

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 233 of 2013 & IA NO.318 of 2013

Dated : 09th May, 2018

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 233 of 2013 & IA NO.318 of 2013

IN THE MATTER OF :

- 1. Power Grid Corporation of India Ltd.,**
Saudamini, Plot No.2, Sector 29,
Near IFFCO Chowk, Gurgaon (Haryana) – 122001
- 2. Power System Operation Corporation Ltd.,**
29 Race Course Cross Road,
Bengaluru 560009.
- 3. Western Regional Land Dispatch Centre,**
F-3 MIDC Area, Marol, Andhrei East,
Mumbai- 490 003.

...Appellant(s)

Versus

- 1. Chattisgarh State Electricity Regulatory Commission**
Shanti Nagar, Irrigation Colony,
Raipur-492001 (Chhattisgarh)
- 2. Chhatisgarh State Power Distribution Co. Ltd.,**
Daganiya,
Raipur-492013 (Chhattisgarh)

....Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Neha Garg for R-1

Mr. K. Gopal Choudhury for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 233 of 2013 & IA No.318 of 2013

1. The Appeal is filed under Section 111 of the Electricity Act, 2003 challenging the order dated 03.09.2013 passed by the Chhattisgarh State Electricity Regulatory Commission (hereinafter referred as the “**State Commission**”) in Petition No. 19(MP) of 2013 (hereinafter referred as “**the Impugned Order**”)

The State Commission vide the Impugned Order has purported to exercise jurisdiction over the Appellants overruling the objections raised by the Appellants that under the Electricity Act, 2003, the Central Electricity Regulatory Commission and not the State Commission can exercise jurisdiction in respect of the activities, functions, duties undertaken by each of the three Appellants. The action of the State Commission as per the Appellants is perverse, patently erroneous, ex-facie illegal and totally unsustainable in law.

- 1.1 The **Appellant No.1** herein, Power Grid Corporation of India Ltd. (Power Grid), is a Company incorporated under the Companies Act, 1956. The Appellant No.1 also discharges the functions of the Central Transmission Utility (CTU) and is engaged in the Inter State Transmission of electricity and other functions provided under the Electricity Act, 2003. The

Appellant No.1 discharges the above functions under the regulatory control of the Central Electricity Regulatory Commission (hereinafter referred to as the “Central Commission”).

- 1.2 The **Appellant No.2** herein, the Power System Operation Corporation Ltd. (POSOCO), is also a company incorporated under the provisions of the Companies Act, 1956 engaged in safe and secure operation of the power system network in the country.
- 1.3 The **Appellant No.3** herein, the Western Regional Load Dispatch Centre (WRLDC) has also been impleaded as it was separately arrayed as Respondent before the State Commission. As per the Act, WRLDC is empowered to ensure the integrated operation of the power system in the Western Region.
- 1.4 The **Respondent No. 1** is Chhattisgarh State Electricity Regulatory Commissioner (CSERC) constituted under the Electricity Act, 2003 for carrying out various regulatory functions in the state as stipulated under Section 86 of the Act.
- 1.5 The **Respondent No. 2**, the Chhattisgarh State Power Distribution Company Ltd. (CSPDCL) –is the successor of the erstwhile Chhattisgarh State Electricity Board. The Respondent No. 2 is functioning as the Distribution Utility in the State and performing functions pertaining to distribution and retail supply of power in the State.

2. **Brief Facts of the Case**

- 2.1 The Open Access Regulations, 2009 and the detailed procedure approved by the Central Commission on 31.12.2009 deal with matters concerning the non-discriminatory Open Access to be provided to the Inter State Transmission System including the matters related to connectivity entitlement of the generating stations to inter connect to the Inter State

Transmission System, the grant of Open Access (Long Term and Short Term) and all related matters.

2.2 The Electricity Act, 2003 defines the term 'Inter State Transmission System' and 'Intra State Transmission System' in sections 2 (36) and (37) as under:

(36) "inter-State transmission system" includes-

(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

(iii) the transmission of electricity within the territory of a State on a system built, owned, operated, 'maintained' or controlled by a Central Transmission Utility;

(37) "intra-State transmission system" means any system for transmission of electricity other than an inter-State transmission system;

Further, the Electricity Act, 2003 defines the term 'Appropriate Commission' in section 2 (4) as under:

"(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;"

2.3 As per the Act, the jurisdiction of the State Commission is limited to Intra State Transmission only and the Inter State Transmission falls within the exclusive jurisdiction of the Central Commission.

2.4 Section 79 (1) (h) of the Electricity Act dealing with the functions of the Central Commission provides that the Central Commission has to specify Grid Code having regard to the grid standards. Section 86 (1) (h) of the Electricity Act authorizes the State Commission to specify the State Grid Code consistent with the Grid Code specified by the Central Commission under section 79 (1) of the Act. In exercise of the powers under section 79 (1) (h) of the Electricity Act, 2003 the Central Commission has specified the Indian Electricity Grid Code (hereinafter referred to as '**the Grid Code**'). The Grid Code, inter alia, provides for the connection conditions, operating code for regional grid and scheduling and dispatch procedures.

2.5 Clause 6.4.2 (c) (i) of the Grid Code, 2010 provides as under:

(i) If a generating station is connected only to the ISTS, RLDC shall coordinate the scheduling, except for Central generating Stations where full share is allocated to one state.

2.6 In the Detailed Procedure approved by the Central Commission vide Order dated 31.12.2009 at Para 6, the Inter Change of Power with the Inter State Transmission System has been dealt as under:

“6 INTERCHANGE OF POWER WITH THE ISTS

6.1 The grant of connectivity shall not entitle an applicant to interchange any power with the grid unless it obtains long-term access, medium-term open access short-term open access.

6.2 However, generating station, including captive generating plant, which has been granted connectivity to the grid shall be allowed to undertake interchange of power including drawl of power for commissioning activities and injection of infirm power in to the grid during full load testing before being put into commercial operation, even before availing any type of open access, after obtaining permission of the concerned Regional Load Dispatch Centre, which shall keep grid security in view while granting such permission. This infirm power from a generating station or a unit thereof,

other than those based on non-conventional energy sources, the tariff of which is determined by the Commission, will be governed by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. The power injected into the grid from other generating stations during such testing shall also be charged at UI rates.

6.3 *The Generating Station including Captive Generating Station shall submit likely date of synchronization, likely quantum and period of injection of infirm power before being put into commercial operation to the SLDC and RLDC concerned at least one month in advance.”*

2.7 The Central Commission had amended the Tariff Regulations, 2004 with effect from 7.1.2008 on the infirm power injection to be treated as Unscheduled Interchange (UI). In the Statement of Reasons at Paras 10 and 11, the Central Commission had stated as under:

“10. *Power Grid Corporation of India Ltd has further suggested as follows:*

“In case of a first generating unit in a new power station, there could be situations when the generator draws auxiliary supply from the grid on a net basis when the unit is out. Such drawls also need to be charged at UI rates if this amendment comes into force. For the period of construction to the first synchronization of unit, the generator could have any arrangement either through Short Term Open Access (STOA) or through the retail supplier for the area. From the period of first synchronization to commercial operation the arrangement needs to be only UI rates to avoid any accounting complications”.

11. *The Commission finds this suggestion reasonable. There is nothing in the 2004 regulations to prevent operationalization of this suggestion and the same maybe adopted as a logical corollary to the proposed amendments regarding infirm power, whenever a generating company wishes to go through this route.”*

In pursuance of the above, the infirm power injection as UI was incorporated in the connectivity Regulations, 2009 and also was made applicable for all generating plants. The Appellant No 1 submitted a draft procedure for implementation of the Connectivity Regulations, 2009 which was approved by the Central Commission for implementation w.e.f. 1st January 2010. As per this procedure, drawl for start up purposes could also be considered as UI.

- 2.8 In view of the above orders from Central Commission, Appellants No. 2 and 3 have been allowing drawl of start up power for commissioning activities as Unscheduled Interchange (UI). While the issue of drawl of start up power as UI is under re-consideration of the Central Commission, the law today as per the Central Commission Regulations and orders is that this is allowed. If each State Commission were to exercise jurisdiction on a matter dealt with by the Central Commission, the Appellant's functioning would be severely affected.
- 2.9 The Appellant No. 1 herein as the Central Transmission Utility and dealing with the Inter State Transmission had provided connectivity to some of the generating stations in the State of Chhattisgarh such as generating stations of Messrs Aryan Coal Benefaction (India) Limited, Messrs Lanco Amarkantak Power Limited and Messrs K.S.K. Mahanadi Power Company Limited in terms of the above Regulations notified by the Central Commission and consistent with the Grid Code notified by the Central Commission and Detailed Procedure approved by the Central Commission.
- 2.10 The above connectivity given including the Open Access to the transmission system of the Central Transmission Utility as well as permitting the above generating stations to undertake inter change of power including drawl of power for commissioning activities and injection of infirm power into the Grid during the full load testing hours before the

commercial operation of the power plant are all in accordance with the applicable Regulations and approvals of the Central Commission.

- 2.11 The Appellants state that Appellant No. 1 is a Central Transmission Utility and is engaged in Inter State Transmission activities including coordination, planning etc. The Appellants 2 and 3 discharge the statutory functions as provided in sections 26 and 27 of the Electricity Act, 2003. None of the Appellants is engaged in the generation of power. In fact, in terms of the provisions of section 38 of the Electricity Act, 2003, Appellant No. 1 is prohibited from undertaking generation of electricity and trading in electricity. Accordingly, there is no question of supplying power by any of the Appellants to Respondent No. 2. The drawl of power through Unscheduled Interchange Mechanism or injection of infirm power compensated through Unscheduled Interchange Mechanism does not amount to either sale of power by any of the Appellants or purchase of power from the Appellants. The Appellants do not either receive any money on account of the power drawn by any person under the Unscheduled Interchange Mechanism or pay any money to the person injecting including any infirm power into the system through Unscheduled Interchange Mechanism. The energy accounting of such Unscheduled Interchange are settled between the beneficiaries (other than the Appellants herein) who are drawing or injecting power into the system based on the frequencies prevalent at the relevant time, namely, principle of helping grid in a positive manner or affecting in a negative manner through under injection or over injection or under drawl or over drawl, as the case may be. The functions of the Appellants are to discharge the coordination and operation of the power system in accordance with the Regulations notified by the Central Commission.

- 2.12 Despite the above clear policies and status of the Appellants, on 12.10.2011 the Respondent No.2 through a letter to the Appellant No.1 wrongly stated that the arrangement which the generating stations in the State have as mentioned above, was illegal and that the Appellant No. 1 being the CTU, cannot sell power to any consumer in the license area of the Respondent No.2.
- 2.13 By letter dated 15.11.2011 the Appellant No. 1 replied to the letter dated 12.10.2011 of the Respondent No.2 stating that as an interim arrangement, interconnection of generating project through LILO of 400KV Korba–Bhatapara S/c line at Aryan Coal Benefaction Thermal Power Station was provided and that the interim arrangement/access was granted to M/s Aryan Coal by Central Transmission Utility in consultation with Central Electricity Authority and all the Constituents of Western Region including Chhattisgarh State Power Transmission Corporation Limited (CSPTCL) and Central Transmission Utility is not involved in any sale/purchase of power to any consumer. The Appellant No. 1 also clarified that as per the Open Access Regulations, 2009 a generating station granted connectivity to the grid is allowed to undertake interchange of power including drawl of power for commissioning activities and injection of infirm power in to the grid during full load testing before being put in to commercial operation even before availing any type of open access, after obtaining permission of concerned Regional Load Dispatch centre. The infirm power from a generating Station or unit thereof, injected to the grid from other generating stations during such testing shall also be charged at UI rates.
- 2.14 Thereafter the Respondent No.2 issued notice dated 06.01.2012 to the Appellants stating that there has been negative injection of power by Aryan Coal, BALCO, Lanco Amarkantak Power Limited amongst others, to the Appellant No. 1's Inter State Transmission System Grid and the supply/sale is there by the Appellants to the generating companies for their

consumption and that the electricity thereby drawn and consumed by the generating companies have not been supplied by the Respondent No.2 or any trading licensee or otherwise under open access and no energy was scheduled for drawl by them under open access of any kind or otherwise. It was further stated that the Appellant No. 1 being a transmission licensee is prohibited from trading in electricity and it cannot engage in the sale of electricity in any manner whatsoever whether under of UI mechanism or otherwise.

- 2.15 In reply to the letter dated 06.01.2012 of the Respondent No. 2, the Appellant No.2 vide letter dated 01.02.2012 referred to clause 6.4.2 (c) (i) of Indian Electricity Grid Code (IEGC) and Central Commissions order dated 31.12.2009 and clarified that Appellant 2 and 3 are carrying out the system operation in a non-discriminatory and dispute free manner in accordance with the Grid Code and Central Commission's Regulations and other orders passed by Central Commission from time to time.
- 2.16 On 30.03.2013 the Respondent No. 2 filed a Petition being Petition No. 19 (MP)/ 2013 before the State Commission alleging violation of Section 12 and first proviso to Section 38 (1) of the Electricity Act by the Appellants by making supply arrangements/supplying power to generating companies in Chhattisgarh for start-up power or for other purpose. In this petition Respondent No.2 prayed for a direction to the Appellants to cease from supplying power to the generating companies within the State of Chhattisgarh for the purpose of consumption in any manner whatsoever and to direct the Appellants for payment of compensation to the Respondent No.2 for loss of revenue due to supply of power by the Appellants to the generating companies.
- 2.17 On 18.05.2013 the Appellant No.1 filed its preliminary reply objecting the maintainability of the petition by stating that the Appellant No. 1 is undertaking Inter-State Transmission of electricity and also discharging the

function of the Central Transmission utility. The Appellant No.1 is discharging such functions under the regulatory control of the Central Commission and that under Section 38 of the Electricity Act the State Commission has no jurisdiction to adjudicate the issues raised by the Respondent No.2.

- 2.18 The State Commission vide order dated 03.09.2013 has rejected the objection raised by the Appellants and held that the matter is related to power supply by the Appellant No.1 by means of UI mechanism and that such supply is being done within the territorial jurisdiction of the State Commission, the State Commission has the jurisdiction to hear and decide the matter.
- 2.19 Aggrieved by the Order dated 03.09.2013, the Appellants have filed the present appeal before this Hon'ble Tribunal.

3. QUESTIONS OF LAW

The following questions of law arise in the present appeal:

- A.** Whether in the facts and circumstances of the case, the State Commission is right in holding that it has the jurisdiction to inquire into and decide the matter raised by Respondent No. 2 on the aspect of alleged violation of the provisions of the Electricity Act, 2003 by the Appellants?
- B.** Whether the State Commission is right in holding that the drawl of power by the generating stations in the State of Chhattisgarh under Unscheduled Interchange Mechanism duly approved by the Central Commission amount to sale or supply of electricity by the Appellants to the generating stations?
- C.** Whether the State Commission can exercise jurisdiction over the Appellants which are the Central Transmission Utility, the National Load Dispatch Centre and the Regional Load Dispatch Centre and are concerned with the Inter State Transmission of electricity and regulated by the Central Commission?
- D.** Whether the State Commission is empowered to pass any order in respect of the matters dealt with and decided by the Central

Commission in exercise of its functions under section 79 and other applicable provisions of the Electricity Act and more particular in a manner to set at naught the process approved by the Central Commission in the Detailed Procedure issued as per Regulation 27 of the Open Access Regulations?

E. Whether the exercise of jurisdiction by the State Commission over the Appellant is perverse, totally misconceived and patently erroneous?

4. **The learned counsel, Mr. M.G. Ramachandran, appearing for the Appellants has filed the following written submissions :-**

MATTER IN ISSUE

4.1 The matter in issue relates to the power drawn by the generating companies in the State of Chhattisgarh which are connected to the Inter State Transmission System under the Unscheduled Interchange (UI) Mechanism and used for start up purposes including testing and commissioning. The principal issue is whether Powergrid and RLDC can be proceeded against by the State Commission for allowing the generating companies in the State of Chhattisgarh connected to the grid to draw such power under the UI Mechanism.

IMPUGNED ORDER AND NATURE OF PROCEEDINGS BEFORE THE STATE COMMISSION

The impugned Order dated 03.09.2013 has been passed by the State Commission on a petition filed by CSPDCL being Petition No. 19 (M) of 2013.

4.2 The petition filed before the State Commission by CSPDCL had alleged that the Powergrid and RLDC have wrongly allowed the generating company to draw power from the Grid for testing and commissioning activities. This, according to CSPDCL, amounts to an act of distribution/sale/supply of electricity by Powergrid and RLDC, which is prohibited under section 38 of the Electricity Act, 2003. The prayers made by CSPDCL in the petition included a prayer for punishing the

Appellants. The petition filed was under Section 142 read with sections 12 and 38 (1) of the Electricity Act, 2003.

4.3 In the impugned Order the State Commission has, inter alia, held as under :-

*“8. Shri Ashok Rajan, the representative of respondent no.1, argued that the respondent no.1 being Central Transmission Utility, discharges its functions under the regulatory control of Central Electricity Regulatory Commission. The respondents cannot engage in the business of trading of Electricity under section 38 of the Electricity Act, 2003 and they are not doing any business of trading of electricity. The connectivity applicants are drawing power as per the provisions of UI Regulations and it is their responsibility to follow the above regulations for drawl of power. **This Commission has no jurisdiction to decide the matter, which falls under the regulatory regime of Central Electricity Regulatory Commission.***

9. *Shri K. Gopal Chaudhary, the learned counsel appeared on behalf of the petitioner, argued that, the respondents have to file detailed reply without which the matter, even the point of jurisdiction, cannot be decided. **He further argued that the power supply for star-up purpose is being made by the respondents to generators for their power plants situated in the territory of State of Chhattisgarh. The petitioner is the only licensee, who has the authority to distribute electricity in those areas, where these plants are established. The Commission has also determined tariff, for supply of electricity for the purposes of Start-up power. **Supply of electricity for start-up power by abusing the UI mechanism, is illegal and it create a clear violation of section 12 and section 38(1) and 38(2) (ii) of the Electricity Act, 2003.*****

10. *After hearing the parties, we have reached to the conclusion that the matter is prima-facie related to power supply, by means of UI mechanism. The supply is being done within the territorial jurisdiction of this Commission. Hence, we have the power to hear and decide the matter. The objection, raised by the respondents in regard to the jurisdiction is not acceptable and accordingly rejected.*

11. *The respondents are directed to submit their detailed reply before the next date of hearing, with copy to the petitioner.*

12. *The case will be heard on 27.09.2013 at 11.00 AM.”*

Allegations of the CSPDCL

4.4 At the outset it is submitted that for the purpose of deciding this appeal, the factual aspects alleged by CSPDCL before the State Commission may be considered as such, namely:

- a. The Generating Stations situated in the State of Chhattisgarh and connected to Inter State Transmission System are drawing Start Up Power from the Power System/Grid operated and maintained by Powergrid and scheduling and dispatch controlled by LDC.
- b. The drawl of such start up power amount to supply of power by the Appellants to the generating station.
- c. The supply of Power in the State of Chhattisgarh is the function of the CSPDCL.
- d. The Appellants have acted contrary to law in undertaking supply of electricity and are therefore punishable.

4.5 **Propositions on behalf of the Appellants:**

PROPOSITION NO. 1: The State Commission on the face of it has no jurisdiction to initiate or proceed against the Appellants in regard to drawl of power by the generating stations connected to Inter-state Transmission System under UI Mechanism. The jurisdiction in regard to the Appellants and for matters involved in the case is only of the Central Commission under section 79 of the Electricity Act, 2003. The initiation of proceedings by the State Commission is palpably wrong and unsustainable.

PROPOSITION NO. 2: Powergrid and RLDC have only implemented the directions of the Central Commission. The drawl of power by the generating stations in the State of Chhattisgarh under the UI Mechanism is in pursuance to the decision of the Central Commission and not at the instance of Powergrid or RLDC. The State Commission has no jurisdiction

to proceed against Powergrid and RLDC, which are only implementing the directions of the Central Commission.

PROPOSITION NO. 3: The scheme under the Electricity Act, 2003 is clear, namely, Powergrid and LDC undertakes the activities under the regulatory control of the Central Commission. The Act does not envisage the State Commission to exercise any regulatory control over Powergrid or LDC. The State Commission has no authority to entertain any proceedings against Powergrid or LDC and require them to act contrary to the decision of the Central Commission. The State Commission should have adhered to the comity of jurisdiction and the State Commission ought not to have interfered in an action taken by the Central Commission.

Lack of jurisdiction in the State Commission:

- 4.6 In terms of section 79 (1) (h) of the Electricity Act, 2003, the Indian Electricity Grid Code (**IEGC**) is notified by the Central Commission based on the Grid Standards specified by the Authority. The Grid Code has been defined in section 2 (33) with reference to the Grid Code notified by the Central Commission (not the State Commission). The IEGC is applicable throughout the country both Inter State and intra State lines.
- 4.7 Section 86 (1) (h) empowers the State Commission to specify the State Grid Code only if it is consistent with the Grid Code notified by the Central Commission under section 79 (1) (h). The State Grid code is applicable only qua Intra State Lines and not Inter State lines.
- 4.8 The Inter State Transmission of electricity and the tariff, therefore, is within the jurisdiction of the Central Commission and not within the jurisdiction of the State Commission. All the Inter State Transmission Lines are regulated by the Central Commission under section 79 (1) (c) of the Act. The term 'Inter State Transmission System' is defined in section 2 (36) to include every Powergrid line even if it is within the State.

- 4.9 In contrast, the State Commission has the jurisdiction under section 86 (1) (c) to deal with the Intra State Transmission and wheeling of Electricity. The State Commission has, therefore, no jurisdiction to deal with the Inter State Transmission of Electricity, namely, the Inter State Transmission System connected to a generating company in the State.
- 4.10 In terms of sections 27, 28, 31, 32 and 33 of the Act, the issue of control over the Grid and scheduling and despatch mechanism is primarily within the jurisdiction of the RLDC which functions within the regulatory control of the Central Commission. The RLDC is required to obey the decision of the Central Commission and has the authority to even direct the SLDC to comply with the directions of the Central Commission and/or with the directions of RLDC as provided in section 33 of the Act.
- 4.11 In the context of the above, the State Commission has no jurisdiction to deal with the functioning of the Powergrid or RLDC. This position has been settled by the decision of the Hon'ble Supreme Court in *Central Power Distribution Company Limited-v- Central Electricity Regulatory Commission (2007) 8 SCC 197.*
- 4.12 In regard to above, Powergrid also relies on the judgments passed by this Hon'ble Tribunal listed as under:
- a. Order dated 06.09.2017 passed by this Hon'ble Tribunal in Appeal 251 of 2016- Bhakra Beas Management Board –v- PSERC and others.
 - b. Order dated 07.10.2015 passed in Appeal No. 89 of 2014- Vandana Vidhyut Limited Raipur and Others –v- CERC and Others dealing with the jurisdiction of the State Commission to initiate proceedings under Section 142.
 - c. Order dated 21.10.2008 passed in Appeal No. 71 of 2008 in the case of Lanco Amarkantak Power Private Limited –v- MPERC and Others dealing with the jurisdiction of the State Commission, inter

alia, with regard to the contention on power of the Commission to call for documents.

The State Commission cannot question the Orders of the Central Commission

4.13 Quite apart from the above, by entertaining the petition, the State Commission was, in fact, proceeding to question the decisions of the Central Commission to allow UI Mechanism to be used for allowing drawl of power by the generating companies connected to the Inter State Transmission System. The State Commission should have adhered to the comity of jurisdiction and the State Commission ought not to have interfered in an action taken by the Central Commission. In this regard, reference may be made to India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd(2007) 5 SCC 510:

“16.....The doctrine of comity or amity requires a court not to pass an order which would be in conflict with another order passed by a competent court of law.....

.....

19. A court while exercising its judicial functions would ordinarily not pass an order which would make one of the parties to the lis violate a lawful order passed by another court.”

4.14 The Central Commission (irrespective of whether it has decided on merits correctly or not) having decided on the drawl of power under UI Mechanism, it is not open to the State Commission to question the same. The appropriate course would be for the aggrieved person to challenge the actions of the Central Commission either in appeal before this Hon’ble Tribunal or by way of writ petition in case the decision is in the form of a regulation notified by the Central Commission and it appears that CSPDCL has not challenged the Regulations notified by the Central Commission.

4.15 CSPDCL had during arguments alleged that there has been consumption of electricity even contrary to the Orders and Regulations of the Central Commission. Even such a question can be raised only before the Central Commission as only Central Commission can determine whether there is a violation of its Regulations or Orders. In this regard, **this Hon'ble Tribunal vide Order dated 07.10.2015 passed in Appeal No. 89 of 2014- Vandana Vidhyut Limited Raipur and Others –v- CERC and Others** has held it is the Central Commission which is legally competent to take action under Section 142 of the Electricity Act, 2003 for violation of CERC (UI charges and related matters) Regulations, 2009 if any violation thereof is established and the State Commission is not legally competent to adjudicate upon the matter on the ground that the parties are within the territorial jurisdiction of the concerned State Commission:

“8) We have carefully and cautiously studied the Central as well as State Commissions various regulations on the point in controversy before us and collated them. We find that in the case in hand it is the Central Commission which is legally competent to take action under Section 142 of the Electricity Act, 2003 against the appellants for the violation of Regulation 7(2) of CERC (UI charges and related matters) Regulations 2009 if any violation thereof is established. The learned State Commission is not legally competent to adjudicate upon the matter just on the ground that both the parties are situated within the territorial jurisdiction of the State of Chhattisgarh. No State Commission can be bestowed with the jurisdiction just on the ground that both the parties are situated within the territorial jurisdiction of the concerned State Commission.”

There is no supply of electricity by Powergrid or RLDC

4.16 CSPDCL as well as the State Commission have proceeded on a fundamentally wrong premise that by allowing the drawl of start up power under UI Mechanism, Powergrid and RLDC have undertaken the supply of electricity to the generating companies in the State of Chhattisgarh. This is patently capricious and wrong for the reason:

- (a) Powergrid and RLDC are undertaking system operation. Neither of them are in the business of selling electricity. They are, in fact, not permitted from undertaking generation or trading in or sale of electricity in terms of the statutory provisions of sections 27, 28 and 38 of the Electricity Act, 2003;
- (b) It is not a case where Powergrid or RLDC is ever the owner of electricity. One has to be an owner before it can sell electricity.
- (c) The UI Mechanism has been evolved by the Central Commission as a commercial mechanism for the generators and end-users including the distribution and trading companies to participate in drawing or injecting the power into the Grid from time to time subject to certain regulations/directions;
- (d) The Generating Station using start-up power is also not a consumer stand settled by this Hon'ble Tribunal in:
 - (i) Order dated 17.04.2012 passed in Appeal No. 47 of 2011 in the case of **Chhattisgarh State Power Distribution Company Limited -v- ISA Power Private Limited and Another;**
 - (ii) Order dated 24.05.2011 passed in Appeal No. 166 of 2010 in the case of **Chhattisgarh State Power Transmission Company Limited -v- R.R. Energy Limited and Another ;** and
 - (ii) Order dated 03.04.2014 passed in Appeal No. 240 of 2013 in the case of **Tamil Nadu Generation and Distribution Corporation Limited -v- Lanco Tanjore Power Company Limited and Others.**

4.17 Even CSPDCL has been permitted to and has been participating in such UI Mechanism. If the contention of CSPDCL is accepted, then the entire UI mechanism should be set aside as in every case of injection or drawl in deviation from the schedule, Powergrid or LDC would be held to have 'supplied the power'. It cannot be that there is a 'supply of power' only when there is a drawl of start up power and in every other case of drawl of power under UI, there is no 'supply of power'. However, CSPDCL has not challenged the UI mechanism for other entities and has in fact participated

in the UI Mechanism. CSPDCL has raised the issue only with respect to drawl of start up power by the generating companies. This clearly shows that CSPCL is selectively challenging the UI mechanism which cannot be accepted.

4.18 The UI mechanism has been evolved as a part of the Indian Electricity Grid Code. Any challenge to the drawl of electricity under the UI Mechanism has to be by way of challenge to the Regulations notified by the Central Commission. CSPDCL cannot indirectly challenge the above by seeking directions against Powergrid or RLDC.

4.19 In the circumstances mentioned herein above, there is no merit in the objections raised by the Respondents and the impugned order passed by the State Commission therefore is liable to be rejected.

5. **The Learned Counsel, Mr. Anand K.Ganesan, appearing for the Respondent No.1 has filed the following written submissions :-**

5.1 By the impugned order, the State Commission has in entertaining the petition of the Respondent held that the State Commission has jurisdiction to proceed with the matter on a prima facie reading that there is supply of electricity.

5.2 The State Commission has only held the following:

(a) Prima facie there appears to be supply of electricity in the State of Chhattisgarh;

(b) Since prima facie there is supply, the State Commission can proceed and hear the matter in detail. The assumption of jurisdiction is based on the prima facie decision and not de-hors the same.

5.3 The State Commission has not conclusively held on the allegations made by the Respondent No. 2, but only given a prima facie view to proceed further in the matter. The issue of jurisdiction decided is also only consequent to the prima facie decision on supply and if it is held on

- hearing the matter that there is no supply or otherwise any of the other defences of the Appellants is upheld, the consequences would be different.
- 5.4 Even on the issue of jurisdiction, there is no categorical or final finding. The premise of the matter being proceeded further is only on a prima facie view on supply. If there is no supply on the matter being heard in detail, the matter may fail on the issue of jurisdiction itself. Further, any of the other defences of the parties on jurisdiction or on merits or both may also be upheld and the petition may be dismissed. The issue raised would only be academic no prejudice would be caused.
- 5.5 The State Commission has also not issued any default notice or any other notice proposing to take penal action or impose penalty on the Appellants. The State Commission has only directed the parties to file their pleadings for the matter to be considered. There is no prejudice whatsoever caused to any person including the Appellants.
- 5.6 The decision of the Hon'ble Supreme Court in the case of *PTC India Limited v Gujarat Electricity Regulatory Commission, Civil Appeal No. 7524 of 2012* dated 18/10/2012 was not cited before the State Commission and the State Commission did not have the benefit of the said decision which directs the Hon'ble Tribunal and all the Regulatory Commissions to deal with the issues of jurisdiction and merits at one go and not separately.
- 5.7 In any event, there being only a prima facie view in the present case, the issue of jurisdiction on the subject matter is still open and has not been conclusively decided. Therefore, it is still for the State Commission to decide all issues including the question of jurisdiction on the subject matter. There is no basis for assumption that the final view on the subject matter and consequent jurisdiction would be the same as the prima facie view.

BASIS OF THE PRIMA FACIE DECISION

5.8 The decision of the State Commission prima facie that there is supply is based on the following:

- (a) The generating companies located in the State of Chhattisgarh are purchasing electricity and paying a price or consideration for the same.
- (b) The generating companies were earlier taking supply from the distribution licensees at the tariff determined by the State Commission.
- (c) The term supply is defined in Section 2(70) as sale of electricity. There is sale of electricity which is being purchased. This is prima facie established.

5.9 The State Commission has however not considered or held the following, as is sought to be alleged:

- (a) The issue is not of inter-state transmission or intra-state transmission. There is no finding on this. Transmission does not involve sale. Sale or purchase is distinct from transmission.
- (b) The State Commission has not held that the Appellant is violating any law, regulation or any direction. There is no such finding. The matter is yet to be heard by the State Commission on the issue. The State Commission has in fact not even issued a show-cause notice for violation.

5.10 There is no finding as to whether the generating companies are consumers or not in the facts of the present case. The issue is on prima facie supply and not of a consumer. The various arguments raised on generating companies not being consumers in the facts of the present case, the past decisions of the Hon'ble Tribunal and their applicability to the facts etc. are subject matter of decision when the matter is heard, if the issue arises. The impugned order does not proceed on the said basis.

5.11 The compliance or violation of the Grid Code - Indian Energy Grid Code or State Grid Code has not been gone into. There is no finding or decision on the same. It could be a matter for consideration while hearing the case

in detail. Whether the relief can be granted without the generating companies being impleaded as Respondents or not. The principle of *dominus litus* applies and it is for the Petitioner to choose the array of Respondents. Whether the petition is to fail for non-joinder of necessary parties or whether there is impleadment of any other party etc. is to be gone into.

- 5.12 No person can refuse to appear before the State Commission or file information that may be required. The State Commission is vested with the powers of a Civil Court under Section 94 of the Electricity Act, 2003 and is empowered to direct the attendance of a party and production of documents before it, producing evidence and such other powers as in a civil court. The contention of the Appellants that they cannot be called upon to appear at all by the State Commission is misconceived and would also set a very dangerous precedent of a person choosing which court he can appear or not. Every citizen in the country is bound to appear before any court of law when required.
- 5.13 The Central Commission does not regulate Powergrid or RLDC as a person or entity, but the activity of inter-state transmission of electricity or Grid Operations. If it is found that Powergrid or RLDC is engaged in any activity that is regulated by the State Commission, they are bound to the jurisdiction of the State Commission. Whether any such activity is being undertaken or not is an issue which is yet to be decided. The jurisdiction is on the subject matter and not on a person.
- 5.14 Further, when only a prima facie view is expressed, it is not for the party to challenge it in appeal at that stage. This is particularly when no prejudice whatsoever is caused to the party and there is no order or injunction that is passed. In this regard, the Hon'ble Supreme Court in **Civil Appeal No. 18834 of 2017, dated 16/11/2017 titled ECL Finance Ltd. v. Harikishan Shankarji Gudipati & Ors.**, has held as under:

“7. Learned counsel for the respondents submits that before issuing notice, the learned Single Judge had considered the merits of the case and had already made his mind to punish the respondents and, therefore, an appeal would lie, in view of the decisions referred to above. We are afraid the contention made by learned counsel for the respondents cannot be appreciated. The observations made by the learned Single Judge in the Order dated 22nd December, 2016, while issuing notice in the contempt petition, is only for the prima facie satisfaction as to whether the contempt petition needs to be considered on merits. Only after such a preliminary stage, notice can be issued. Now, it is open to the respondents to file their reply and after considering the defence, the learned Single Judge will have to take a call as to whether it is a case to be proceeded against for punishing the respondents. In case such a decision is taken by the High Court, it is, at that stage, that the respondents get a right to file an appeal before the Division Bench in terms of Section 19(1)(a) of the Act. Such a stage having not arisen, the impugned order passed by the Division Bench is only to be set aside. Ordered accordingly.

5.15 Therefore, it is amply clear that it is only after the Court decides a matter after considering the defence of the Respondents, the Respondents get the right to file an appeal before the Appellate authority. Therefore, the present appeal needs to be disposed of at the outset because no interference of this Hon’ble Tribunal is required at this stage.

6. **The learned counsel, Shri Gopal Choudhury, appearing for the Respondent No.2 has filed the following written submissions :-**

6.1 The main grounds of preliminary objection taken by the Appellants before the Commission was that they were completely beyond the jurisdiction of the State Commission for all purposes merely because they were regulated in the performance of their legitimate functions/activities by the CERC. They referred time and again to section 79 of the Act.

6.2 Appellants, however, they evaded giving the actual specific facts. They did not specifically deny or dispute the facts stated by the CSPDCL in the petition. They ignored that the CSPDCL petition was for violation of

section 12 by reason of carrying out activity beyond their legitimate functions tantamount to carrying on distribution activities within Chhattisgarh without a distribution licence to which they could never be entitled to.

Impugned Order of the Hon'ble Commission dated 3.9.2013

- 6.3 The Hon'ble Commission has merely taken a prima facie view that the issue related to power supply by means of UI mechanism within the territorial jurisdiction of the Commission, and that therefore the Commission has the power to hear and decide the matter. Thereupon, the Appellants herein were directed to submit their detailed reply. The impugned order does not decide anything finally. No findings on facts were given. It merely envisages that the enquiry into the alleged facts and circumstances must proceed and for that purpose the Commission has the jurisdiction. It merely takes a prima facie view as to the jurisdiction and requires the Appellants to file their reply. The issue of jurisdiction is still open for a final decision by the Commission upon an enquiry into the jurisdictional facts and the findings of the Commission thereon.
- 6.4 This Appeal invokes the Appellate Jurisdiction of the Hon'ble Tribunal. In exercise of such appellate jurisdiction, this Hon'ble Tribunal would not go into merits of any issue as an authority of the first instance. The issue in this appeal must therefore be confined to the question as to whether the Commission patently lacks jurisdiction to go into anything at all with respect to the complaint/contentions and allegations made in the petition before the Hon'ble Commission. Whether or not the Commission has correctly decided on the jurisdictional facts and exercised jurisdiction and/or its power thereupon can only be gone into an appeal against the final order of the Commission.

State Commission's Jurisdiction and Power under the Act

- 6.5 A distribution licence required under Section 12 can be issued under Section 14 only by a State Commission, being the only Appropriate Commission, under the Act. It necessarily follows that the State Commission alone is the Appropriate Commission to enforce the bar on distribution without a licence. It is submitted that the Central Commission would never have the power or jurisdiction on any matter concerning the distribution of electricity.
- 6.6 A State Commission also has the power to determine whether any CTU or STU or transmission licensee has contravened the bar on their engaging in trading within the State, and the State Commission can enforce the bar on such activity within the State by resort to powers under Sections 142 and/or 146. It also necessarily follows that it is the State Commission alone which has the power and jurisdiction to determine whether or not an activity or transaction amounts to distribution of electricity without a licence.
- 6.7 Without prejudice, even if some activities and/or transactions are claimed in defence to be undertaken upon the directions of some other authority and therefore considered excusable, it is within the power of the State Commission to decide and determine upon enquiry as to whether and to what extent such activity is covered by that other authority's directions and as to whether anything beyond amounts to distribution and/or trading within the State and as to what consequences follow according to law.

Power to enquire into and decide upon Jurisdictional Facts

- 6.8 It is settled law that, where the exercise of jurisdiction and power is conditional to the existence of certain facts, the authority is required to enquire into the existence of such jurisdictional facts before exercise of the power vested; and such authority inherently has the power and jurisdiction to enquire into and record findings on such jurisdictional facts. This principle is

discernible from the decision of the Supreme Court in *Katikara Chintamani Dora & Ors vs. Guntreddi Annamanaidu & Ors* [(1974) 1 SCC 567]

6.9 The questions as to whether the alleged activities / transactions tantamount to distribution and or trading of electricity in the State, and whether the same are with or without a licence, and whether they are authorized wholly or in part by other means, and whether any of them are unlawful and to what extent, are necessary jurisdictional facts to be determined by the State Commission upon enquiry and evidence taken in the course thereof. Such enquiry into jurisdictional facts is entirely within the power and jurisdiction of the State Commission. Thereupon, the State Commission would decide upon whether it has the jurisdiction and power to proceed further and exercise the powers vested in it in accordance with law.

Question of Jurisdiction depends on the allegation in the Petition, not on the defence thereto or results on merit.

6.10 It is settled law that the question of jurisdiction depends on the allegations made in a petition and not the defence taken against the allegations or the results on merit.

The following decisions of the Supreme Court are relevant –

- *Abdullah bin Ali & Ors vs Calappa & Ors* [(1985) 2 SCC 54, para 5]
- *Smt Bismillah vs Janeshwar Prasad & Ors* [(1990) 1 SCC 207, para 9]
- *Vasudev Gopalkrishna Tambwekar v Board of Liquidators* [AIR 1967 SC 369, paras 2a, 10]

6.11 It is settled law that the Commission has the power to decide on the question of its own jurisdiction. This does not necessarily have to be done conclusively at the stage of preliminary objections itself. It may require enquiry and finding upon the jurisdictional facts, and the Commission cannot be pre-empted from such enquiry. The question of jurisdiction at the

preliminary stage has to be seen taking the facts and pleadings and contentions as set out in the petition as true and correct. The Commission has the power to make the necessary enquiries on the relevant facts and call upon the petition respondents to reply to the alleged facts and provide such other or further facts as the Commission finds necessary. It may be that the Commission, after such enquiry, comes to a conclusion that the facts do not disclose any basis or cause for the Commission to exercise any jurisdiction and thereupon it may rule upon jurisdiction. Otherwise, the Commission can conclude upon an enquiry into the facts that the jurisdictional facts make out a case within the jurisdiction and power of the Commission, and thereupon the Commission can proceed to exercise power according to law.

6.12 The State Commission has to only proceed upon the allegations made in the petition with regard to distribution and/or trading. The defence of the Appellants herein that they were otherwise authorized, do not oust the jurisdiction of the State Commission. The Appellants may raise those as defence before the State Commission, but then it is for the State Commission to decide in the first instance. An appeal lies to this Hon'ble Tribunal only there from.

Submissions of the Appellant in this Appeal and Response thereto

6.13 It is reiterated that the mere defence of the Appellants to the allegations are not conclusive or relevant to the question of jurisdiction as already elaborately stated above. Clearly, the Appellants are avoiding enquiry into the details and facts of the energy supplied and consumed by the generators. It is only upon a full enquiry into the facts and gathering all necessary evidence that a conclusion can be reached as to whether or not the violations alleged are established or not. Only the State Commission has the power, jurisdiction and duty to carry out the enquiry.

- 6.14 The exercise of jurisdiction by the State Commission of the power conferred upon it by the Act is not limited or fettered by the mere fact of the nature of the Appellants or their origin. If the State Commission finds that the activities of the Appellants transcend their legitimate limited functions, and that the transgression is tantamount to undertaking distribution activities and/or supply of electricity to consumers within Chhattisgarh, the State Commission has the power and jurisdiction to take action according to law.
- 6.15 The contention that the State Commission cannot exercise any jurisdiction whatever over the Appellants merely for the reasons that their legitimate functions are within the regulatory control of the CERC, is misconceived. If the Appellants transcend their legitimate functions and undertake illegitimate activities tantamount to engaging in distribution activities in contravention of section 12 of the Act, the State Commission is well within its jurisdiction to enquire to all the facts relating to the same, determine whether or not the facts disclose violation of section 12 within its territorial jurisdiction and take action according to law upon a finding of such violation, The CERC has no jurisdiction whatsoever to go into the question as to whether any entity has violated the provisions of section 12 insofar as distribution activity is concerned; and it is only within the exclusive jurisdiction of the State Commission.
- 6.16 The State Commission is not exercising, and has not been called upon to exercise, any regulatory control over the Appellants in respect of their legitimate functions and activities within the regulatory control of the CERC. The Commission is enquiring into the illegal or extra-legal activities of the Appellants alleged to be in contravention of section 12 in relation to distribution of electricity and over which it has the exclusive jurisdiction under law.
- 6.17 The generating companies in Chhattisgarh have consumed electricity. The power is paid for at a price, albeit the UI rate. The title to the power is

thereby transferred for a consideration and consumed. It is a sale within the State of Chhattisgarh. It is supply under section 2(70). It was not under open access. If the Appellants contend that they are not the owners of any electricity, then it has to be established in the course of proceedings before the State Commission as to who is the owner, to whom the benefit went, and whether such sale for consumption amounts to distribution within Chhattisgarh. Only the State Commission has the power and authority to determine that issue upon necessary enquiry and gathering evidence.

6.18 It is the allegation of the CSPDCL in the petition before the Commission that the supply and consumption of electricity is allowed by PGCIL and WRLDC. Without prejudice, such supply has been even beyond that allowed by the Central Commission, and such energy claimed to be supplied and/or allowed to be drawn beyond what was allowed would in any case be a unlawful distribution and/or supply of electricity. The State Commission has to determine the issue on facts and evidence. The issue cannot be swept under the carpet on issue of jurisdiction or on a claim of immunity from the power and jurisdiction of the State Commission merely by reason of their being regulated by the Central Commission in respect of their legitimate activity.

6.19 The UI mechanism is a commercial mechanism to deal with the variations of scheduled activities. Unscheduled or random activities or drawl at will, without arrangement or schedule, are entirely beyond its conception, purpose and intent. The UI mechanism cannot be used as a tool of a pricing mechanism for unauthorized or illegal supply of power in a manner that is tantamount to distribution of electricity. The Appellant's activities are an abuse of the UI mechanism, and not even authorized even by the CERC.

6.20 The averment that the Appellants are only implementing the Central Commission's directions is seriously disputed. The activities and transactions go beyond that, and if that is so it would be distribution of

electricity at least to that extent and the State Commission alone would have jurisdiction to determine the same. The State Commission would have the jurisdiction if, upon facts determined on enquiry, any activity / transaction is tantamount to distribution within Chhattisgarh. Consequently and necessarily the power and jurisdiction to make an enquiry into jurisdictional facts and to decide upon them inheres in the Commission.

6.21 The Appellants are also in violation and transgression of the limits of the CERC Regulations. The suggestion that comity of jurisdiction can mean that a person who is under the jurisdiction of one authority in certain matters is immune from the jurisdiction of all other authorities in any other respect notwithstanding the nature of their misdemeanour or transgression is grossly misconceived and unknown to law. Comity of jurisdiction is not a fetter such as to strip one authority of jurisdiction vested by law merely because another entity has usurped or exceeded its jurisdiction even if it be with benign intention. Comity of jurisdiction envisages that one authority would not wander or infringe the jurisdiction of another authority.

6.22 It has not be shown anywhere, or even pleaded, how the CERC has jurisdiction to allow consumption of electricity within a State out of the energy injected into the ISTS without open access being arranged and for a price determined by the UI rate. The State Commissions are not subordinate to the Central Commission. They are distinct authorities with definite jurisdictions. The supply of electricity within a State, otherwise than by inter-state open access is within the exclusive domain of the State Commission. The Appellants submissions on “comity of jurisdiction” are wholly misconceived.

6.23 The jurisdiction of the State Commission extends more widely to all issues not covered by section 79. Each authority can exercise jurisdiction conferred upon it irrespective of the jurisdiction of other authorities in respect of other matters. The issue in this case is in respect of violation of

section 12 in relation to distribution of electricity; and that falls squarely and exclusively within the jurisdiction of the State Commission.

7. **We have heard at length the learned counsel appearing for the Appellants and the learned counsel appearing for the Respondents and considered carefully their written submissions/arguments during the proceedings and available material on record. The following principal issues emerge in Appeal Nos. 233 of 2013 for our consideration:-**

- 7.1 Whether the State Commission is right in holding that the drawl of power by the generating stations under UI mechanism in the state of Chhattisgarh amounts to supply or trading of electricity by the Appellants to the generating stations?
- 7.2 Whether the State Commission has the jurisdiction to pass any order relating to the matters dealt with and decided by the Central Commission in exercise of its functions under the Electricity Act and more particular in the detailed procedure issued as per the Regulation 27 of the Open Access Regulations?
- 7.3 Whether the State Commission can exercise a jurisdiction over the Appellants (CTU, POSOCO and RLDC) which are concerned only with the ISTS and regulated by the Central Commission?

8. **Our Findings and analysis**

8.1 **Issue No.1**

The Appellants have submitted that the Inter-State Transmission System and its tariff are within the jurisdiction of Central Commission and the term Inter- State Transmission System is duly defined in Section 2(36) of the Electricity Act. The Power Grid, POSOCO, NLDC and RLDC are only implementing the directions of the Central Commission and the drawl of power by the generating stations in the state of Chhattisgarh under the UI mechanism is in pursuance to the decision of the Central Commission and not at instance of Power Grid or RLDC. It is an established fact that the UI mechanism has been evolved and notified by the Central Commission with an objective of safe and secure operation of the regional/national grid with specific adherence to the prescribed grid frequency band.

8.2 It is also a settled principle that the drawl/injection of power under UI mechanism is just a mechanism for allowing unscheduled drawl or injection of power with a view to maintain grid frequency and the applicable charges are accounted for positive or negative contribution by the beneficiaries as per frequency variations in a particular time block. The power drawl for testing and commissioning activities by the generating companies in the state of Chhattisgarh has been permitted by the Central Commission considering all the pros and cons involved and after considering views of concerned stakeholders. The Appellants have further contended that a drawl of power by the generating companies for testing and commissioning activities prior to COD cannot be claimed to be an act of distribution / sale / supply of electricity by the Appellants. Besides, a generating station using start up power is not a consumer stand settled by this Tribunal in several judgments dated 17.04.2012, 24.05.2011, 03.04.2014, etc.. As such, the State Commission and CSPDCL have proceeded on fundamentally a wrong premise that the Appellants are undertaking supply/distribution of electricity in the State of Chhattisgarh.

8.3 *Per contra*, the Respondent, CSPDCL has contended that the generating companies have consumed electricity in the state of Chhattisgarh and paid for the same albeit at the UI rate. It is, accordingly supply of power under section 2(70) and also a sale within the state of Chhattisgarh. The Respondent has further alleged that the supply or consumption of electricity is allowed by the Appellants is, in any case, an unlawful distribution and supply of electricity under the jurisdiction of the distribution licensee. It is further argued by the Respondent that the UI mechanism is a commercial mechanism to deal with the variation of scheduled activities. The UI mechanism cannot be used as a tool of a pricing mechanism for unauthorised or illegal supply of power in a manner that is tantamount to

distribution of electricity and as such, the activities of the Appellants are abuse of the UI mechanism.

Our findings

8.4 We have gone through the rival contentions of the learned counsel appearing for the Appellants and the Respondents and noted that the drawl of power by the generating companies in the state of Chhattisgarh for testing and commissioning has been permitted by the Central Commission vide its *bona fide* orders and the Appellants have only executed the order by facilitating the concerned generating companies. It is significant to note that the primary objective of UI mechanism and its pricing has been to maintain the grid frequency at a reasonable pre-set band in accordance with IEGC and for the smooth & integrated operation of the regional/national grid. The UI charges for respective drawl or injection are accounted for and the surplus arising out of the settlement is credited to the PSDF notified by the Central Commission. The Appellants remain as revenue neutral in such activities and act only as facilitator for drawl/injection of power through ISTS as per directions of the Central Commission. It is well settled by law that neither drawl under UI is a distribution/supply nor the drawee of such power from the grid is a consumer.

8.5 We, therefore, opine that the aforesaid activities carried out by the Appellants do not attract any violation of law or otherwise misuse or the abuse of the UI mechanism. Further, there is no case of unlawful distribution/supply of electricity by the Appellants under the jurisdiction of distribution licensee, as alleged by the Respondent No.2.

9. **Issue No.2**

9.1 The Appellants have submitted that they being the statutory authorities under the Act discharge their functions under the regulatory control of the Central Commission. The Appellants cannot engage in the business of

trading or supply of electricity as per section 38 of the Act. It is further contended by the Appellants that the connectivity applicants are drawing power as per the provision of UI Regulations notified by the Central Commission. It is, thus clear that the drawl of power by the generating companies in the State of Chhattisgarh is only through UI mechanism which is governed and regulated by the regulations notified by the Central Commission. Hence, the State Commission has no jurisdiction to decide in a matter which falls under the control and regulatory regime of the Central Commission. The Appellants have further submitted that drawl of power for testing and commission by a generating company is not at all a supply or distribution of electricity and in the circumstances of the present case, the State Commission cannot exercise its jurisdiction over the decisions and regulations of the Central Commission. It has been held by several judgments of the Apex Court and this Tribunal that the matter relating to UI mechanism and its charges are under the sole jurisdiction of the Central Commission which has been evolved by it for a specific purpose for safe and integrated operation of the grid.

9.2 ***Per contra***, the Respondents have stated that a distribution license required under Section 12 can be issued under Section 14 only by a State Commission and, therefore, it alone is the Appropriate Commission to enforce bar on distribution without license and on any matter concerning the distribution of electricity. In other words, it is the state commission alone which has the power and jurisdiction to determine whether or not an activity or transaction amounts to distribution of electricity without a license. The question as to whether the alleged activities/transactions pertain to distribution and/or trading of electricity in the state, legally or illegally, can be decided by the State Commission on enquiry and evidence taken in the course thereof. It is only after that the State Commission may decide upon

whether it has the jurisdiction to proceed further in accordance with law or not.

Our findings

9.3 After thorough critical evaluation of the relevant materials on record and submissions of the rival contentions of the counsel appearing for the Appellants and Respondents, we find that the impugned order of the State Commission is, *prima facie*, based on the complaints of the CSPDCL through their writ petition related to power supply by means of UI mechanism. The State Commission has recorded in its proceedings that **“as supply is being done within the territorial jurisdiction of this commission, hence we have the power to hear and decide the matter”**. With these findings, the State Commission rejected the objections of the Appellants raised in regard to the jurisdiction. We, however, observe that as the matter specifically pertained to drawl of power by the generating companies in the state of Chhattisgarh for testing and commissioning activities under UI mechanism, the State commission ought not to have proceeded with the petition of CSPDCL considering that the matters relating to UI mechanism fall under the sole jurisdiction of the Central Commission and also, a generating company drawing power through ISTS for commissioning activities is not a “consumer” under the meaning & purpose of distribution as held by this Tribunal in its several judgments.

10. **Issue No.3**

10.1 The Appellants have submitted that the State Commission on the face of it has no jurisdiction to initiate or proceed against the Appellants on matters relating to the drawl of power by the generating stations connected to ISTS under UI mechanism. It is further stated that the jurisdiction in regard to the Appellants and for matters involved in the case is only of the Central Commission under Section 79 of the Electricity Act and, thus, the initiation

of proceedings by the State Commission is unsustainable in law. The Appellants have further contended that the drawl of power by the generating companies for testing and commissioning in the state of Chhattisgarh under UI mechanism has been effected by them after the decision of the Central Commission and not, at the instance of the Appellants. As provided under the Act, all the ISTS lines are regulated by the Central Commission and hence, the matters related to injection/drawl of power under ISTS including its tariff are within the jurisdiction of the Central Commission. The State Commission exercises its regulatory powers under section 86(1)(c) concerning the intra state transmission lines and wheeling of electricity within the state.

10.2 To support their contentions, the Appellants have cited the decision of the Hon'ble Supreme Court in *Central Power Distribution Company Ltd. vs. CERC (2007) 8 SCC 197*. The Appellants have also relied upon various judgments of this Tribunal relating to the determination of jurisdictions. The Appellants have gone further in pointing out that by entertaining the petition of CSPDCL, the State Commission has proceeded to question the decisions of the Central Commission to allow drawl of power by the generating companies under UI mechanism through ISTS. The State Commission should have adhered to the Comity of jurisdiction and ought not to have cited in an action taken by the Central Commission. In this regard, Appellants have cited the relevant para of the judgment of the Apex Court in *Household and Healthcare Ltd. vs. LG Household and Healthcare Ltd.(2007)5 SCC 510*.

10.3 The Appellants have also submitted that the generating stations using start up power are not consumers as settled by this Hon'ble tribunal in various Appeals such as Appl.No.47 of 2011, 166 of 2010 and 240 of 2013 etc.. The Appellants have alleged that the State Commission without applying prudence on the petition of CSPDCL has proceeded to enquire about the

decision of the Central Commission on the drawl of power under UI mechanism and also, on the follow up action taken by the Appellants in accordance with the decisions of the Central Commission. It is in the full knowledge of all the distribution licensees and State Commissions in the country the very purpose and operation of UI mechanism and even CSPDCL has been permitted to and has been participating in such mechanism.

- 10.4 *Per contra*, the learned counsel for the State Commission submitted that the State Commission has not conclusively held on the allegations made by the Respondent No.2, CSPDCL but only has given a *prima facie* view to proceed further in the matter. Even on the issue of jurisdiction, there is no categorical or final finding of the Commission in this regard. After detailed examination of facts and circumstances and hearing, the State Commission may decide either to proceed in the matter or dismiss the petition. It is further brought out by the learned counsel for the State Commission that no person can refuse to appear before the State Commission or to file information as asked for. The State Commission is vested with the powers of the civil court under section 94 of the Electricity Act and is empowered to direct the attendance of the party and production of documents before it.
- 10.5 The learned counsel for the State Commission has further emphasised that contention of the Appellants that they cannot be called upon to appear before the State Commission is not justified and is intended to set a dangerous precedence. The learned counsel for Respondent No.2, CSPDCL submitted that the main ground of preliminary objections taken by the Appellants before the commission was that they were completely beyond the jurisdiction of the State Commission for all purposes merely because they were regulated in the performance of their legitimate functions by the CERC.

10.6 It is further brought out by the Respondents that the Hon'ble State Commission has merely taken a prima facie view that the issue involved power supply in the State of Chhattisgarh by means of UI mechanism and accordingly the appellants were directed to submit their detailed reply. The impugned order does not decide anything finally and it merely envisages to proceed an enquiry into the alleged facts by the distribution licensee. The Respondent No.2 has further contended that the State Commission has various regulatory powers such as issuing a distribution licence under section 14, to enforce the bar on distribution without a license, to determine whether any CTU or STU or transmission licensee has contravened the power on their engagement in distribution or trading within the state, etc.. As such, the State Commission has acted strictly as per its jurisdiction. The Respondent No.2 has further relied on various judgments of the Hon'ble Supreme Court regarding question of jurisdiction and has pointed out that it a settled law that the question of jurisdiction depends on the allegations made in a petition and not the defence taken against the allegations or the results on merits.

Our Findings

10.7 We have gone through the contents of submissions of the learned counsel appearing for the Appellants as well as Respondents and also perused the findings of various Authorities referred to by the parties. We find that the State Commission after hearing the parties concluded that **“the matter is *prima-facie* related to power supply by means of UI mechanism and as the supply is being done within the territorial jurisdiction of the State Commission, we have the powers to hear and decide the matter”**. In our opinion, as the case related to drawl of power by generating companies through UI mechanism, the State Commission ought not to have precipitated the matter further. It is well-settled fact that the UI mechanism has been

evolved and being regulated by the Central Commission for ultimate benefit of all the stakeholders in the country concerning generation, transmission and distribution of electricity and as such, the matter is fairly under the sole jurisdiction of the Central Commission. Once the Central Commission having decided on the drawl of power under UI mechanism, it is not open to any State Commission to question the same or examine it on merits of correctness or otherwise. **The appropriate course could be for the aggrieved person or parties to challenge the action of the Central Commission before it or at any appropriate legal forum.**

10.8 The Central Commission once passed an order permitting drawl of power by the generating companies under UI mechanism for testing and commissioning, whether correctly or not, it is the legitimate duty of the Appellants namely CTU, POSCO/NLDC and RLDC to facilitate the concerned connectivity applicants and implement the directions of the Central Commission up to a logical conclusion. It is also relevant to note that it has been held in several judgments by this Tribunal as well as the Apex Court that the Central Commission has the sole jurisdiction over the drawl of power under UI mechanism from ISTS and also, the generating companies drawing such power from the grid are not “consumers” for the purpose and meaning of distribution/supply of electricity as defined in the Electricity Act.

10.9 **We thus, hold that the State Commission has not acted in an equitable and justifiable manner. It ought to have refrained from the further proceedings in the petition filed by CSPDCL alleging supply and distribution of electricity in the state whereas the drawl of power was clearly under UI mechanism from ISTS for testing and commissioning activities as decided by the Central Commission. The Appellants have only scrupulously implemented the directions/orders of the Central Commission.**

11. Summary of our findings

We have carefully gone through the various contentions of the learned counsel appearing for the Appellants as well as Respondents and also perused the relevant material on record.

We are of the considered opinion that there is merit in the appeal and deserves to be allowed. The impugned order of the State Commission is liable to be set aside.

ORDER

In view of our findings and analysis in foregoing Paras, we are of the considered opinion that the issues raised in the present appeal being Appeal No. 233 of 2013 have merit. Hence, the Appeal is allowed and the impugned order dated 3.9.2013 passed by the State Commission in the Petition No. 19(MP) of 2013 is set aside.

In view of the above, IA No. 318 of 2013 stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **09th day of May, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

Pr