines but extends to even supply lines, distribution, main service lines, etc. However, sub-section (3) of Section 28 deals with duties of RLDC using the expression "within the region" or "in the region". Obviously it includes both "inter-State" and "intra-State" lines and is not

restricted to inter-State lines. Section 29 of the Act empowers RLDC to give directions and exercise such supervision and control to any person for ensuring stability of Grid operation. It also provides that the State Load Dispatch Centre shall duly enforce such directions. Sub-section (3) of Section 33 of the Act provides that the State Load Dispatch Centre shall comply with the directions of RLDC.

19. A fascicule reading of the above provisions would clearly show that the scheme of the Electricity Act is that RLDC is required to follow the principles, guidelines and methodologies specified by the Central Commission and all persons including the distribution licensees like the appellants herein are required to follow the directions of RLDC. RLDC can enforce such directions through SLDC. In turn SLDC is required to follow the directions of RLDC."

77. The CERC has the necessary powers to issue orders and frame regulations for the purposes of open access, which is facet of transmissions through the grid. The CERC is empowered to make the Grid Code and set out the guidelines and methodologies in respect of wheeling and optimum scheduling and dispatch of electricity. The Regional Load Dispatch Centres (RLDCs) are required to comply with these guidelines and methodologies. The RLDCs exercise supervision and control over inter-State transmission system, and the SLDCs exercise control over intra-State transmission system. However, SLDCs are required to comply with the directions of RLDCs, which, as stated earlier are to comply with the guidelines and methodologies specified by CERC.

78. The appellants' grievance in this regard is in respect of Regulation 8 of the Open Access Regulations. The same is set out below:

"8. (1) Wherever the proposed bilateral transaction has a State utility or an intra-State entity as a buyer or a seller, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. The concurrence of the State Load Despatch Centre shall be in such form as may be provided in the detailed procedure.

(2) When a State utility or an intra-State entity proposes to participate in trading through a power exchange, it shall obtain a "no objection" or a prior standing clearance from the State Load Despatch Centre in such form as may be prescribed in the detailed procedure, specifying the MW up to which the entity may submit a buy or sell bid in a power exchange.

(3) ⁹[(a) For obtaining concurrence or 'no objection' or prior standing clearance an application shall be made before the State Load Despatch Centre who shall, acknowledge receipt of the application, either by e-mail or fax, or any other usually recognised mode of communication, within twenty four hours from the time of receipt of the application:

Provided that where the application has been submitted in person, the acknowledgement shall be provided at the time of submission of the application.

⁹ Substituted vide Central Electricity Regulatory Commission (Open Access in inter-State Transmission) (Amendment) Regulations 2009, published in the Gazette of India (Extraordinary) Part III, Section 4 (No. 86) on 29.5.2009

(b) While processing the application for concurrence or 'no objection' or prior standing clearance, as the case may be, the State Load Despatch Centre 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 Grid Code in force, and

(ii) availability of surplus transmission capacity in the State network.

(c) Where existence of necessary infrastructure and availability of surplus transmission capacity in the State network has been established, the State Load Despatch Centre shall convey its concurrence or 'no objection' or prior standing clearance, as the case may be, to the applicant by e-mail or fax, in addition to any other usually recognised mode of communication, within three (3) working days of receipt of the application:

Provided that when short-term open access has been applied for the first time by any person, the buyer or the seller, the State Load Despatch Centre shall convey to the applicant such concurrence or 'no objection' or prior standing clearance, as the case may be, within seven (7) working days of receipt of the application by e-mail or fax, in addition to any other usually recognised mode of communication.]

¹⁰[(3A) In case the State Load Despatch Centre finds that the application for concurrence or 'no objection or prior standing clearance, as the case may be, is incomplete or defective in any respect, it shall communicate the deficiency or defect to the

¹⁰ Inserted vide Central Electricity Regulatory Commission (Open Access in inter-State Transmission) (Amendment) Regulations 2009, published in the Gazette of India (Extraordinary) Part III, Section 4 (No.86) on 29.05.2009.

applicant by e-mail or fax, in addition to any other usually recognised mode of communication, within two (2) working days of receipt of the application:

Provided that in cases where the State Load Despatch Centre has communicated any deficiency or defect in the application, the date of receipt of application shall be the date on which the application has been received duly completed, after removing the deficiency or rectifying the defects, as the case may be.

(4) ¹¹[In case the application has been found to be in order but the State Load Despatch Centre refuses to give concurrence or 'no objection' or prior standing clearance as the case may be, on the grounds of non-existence of necessary infrastructure or unavailability of surplus transmission capacity in the State network, such refusal shall be communicated to the applicant by e-mail or fax, in addition to any other usually recognized mode of communication, within the period of three (3) working days or seven (7) working days, as the case may be, from the date of receipt of the application, specified under clause (3), along with reasons for such refusal:

Provided that where the State Load Despatch Centre has not communicated any deficiency or defect in the application within two (2) days from the date of receipt of application or refusal or concurrence or 'no objection' or prior standing clearance, as the case may be, within the specified period of three (3) working days or seven (7) working days, as applicable, from the date of

¹¹ Substituted vide Central Electricity Regulatory Commission (Open Access in inter-State Transmission) (Amendment) Regulations 2009, published in the Gazette of India (Extraordinary) Part III, Section 4 (No.86) on 29.5.2009.

receipt of the application, concurrence or 'no objection' or prior standing clearance, as the case may be, shall be deemed to have been granted:

Provided further that where concurrence or 'no objection' or prior standing clearance, as the case may be, is deemed to have been granted by the State Load Despatch Centre, the applicant while making application ¹²shall submit to the nodal agency an affidavit (in the format provided in the detailed procedure), duly notarised, declaring that-

(a) the State Load Despatch Centre has failed to convey any deficiency or defect in the application or its refusal or concurrence or 'no objection' or prior standing clearance, as the case may be, within the specified time,

(b) necessary infrastructure for time-block-wise energy metering and accounting in accordance with the provisions of the Grid Code in force, is in place; and enclosing with the affidavit -

(i) a copy of the complete application after removal of deficiency or rectification of defects, if any communicated, made to the State Load Despatch Centre for seeking concurrence or 'no objection' or prior standing clearance, as the case may be, and

(ii) a copy of the acknowledgement, if any, given by the State Load Despatch Centre, or any other evidence in support of delivery

¹²Omitted vide Corrigendum dated 10.6.2009 to Central Electricity Regulatory Commission (Open Access in inter-State Transmission) (Amendment) Regulations 2009, published in the Gazette of India (Extraordinary) Part III, Section 4 (No. 86) on 29.5.2009.

of the application to the State Load Despatch Centre.]"

79. A conjoint reading of the powers of CERC under Section 79 and 178 of the Act with the scheme of Sections 28(2) and 33(3) of the Act clearly indicates that CERC has the jurisdiction to frame Regulation 8 of the Open Access Regulations, which is intended to provide for the methodology, discipline, and other attendant matters relating to the use of the transmission system.

80. In view of the above, the question whether Regulation 8 of the Open Access Regulation is *ultra vires* the Act is answered in the negative.

81. The next aspect to consider is whether the Open Access Regulations are in conflict with the exclusive powers conferred on SLDC.

82. We may now examine the functions and powers of SLDC. Section 31 of the Act provides for establishment of SLDC. Section 32 of the Act provides for the functions of SLDC and Section 33 of the Act contains provisions regarding compliance with the directions issued by the SLDC. Sections 32 and 33 of the Act are relevant and are set out below:

"32. Functions of State Load Despatch Centres.-

(1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall -

(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;

(b) monitor grid operations;

(c) keep accounts of the quantity of electricity transmitted through the State grid;

(d) exercise supervision and control over the intra-State transmission system; and

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

(3) The State Load Despatch Centre may levy and collect such fee and charges from the generating companies and licensees engaged in intra-State transmission of electricity as may be specified by the State Commission.

33. Compliance of directions.- (1) The State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, sub-station and any other

person connected with the operation of the power system shall comply with the directions issued by the State Load Despatch Centre under sub-section (1).

(3) The State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(4) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under sub-section (1), it shall be referred to the State Commission for decision:

Provided that pending the decision of the State Commission, the directions of the State Load Despatch Centre shall be complied with by the licensee or generating company.

(5) If any licensee, generating company or any other person fails to comply with the directions issued under sub-section(1), he shall be liable to a penalty not exceeding rupees five lacs."

83. In terms of Section 32(2) of the Act, SLDC is, *inter alia*, responsible for optimum scheduling and despatch of electricity within a State. It is required to monitor the grid operations and exercise supervision and control over intra-state transmission systems. In terms of Section 32(3) of the Act, the SLDC is also empowered to levy fees from generating companies and licensees engaged in intra-state transmission of electricity. Under Section 33 of the Act, the SLDC is also empowered to give directions and exercise supervision and control as may be required for ensuring

the integrated grid operations and for achieving maximum economy and efficiency in the operation of power systems in the State.

84. We may at this stage also refer to Regulation 20 of the Open Access Regulations, which has not been challenged. The same is set out below:

"20. (1) All transactions for State utilities and for intra-State entities scheduled by the nodal agency under these regulations, shall be accounted for and included in the respective day-ahead net interchange schedules of the concerned regional entity issued by the Regional Load Despatch Centre.

(2) Based on net metering on the periphery of each regional entity, composite UI accounts shall be issued for each regional entity on a weekly cycle and transaction-wise UI accounting, and UI accounting for intra-State entities shall not be carried out at the regional level.

(3) The State utility designated for the purpose of collection / disbursement of UI charges from/to intra-State entities shall be responsible for timely payment of the State's composite dues to the regional UI pool account.

(4) Any mismatch between the scheduled and the actual drawal at drawal points and scheduled and the actual injection at injection points for the intra-State entities shall be determined by the concerned State Load Despatch Centre and covered in the intra-State UI accounting scheme.

(5) Unless specified otherwise by the concerned State Commission, UI rate for intra-State entity shall be 105% (for over-drawals or under generation) and 95% (for under-drawals or over generation) of UI rate at the periphery of regional entity.

(6) ¹³[No charges, other than those specified under these regulations shall be payable by any person granted short-term open access under these regulations.]

85. Regulation 20(5) of the Open Access Regulations is relevant, as it expressly sets out the UI charges payable in case of over-supply of electricity. The impugned condition imposed by SLDC is in conflict with this clause.

86. The dispute is regarding the impugned condition inserted in SC/NOC issued by the SLDC. A plain reading of the said clause indicates that the same seeks to substitute the charges payable for excess generation for UI rates. The SLDC does not have power to fix any tariffs or charges for inter-state transmission of electricity. As noted above, in terms of Sections 31 and 32 of the Act, the SLDC can levy and collect fees and charges engaged in relation to intra-state transmission of electricity. However, the SLDC cannot determine the rates of electricity. Thus, we find no infirmity with the view of the learned Single Judge that the SLDC had exceeded its jurisdiction in substituting the UI rates for inter-state transmission by CERC with the rate fixed for old plants.

¹³Substituted vide Central Electricity Regulatory Commission (Open Access in inter-State Transmission). (Amendment) Regulations 2009, published in the Gazette of India (Extraordinary) Part III, Section 86) on 29.5.2009. Section 4 (No.86) on 29.5.2009.

87. We pointedly asked the learned counsel for the appellants as to what were those rates which would be applicable in the present case. He responded that the same would have to be assessed on the basis of the value of the generating plants. Although, the SLDC is charged with the function of monitoring the grid operations, it is also to keep accounts of quantity of electricity transmitted through the grid. Its functions are necessarily aligned with the Regional Load Despatch Centre, which in turn is required to follow the principles and guidelines set out by the CERC.

88. The contention that the SLDC has imposed the impugned condition not in exercise of its administrative powers but, in exercise of its statutory powers, and the same could not be overridden by the regulations, is without merit. First of all, the impugned condition was not in conformity with the powers vested with the SLDC. Secondly, the regulations framed by the CERC, are subordinate legislation. Thus, unless the regulations are set aside as beyond CERC's competence or as manifestly arbitrary, they must be complied with, including by the concerned authorities.

89. In the present case, the impugned condition is in conflict with the UI Regulations read with the Open Access Regulations. As noted above, the jurisdiction of the CERC to frame UI regulations

has been upheld by the Supreme Court and the said question is no longer *res integra*. In view of the above, the impugned condition cannot be sustained, and the CERC's order setting aside the impugned condition has been rightly upheld by the learned Single Judge. The question whether the impugned clause is valid is answered in the negative.

90. The last question to be addressed is whether the CERC has the jurisdiction to adjudicate the subject disputes. In terms of Section 79(1)(f) of the Act, the CERC is also required to adjudicate the disputes involving generating companies in regard to matters connecting with clauses (a) to (d) of Section 79(1) of the Act. Under clause (c), the CERC is charged with the function of regulating the interstate transmission of electricity. Thus, disputes involving generating companies or transmission licensees and relating to the inter-state transmission of electricity would fall within the jurisdiction of CERC. In the present case, the dispute relates to substituting the UI rate fixed for inter-state transmission of electricity *inter alia* as a measure to address "gaming" as contended on behalf of the appellants. These are covered under the UI Regulations and the Open Access Regulations.

91. It is also relevant to refer to Regulation 26 of the Open Access Regulations, which sets out the redressal mechanism. The said Regulation, as in force prior to 29.05.2009, read as under:

“26. Unless the dispute involves the State Load Despatch Centre and the intra-State entities of the concerned State and falls within the jurisdiction of the State Commission, all disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.”

92. The said Regulation was amended with effect from 29.05.2009. Post the amendment, the aforesaid regulation was substituted to read as follows:

“26. All disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.”

93. It is material to note that by virtue of the pre-amendment Regulation 26 of the Open Access Regulations, adjudication of disputes arising under the said Regulations involving the State Load Despatch Centre and intra-State entities of the concerned State, which fall within the jurisdiction of the State Commission, were excluded from the jurisdiction of the CERC and were required to be adjudicated by the respective State Commissions. However, SSL's petition before the CERC was filed on 21.02.2011, which was after the Open Access Regulations were amended on

29.05.2009. Therefore, Regulation 26, was in force post-amendment, and was applicable.

94. In view of the above, the question whether CERC's order is without jurisdiction, is answered in the negative.

95. In view of the above, the present appeal is dismissed.

**Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE**

**Sd/-
(C.M. POONACHA)
JUDGE**

KPS.