

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 86 OF 2014 & IA NO.156 of 2014**

**AND**

**APPEAL NO.102 OF 2014**

**Dated : 11<sup>th</sup> May, 2018**

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

**APPEAL NO. 86 OF 2014 & IA NO.156 of 2014**

**IN THE MATTER OF:**

Chhattisgarh State Power Distribution Co Ltd.,  
4<sup>th</sup> Floor, Vidyut Seva Bhavan, Daganiya,  
Raipur 492013,  
represented by its Additional Chief Engineer (RAC).

**.....Appellant**

**Versus**

1. Central Electricity Regulatory Commission,  
3& 4 Floor, Chanderlok Building, 36, Janpath,  
New Delhi-110001
2. Member-Secretary, Southern Regional Power  
Committee, 29 Race Course Cross Road,  
Bengaluru 560009.
3. Power Grid Corporation of India Ltd.,  
Saudamini, Plot No.2, Sector 29,  
Near IFFCO Chowk,  
Gurgaon (Haryana) -122001

4. Power System Operation Corporation Ltd.,  
29 Race Course Cross Road,  
Bengaluru 560009.
5. Tamil Nadu Generation & Distribution Corporation Ltd.,  
NPKRR Maaligai,  
144, Anna Salai,  
Chennai – 600 002.
6. Kerala State Electricity Board,  
Vydyuthi Bhavanam, Pattom,  
Thiruvananthapuram 695004
7. State Power Purchase Co-ordination Committee,  
Cauvery Bhawan,  
Bangalore 560 001
8. Puducherry Electricity Department,  
Duppuypet,  
Puducherry 605001
9. Andhra Pradesh Power Co-ordination Committee,  
Vidyut Soudha,  
Khairatabad,  
Hyderabad 500082
10. Neyveli Lignite Corporation Ltd.,  
No.135, Periyar E.V.R. High Road,  
Kilpauk,  
Chennai -600 010
11. KSK Mahanadi Power Co. Ltd.,  
8-2-293/82/A/431/A, Road  
No. 22 Jubilee Hills,  
Hyderabad 500033
12. EMCO Energy Ltd.  
701/704, 7<sup>th</sup> Floor, Naman Centre,  
A-Wing, BKC (Bandra Kurla Complex),  
Bandra,  
Mumbai- 400 051.

....Respondents

**Counsel for the Appellant(s)** : Mr. K. Gopal Choudhury

**Counsel for the Respondent(s)** : Mr. Nikhil Nayyar  
Mr. Divyanshu Rai for R-1

Mr. M.G. Ramachandran  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Mr. Anushree Bardhan for R-3 & R-4

Mr. Maiturgupta Misra for R-11  
Ms. Raveena Dhamija for R-12

**APPEAL NO.102 OF 2014**

Tamil Nadu Generation and Distribution Corporation Ltd)  
Rep. by its Chief Financial Controller, Regulatory Cell  
144, Anna salai  
Chennai-600002

..... **Appellant**

**Versus**

1. Central Electricity Regulatory Commission,  
3& 4 Floor, Chanderlok Building, 36, Janpath,  
New Delhi-110001
2. Member-Secretary, Southern Regional Power  
Committee, 29 Race Course Cross Road,  
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Thiruvananthapuram 695004

6. State Power Purchase Co-ordination Committee,  
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7. Puducherry Electricity Department,  
Duppuyet,  
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8. Andhra Pradesh Power Co-ordination Committee,  
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Hyderabad 500082
9. Neyveli Lignite Corporation Ltd.,  
No.135, Periyar E.V.R. High Road,  
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Chennai -600 010
- 10.KSK Mahanadi Power Co. Ltd.,  
8-2-293/82/A/431/A, Road  
No. 22 Jubilee Hills,  
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**....Respondents**

**Counsel for the Appellant(s)** : Mr. S. Vallinayagam

**Counsel for the Respondent(s)** : Mr. Nikhil Nayyar  
Mr. Divyanshu Rai for R-1

Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Mr. Anushree Bardhan for R-3 & R-4

Mr. Hemant Singh for R-10

## J U D G M E N T

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

APPEAL NO. 86 OF 2014 & IA NO.156 of 2014

AND

APPEAL NO.102 OF 2014

1. The Appeal Nos. 86 of 2014 and 102 of 2014 under section 111(1) & (2) of the Electricity Act, 2003 have been preferred by Chhattisgarh State Power Distribution Company Ltd. and Tamil Nadu Generation and Distribution Corporation Ltd. respectively (herein after referred to as 'the **Appellant(s)**) against the Order dated 18.09.2013 passed by the Central Electricity Regulatory Commission (**Central Commission**) in Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012.
  - 1.1 The Central Commission passed the final order dated 18.09.2013 in Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012 directing that drawl of start-up power under UI shall be permitted in respect of the generating stations which have been approved for direct connectivity to the ISTS, and that the RLDCs should satisfy itself that the power drawn is for the purpose of start-up only and not for the purpose of construction activities which should be met by making arrangement with the distribution company. The Central Commission directed the staff to process the proposal for amendment of the 2009 Regulations based on the above decision.
  - 1.2 Aggrieved by the impugned order of the Central Commission dated 18.09.2013 passed in Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012, the Appellants have filed these Appeals.

- 1.3 Respondent No.1 is Central Electricity Regulatory Commission constituted under the Electricity Act, 2003 for carrying out various regulatory functions as stipulated under Section 79 of the Act.
- 1.4 Respondent No.2 to 4 are Southern Regional Power Committee (SRPC), Power Grid Corporation of India Ltd. (PGCIL), Power System Operation Corporation Ltd.(POSOCO) constituted under the Electricity Act, 2003 for performing various functions relating to Inter-State Transmission System (ISTS) as stipulated under the Act.
- 1.5 Other Respondents are generating/distribution companies constituted under Companies Act and involved in the business of Electricity.

## **2. Brief Facts of the Case(s) in Appeal Nos. 86 of 2014 & 102 of 2014**

- 2.1 The Hon'ble Central Commission notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium-Term Access in inter-State Transmission and related matters) Regulations, 2009, dated 07.08.2009 (hereafter referred to as the "2009 Regulations").
- 2.2 Clauses 8(6) and 8(7) in Chapter 3 of the said 2009 Regulations, (as amended from time to time) have specific reference to the grant of connectivity and interchange of power with the grid and other associated matters.
- 2.3 The aforesaid Clause 8(7) was amended by Clause 2(1) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in Interstate Transmission and Related Matters) (Second Amendment) Regulations, 2012, dated 21.03.2012.

- 2.4 In pursuance of Clause 27 of the aforesaid 2009 Regulations, a Procedure for Making Applications for Grant of Connectivity in ISTS was approved by the CERC's order dated 31.12.2009.
- 2.5 The Neyveli Lignite Corporation Ltd (NLC) filed Petition No 117/MP/2012 seeking directions regarding injection of infirm power and drawl of power for the commissioning activities under UI mechanism till declaration of COD of NLC TPS II Expansion due to delay in declaration of COD as a result of numerous teething problems resulting in prolonged injection of infirm power. In the Record of Proceedings dated 26.04.2012, the Central Commission observed that the UI is not a mechanism to draw power for testing during commissioning and directed that the NLC should make arrangement through some form of open access to meet its requirement.
- 2.6 The Central Commission passed an order dated 02.11.2012 in Petition No 117/MP/2012, granting extension of the period of injection of infirm power. The Hon'ble Commission also held that the 2009 Regulations do not provide for drawl of power under UI for testing and commissioning, and that the detailed procedure issued under the Regulations cannot travel beyond the scope of the Regulations to allow drawl of start-up power under UI. The Central Commission declined to reconsider its directions dated 26.04.2012 and directed that the words "including drawl of power for commissioning activities" in Clause 6.2 of the detailed procedure shall stand deleted with immediate effect.
- 2.7 The KSK Mahanadi Power Co. Ltd filed Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012, purportedly on the ground that the other stakeholders were not given an opportunity to make their submissions before the Central Commission passed the order dated 02.11.2012, seeking review of the said order dated 02.11.2012 to the extent of the amendment of the procedure regarding drawl of power in Clause 6.2, or alternatively direct the WRLDC to

allow the Review Petitioner to draw power on UI rates from the ISTS as a special case till the testing and commissioning of the 1<sup>st</sup> unit of the project is completed. The Review Petitioner had apparently stated that it was in the process of commissioning the first unit of 6 x 616 MW thermal power plant in Chhattisgarh, and that the WRLDC had permitted the Petitioner to draw power from the grid for commissioning activities. The Central Commission passed an order dated 07.12.2012 as an interim measure pending consideration of the issue raised in the petitions directing the RLDCs to permit the Petitioner / Review Petitioner and similarly placed generators to draw power from the grid under UI for testing and commissioning activities.

2.8 The Central Commission passed the final order dated 18.09.2013 in Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012 directing that drawl of start-up power under UI shall be permitted in respect of the generating stations which have been approved for direct connectivity to the ISTS, and that the RLDCs should satisfy itself that the power drawn is for the purpose of start-up only and not for the purpose of construction activities which should be met by making arrangement with the distribution company. The Central Commission directed the staff to process the proposal for amendment of the 2009 Regulations based on the above decision.

2.9 The Appellants claim that they were not made a party to any of the aforesaid proceedings including the proceedings in which the impugned order dated 18.09.2013 was passed. The Appellants had no notice or knowledge of the proceedings. The Appellants also were unaware of the impugned order dated 18.09.2013. The Appellants came to know of the impugned order only on 16.12.2013 when the same was referred to in the course of arguments in an appeal before the Hon'ble Tribunal.



2.10 Aggrieved by the impugned order of the Central Commission dated 18.09.2013 passed in Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012, the Appellants have filed these Appeals before the Hon'ble Tribunal.

### **3. QUESTIONS OF LAW**

The Appellants have raised following questions of law in their Appeals:-

- 3.1 Whether, in the facts and circumstances of the case, the impugned order dated 18.09.2013 passed in Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012, is erroneous, arbitrary, without jurisdiction and/or contrary to law and unsustainable?
- 3.2 Whether, in the facts and circumstances of the case, the Review Petition No. 27/RP/2012 in Petition No. 117/MP/2012 was maintainable in law and whether the Hon'ble Commission had acted without jurisdiction and/or contrary to law in passing the impugned order ?
- 3.3 Whether, in the facts and circumstances of the case, the impugned order is not violative of the principle of natural justice in that all the stake holders affected by the order to be passed, or likely to be so affected, including the Appellants, were given notice of the proceedings / petition and afforded sufficient opportunity to be heard in the matter?
- 3.4 Whether, in the facts and circumstances of the case, the Hon'ble Commission had rightly and correctly held in the order dated 02.11.2012 in Petition No 117/MP/112 that the 2009 Regulations do not provide for drawl of power under UI for testing and commissioning, and that the detailed procedure issued under the Regulations cannot travel beyond the scope of the Regulations to allow drawl of start-up power under UI; and accordingly, whether the Hon'ble Commission correctly declined to reconsider its directions dated 26.04.2012; and whether the Hon'ble Commission had not correctly directed that the words

“including drawl of power for commissioning activities” in Clause 6.2 of the detailed procedure shall stand deleted with immediate effect?

- 3.5 Whether, in the facts and circumstances of the case, the Hon’ble Commission was justified in making the interim order dated 07.12.2012 permitting drawl of power from the grid under UI for testing and commissioning activities, notwithstanding that the Hon’ble Commission had itself held that the same was contrary to the Regulations?
- 3.6 Whether, in the facts and circumstances of the case, the Hon’ble Commission could have lawfully decided to pass the impugned order consciously contrary to the Regulations, purporting and intending it to be operative forthwith, and then direct its staff to process a proposal for amendment of the Regulations based on the impugned decision; and whether the same was not repugnant to the Rule of Law and wholly unsustainable?
- 3.7 Whether, in the facts and circumstances of the case, the impugned order of the Hon’ble Commission is contrary to the very purpose and scheme of UI as set out in the UI Regulations, and whether the impugned order violates the provisions of the UI Regulations and the Open Access Regulations; and whether the impugned order is tantamount to abuse of the UI mechanism for an improper and obtuse purpose and thereby contrary to law and unsustainable ?
- 3.8 Whether, in the facts and circumstances of the case, effect of the impugned order to allow the abuse of the UI mechanism allowing drawl and purchase of power by a generating company for start-up, stand-by and/or for any other purposes contrary to the express provisions of the statutory regulations and subversion of the same, and create a device by which the liability and obligation to source power for consumption through open access duly paying cross subsidy surcharge to the distribution licensee is bypassed and evaded, and create a device for the trading of power in the grid without arranging for the

same lawfully under open access or by arrangement with the distribution licensees and thereby permitting an activity prohibited by law to be undertaken, and subverting and evading the provision and cross-subsidising tariff established by the State Commission for start-up power for generating companies in the states from the distribution licensees, and allowing trading in power by entities prohibited and/or disentitled by law to engage in trading is not contrary to law and unsustainable?

**4. The submissions of the learned counsel, Shri Gopal Choudhury, appearing for the Appellant in Appeal No. 86 of 2014 are as under :-**

**Provisions of Regulations and pursuant procedure**

**UI Regulations**

4.1 The Central Commission notified the Central Electricity Commission (Unscheduled Interchange charges and related matters) Regulations, 2009, dated 30.03.2009 (hereafter referred to as the “UI Regulations”). In order to appreciate the scope of the UI Regulations and the charges there under, the following provisions of the UI Regulations may be noticed.

1.1 Definition of “Unscheduled Interchange” – Clause 2(1)(o) :

*(o) “Unscheduled Interchange” in a time-block for a generating station or a seller means its total actual generation minus its total scheduled generation and for a beneficiary or buyer means its total actual drawl minus its total scheduled drawl.*

Scope and application of UI Charges – Clauses 4 and 5 :

*These regulations shall be applicable to –*

- (i) The generating stations and the beneficiaries, and*
- (ii) Sellers and buyers involved in the transaction facilitated through open access or medium term access or long-term access in inter- State transmission of electricity.*

5. Unscheduled Interchange (UI) Charges :

*The charges for Unscheduled Interchange for all the time-blocks when grid frequency is between 50.3 Hz and 49.2 Hz shall be payable for over-drawl by the buyer or the beneficiary and under-injection by the generating station or the seller and receivable for under-drawl by the buyer or the beneficiary and over-injection by the generating station or the seller and shall be worked out on the average frequency of the time-block at the specified rates.*

4.2 From the above it is clear that the scope and scheme of UI & its UI Charges are as follows :-

- UI charges are payable by a buyer / beneficiary for overdrawl and by a generating station / seller for under-injection; and conversely receivable by a buyer / beneficiary for underdrawl and by a generating station / seller for over injection.
- UI for a generating station / seller arises out of the difference between actual and scheduled generation; and UI for a beneficiary / buyer arises out of the difference between actual and scheduled drawl.
- The only entities involved in a UI are beneficiary / buyer and generating station/seller. A situation where there is a generating station / seller but no beneficiary / buyer is not at all contemplated or covered.
- In so far as “generating stations” are concerned, these are only those whose tariff is determined by the Central Commission in view of the specific definition. Other generating stations may be only “sellers” as defined in the Regulation.
- There must be a supply of electricity through a transaction scheduled in accordance with the Open Access Regulations for the scheme of UI and UI charges to operate. A scheduled open access transaction is a sine qua non for the scheme of Unscheduled interchange and UI charges to operate and apply.

### **Connectivity and Open Access Regulation**

4.3 The Central Commission notified the Central Electricity Commission (Grant of Connectivity, Long Term Access and Medium-Term Access in inter-State Transmission and related matters) Regulations, 2009, dated 07.08.2009 (hereafter referred to as the “2009 Regulations”).

4.4 Clauses 8(6) and 8(7) in Chapter 3 of the said 2009 Regulations, as they stood prior to the 2012 Amendment, read as follows :-

- (6) *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 or short-term open access.*
- (7) *A generating station, including captive generating plant which has been granted connectivity to the grid shall be allowed to undertake testing including full load testing by injecting its infirm power into the grid before being put into commercial operation, even before availing any type of open access, after obtaining permission of the concerned Regional Load Despatch 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 as a result of this testing shall also be charged at UI rates.*

4.5 The aforesaid Clause 8(7) was amended by Clause 2(1) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in Interstate Transmission and Related Matters) (Second Amendment) Regulations, 2012, dated 21.03.2012 to read as follows :-

*“(7) Notwithstanding anything contained in clause (6) of this regulation and any provision with regard to sale of infirm power in the PPA, a unit of a generating station, including a captive generating plant which has been granted connectivity to the grid shall be allowed to inject infirm power into the grid during testing including full load testing before its COD for a period not exceeding six months from the date of first synchronization after obtaining prior permission of the concerned Regional Load Despatch Centre :*

*Provided that the Commission may allow extension of the period for testing including full load testing, and consequent injection of infirm power by the unit, beyond six months, in exceptional circumstances on an application made by the generating company at least two months in advance of completion of six months period:*

*Provided further that the concerned Regional Load Despatch Centre while granting such permission shall keep the grid security in view:*

*Provided also that the onus of providing that the injection of infirm power from the unit(s) of the generating station is for the purpose of testing and commissioning shall lie with the generating company, and the respective ROLDC shall seek such information on each occasion of injection of power before COD. For this, the generator shall provide RLDC sufficient details of the specific testing and commissioning activity, its duration and intended injection etc :*

*Provided also that the infirm power so injected shall be treated as Unscheduled interchange of the units(s) of the generating station and the generator shall be paid for such injection of infirm power in accordance with the provisions of the Central Electricity Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009, as amended from time to time.”*

4.6 From the above provisions the following position is clear –

- Clause 8(6) is the main provision which clearly states that connectivity shall not entitle interchange of any power unless open access is obtained.
- Clause 8(7) is an exception to 8(6). Both in the 2009 Regulation and in the 2012 Amendment, Clause 8(7) permits a generating station to only inject power during testing before being put into commercial operation; the 2012 Amendment providing further that the period shall not exceed 6 months from the date of 1<sup>st</sup> synchronisation.
- This is emphasised further by the 3<sup>rd</sup> proviso of the 2012 amendment that the onus of proving that the injection is only for testing and commissioning lies with the generating company which is to be overseen by the RLDC.
- There is no provision permitting drawl of power for any reason or purpose. Drawl will have to be arranged only through open access as specifically provided in Clause 8(6). Drawl without open access is impermissible.

**Detailed Procedure pursuant to 2009 Regulation**

4.7 In pursuance of Clause 27 of the aforesaid 2009 Regulations, a Procedure for Making Applications for Grant of Connectivity in ISTS was approved by the CERC's order dated 31.12.2009.



Clause 6 of the said procedure, comprising of Clauses 6.1 to 6.3 is as follows:-

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 or short-term open access.*

6.2 *However, generating station, including captive generative 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 into 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.*

4.8 The detailed procedure includes and purports to also allow “drawl of power for commissioning activities” which is contrary to the Regulation and is unauthorised.

**2014 Amendment (During pendency of Appeal)**

4.9 During the pendency of this Appeal before this Hon’ble Tribunal, the Central Commission has notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in Interstate Transmission and Related Matters) (Fourth Amendment) Regulations, 2014, dated 12.08.2014. Clause 8(7) was amended to read as follows :

*“(7) Notwithstanding anything contained in Clause(6) of this Regulation and any provision with regard to sale of infirm power in the Power Purchase Agreement, a unit of a generating station including a captive generating plant which has been connectivity to the inter-State Transmission System in accordance with these regulations shall be allowed to inter-change infirm power with the grid during the commissioning period, including testing and full load testing before the COD, after obtaining prior permission of the concerned Regional Load Despatch Centre for the periods mentioned as under:-*

- (a) Drawl of Start-up power shall not exceed 15 months prior to the expected date of first synchronization and 6 months after the date of first synchronization.*
- (b) Injection of infirm power shall not exceed six months from the date of first synchronization.*

*Provided that drawl of start-up power shall be subject to payment of transmission charges and generator shall have to open a Revolving and irrevocable Letter of Credit issued by a Scheduled Bank equivalent to 2 months transmission charges prior to drawl of Start-up power.*

*Provided further that the Start-up power shall not be used by the generating station for the construction activities.*

*Provided further that RLDC shall stop the drawl of the Start-up Power in the following events:*

- (a) In case, it is established that the Start-up power has been used by the Generating Station for construction activity.*
- (b) In case of default by the Generating Station in payment of monthly transmission charges to the transmission licensee for the drawl of Start-up power, on the request of the transmission licensee.*

*Provided that the Commission may in exceptional circumstances, allow extension of the period for inter-change of power beyond the period as prescribed in this clause, on an application made by the generating station at least two months in advance of completion of the prescribed period:*

*Provided further that the concerned Regional Load Despatch Centre while granting such permission shall keep the grid security in view:*



*Provided also that the onus of proving that the interchange of infirm power from the unit(s) of the generating station is for the purpose of commissioning activities, testing and commissioning, shall lie with the generating company and the respective RLDC shall seek such information on each occasion of interchange of power before COD. For this, the generating station shall provide RLDC sufficient details of the specific commissioning activity, testing and full load testing, its duration and intended period of interchange, etc.*

*Provided also that the infirm power so interchanged by the unit(s) of the generating plant shall be treated as deviation and the generator shall be paid/charged for such injection/drawl of infirm power in accordance with the provisions of Central Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2014, as amended from time to time or subsequent re-enactment thereof.”*

4.10 Even under this amendment, the drawl of power is severely restricted to a certain period and restricted to the purpose of testing and commissioning and not beyond and unrestricted as the impugned order has purported to do. This is submitted without prejudice to the Appellant’s right to challenge the vires, legality and/or validity of the amendment in part / whole before an appropriate High Court as it is beyond the jurisdiction and power of this Hon’ble Tribunal to go into such questions.

**Review Petition not maintainable**

4.11 The Central Commission gravely erred in entertaining the Review Petition and passing an order therein. No grounds for review permissible under section 94(f) read with Order 47 Rule 1 CPC were at all made out.

4.12 The Review Petition merely sought a re-consideration and reversal of the reasoned decision in the main petition. It was in the nature of an appeal to reverse the decision in the main petition. A review petition is impermissible in law for such purpose. Even the separate Petition No 259/MP/2012, though not

filed as a review petition, essentially seeks relaxation in the Petitioner's case only for the purposes of commissioning and testing.

- 4.13 The Central Commission becomes functus officio in respect of the order passed in the main petition as soon as it has been made, and is thereafter without jurisdiction to re-appraise, reconsider and/or revise its order except on the very limited grounds for review.
- 4.14 The impugned order goes well beyond the scope and prayers in Petition No 259/MP/2012 and the Review Petition No 27/RP/2012. The impugned order also goes beyond the scope and prayer in the Main Petition No 117/MP/2012 contravening the Regulation. An order cannot be passed contrary to the Regulation more particularly when the main order has asserted the provisions of the Regulation and upon an unwarranted premise that the Regulation would be amended in terms of the impugned order.

**No notice or hearing to all affected parties**

- 4.15 The Central Commission grievously erred in not ensuring that all the stake holders affected by the order to be passed, or likely to be so affected, including the Appellant, were given notice of the proceedings / petition and afforded sufficient opportunity to be heard in the matter. There has been gross violation of the principles of natural justice.
- 4.16 Before passing orders of wide import and/or intended to apply generally, the Commission is duty bound in law to afford sufficient opportunity to all parties likely to be affected and other stakeholders by a public notice and/or otherwise. Failure to do so would tantamount to a breach of the due process required to be followed and violation of the principles of natural justice, and the consequent order is thereby vitiated and liable to be said aside. The impugned order suffers incurably from such vice and is therefore liable to be set aside.

- 4.17 The Appellants are the sole distribution licensees in their States and are entitled to be the sole supplier of electricity for consumption except in cases where open access is availed in accordance with the applicable Regulations. The Appellants are also entitled to cross subsidy surcharge in respect of the electricity availed and consumed from a source other than a distribution licensee.
- 4.18 The Appellant is seriously affected by the impugned order which permits drawl and consumption of electricity without arranging for, and availing, open access and/or evading / avoiding the obligation for payment of cross subsidy surcharge.
- 4.19 The supply of electricity is to be compensated in terms of the impugned order by way of UI mechanism which is tantamount to supply and sale of electricity for consumption within the area of supply of a distribution licensee by improper use of the UI mechanism as a pricing mechanism for such supply and sale and bypassing also the obligations towards the Appellants for cross subsidy surcharge.
- 4.20 As such is the effect of the impugned order, it ought not to have been passed without notice and hearing to the Appellant.

**Effect and binding nature of Regulation**

- 4.21 The notification of a Regulation by the Commission in exercise of its delegated legislative power brings into effect a statutory instrument having force of law. Such a Regulation is binding on all parties. The Commission is also bound by the Regulation. The Commission cannot make orders inconsistent or contrary to the Regulation. The provisions of a Regulation cannot be given a go-by or made ineffective by any order passed by the Commission.

4.22 The mere intention or contemplation of the Commission to amend the Regulation in future, whether expressed in an order or otherwise, cannot be the basis or consideration to pass orders contrary to the Regulation. The Regulation continues to be in full force and effect till it has actually been amended by a notification after following the procedure prescribed by law.

4.23 This Hon'ble Tribunal, in exercise of its appellate power and authority, has consistently held that the Regulation is binding and this Hon'ble Tribunal has not itself interdicted with, or rendered effective, any Regulation notified by a Commission. This was on the settled principle that the Regulation is a delegated legislation and is binding. The Commission cannot be on any better or different footing so far as the binding nature of a Regulation is concerned.

**Clause 8(7) of the 2009 Regulation**

4.24 Clearly, the 2009 Regulation only allows a generating station which has been granted connectivity to the grid to inject infirm power into the grid during testing including full load testing before its COD for a period not exceeding six months (subject to extension in exceptional circumstances) from date of first synchronization by injecting its infirm power into the grid before being put into commercial operation. It only provides for the treatment of the infirm power injected during the testing and provides for the same to be settled at UI rates. Nothing in the aforesaid clause(s), nor anything in any other provisions of the Regulations, provides for interchange of power by way of drawl for any purpose whatsoever including start-up and/or for commissioning. The exception in Clause 8(7) is to be construed strictly. Except to the extent provided therein, the provision of Clause 8(6) shall apply.

**Clause 6.2 of detailed procedure allowing drawls is contrary to Regulation**

4.25 The Clause 6.1 of the detailed procedure is a repetition of Clause 8(6) of the CERC 2009 Regulations.

- 4.26 Clause 6.2 of the detailed procedure clearly went beyond the scope of Clause 8(7) of the 2009 Regulations and purports to allow, in addition to the injection of infirm power during full load testing, interchange by way of drawl of power for commissioning activities, and provides for such drawl also to be settled at UI rates. Insofar as Clause 6.2 provides for interchange in excess of that specified in Clause 8(7) of the Regulations, it is ultra vires of the Regulations and is ab initio void and of no legal force or effect. Moreover, Clause 6.2 of the Procedure is contrary to, and in violation of, Clause 8(6) of the Regulations. The Central Commission had rightly and correctly held in the order dated 02.11.2012 in Petition No 117/MP/112 that the 2009 Regulations do not provide for drawl of power under UI testing and commissioning, and that the detailed procedure issued under the Regulations cannot travel beyond the scope of the Regulations to allow drawl of start-up power under UI.
- 4.27 Accordingly, the Hon'ble Commission correctly declined to reconsider its directions dated 26.04.2012 and directed that the words "including drawl of power for commissioning activities" in Clause 6.2 of the detailed procedure shall stand deleted with immediate effect.

**Interim Order dated 07.12.2012 is contrary to Regulation and law**

- 4.28 In the interim order dated 07.12.2012 passed in the review petition, the Commission has erroneously and grievously made a complete turnaround permitting drawl of power from the grid under UI for testing and commissioning activities, notwithstanding that the Commission had itself held that the same was contrary to the Regulations. The interim order was contrary to law.
- 4.29 When a 4-member Bench of the Commission had specifically decided that the Regulation did not permit drawl of power under UI and specifically directed that the offending clause in the detailed procedure be deleted with immediate

effect, the interim order passed by a 3-member Bench subsequently to the contrary is not lawful and is vitiated by impropriety.

**The Impugned Order is contrary to Regulation and law**

4.30 In the impugned order dated 18.09.2013, the Commission has gone even further in directing that start-up power under UI be permitted in respect of the generating stations which have been approved for direct connectivity. Such a direction was even well beyond the prayer made in the Review Petition which was in relation only to Clause 6.2 of the detailed procedure making provision for drawl of power for commissioning activities before being put to commercial operation. Such a creeping enlargement of non-conformance with the statutory Regulations is gross subversion of the statutory notified Regulation, and cannot be countenanced in law or sustained.

4.31 When a 4-member Bench of the Commission had specifically decided that the Regulation did not permit drawl of power under UI and specifically directed that the offending clause in the detailed procedure be deleted with immediate effect, the impugned order passed by a 2-member Bench subsequently completely to the contrary is not lawful and is vitiated by impropriety

4.32 If such orders are passed by the Central Commission from case to case, there is every danger that the Central Commission would be exercising its power improperly and beyond its lawful limits (perhaps for example by permitting consumers connected to the ISTS to draw power under the UI mechanism created by it for an entirely different purpose), encroaching into the regulatory jurisdiction of the State Commissions, interfering with the rights of the distribution licensees in a manner not contemplated or permitted by law and/or fraying the statutory scheme of the Act itself.

- 4.33 The Central Commission grievously erred in consciously and openly passing the impugned order contrary to the Regulations. The Commission could not have lawfully decided to pass the impugned order consciously contrary to the Regulations, purporting and intending it to be operative forthwith, and then direct its staff to process a proposal for amendment of the Regulations based on the impugned decision. Such an approach is repugnant to the Rule of Law and wholly unsustainable.
- 4.34 Eventually, the 2014 Amendment to the Regulation was not in accordance with the impugned decision. In the separate exercise of its delegated legislative power, the Central Commission came to a conclusion which is very restricted and applicable only for a small period of time before and after synchronisation. Implicitly thereby, the Central Commission was therefore of the view that start up power could not be allowed to draw under UI indefinitely and at all or any time as provided for in the impugned order.
- 4.35 Consequently, the impugned order was not only contrary to the Regulation as it was in effect at that time, but is also not in conformity with the Regulation as subsequently amended. The impugned order cannot therefore be sustained.

**Scope and purpose of the UI Mechanism**

- 4.36 The UI mechanism was evolved by statutory Regulations for a specific purpose. The impugned order of the Hon'ble Commission is contrary to the very purpose and scheme of UI as set out in the UI Regulations and violates the provisions of the UI Regulations and the Open Access Regulations. It is tantamount to abuse of the UI mechanism for an improper and obtuse purpose. The impugned order is therefore unsustainable and is liable to be set aside.
- 4.37 The effect of the impugned order is to allow the abuse of the UI mechanism allowing drawl and purchase of power by a generating company for start-up,

stand-by and/or for any other purposes contrary to the express provisions of the statutory regulations and subversion of the same, and to create a device by which the liability and obligation to source power for consumption for through open access duly paying cross subsidy surcharge to the distribution licensee is bypassed and evaded, and to create a device for the trading of power in the grid without arranging for the same lawfully under open access or by arrangement with the distribution licensee and thereby permitting an activity prohibited by law to be undertaken, and to subvert and evade the provision and cross-subsidising tariff established by the State Commission for start-up power for generating companies in Chhattisgarh from the distribution licensees, and to allow trading in power by entities prohibited and/or disentitled by law to engage in trading.

***RESPONSE TO THE SUBMISSIONS / CONTENTIONS OF RESPONDENTS***

***RE : Submissions/contentions on behalf of 1<sup>st</sup> Respondent CERC:***

4.38 It is required to be noticed that the Commission only directed the staff to examine the issue without any view being expressed thereon in the order passed in Petition No 117/MP/2012. The submission that there was any realisation of any lacuna is incorrect and baseless. It may also be noticed that the Commission was clear that if at all a provision for start up drawl is to be made, it can only be done through an amendment to the Regulation and not otherwise.

4.39 It is strange that the NTPC which was not a party was heard without any pleadings merely because some representative is always present all the time before the Commission. The distribution companies around the country whose interest is affected were not even put on notice.

The submission of the NTPC that most tariff orders issued by the State Commissions do not have a category for 220/400 kV supply is incorrect and without any basis in fact. The Commission ought not to have relied on the



same. The extract of the Chhattisgarh tariff order for 2012-2013 and 2013-14 specifically providing for start up power even at 400 or 220 kV has been handed over to the Hon'ble Tribunal during the course of hearing.

4.40 It is clear that the Commission's view in the impugned order was contrary to the Regulation and the decision of a larger Bench of the Commission. It is incorrect to say that the direction to the staff to process an amendment in conformity with the impugned order was in consonance with the Commission's order dated 2.11.2012. Eventually, the amendment Regulation subsequently issued was significantly different than that in the impugned order.

4.41 It is absurd and incorrect to say that there is no real deviation between the impugned order and the earlier order dated 2.11.2012. Significantly, there is no submission as to which ground available for review was seen by the Commission while entertaining the review.

4.42 Even from the PTC case, as extracted, is clear that the Regulation is to be followed if there is a Regulation. In the present case, there is a Regulation. Clause 8(6) clearly does not allow interchange without open access. Clause 8(7) is an exception. The Commission is bound to follow the Regulations and enforce the same.

***RE : Submissions / contentions on behalf of 3<sup>rd</sup> & 4<sup>th</sup> Respondents PGCIL & POSOCO***

4.43 Notwithstanding the assertion that these Respondents are only implementing the Central Commission's orders and directions and that do not gain by the allowing of drawl under UI mechanism, these Respondents have come out at the main and chief protagonists and defenders of the impugned order. It is difficult to comprehend or appreciate. This appeal is only against the impugned order passed by the Central Commission.

- 4.44 It needs to be appreciated that the Tariff Regulations 2004 was concerned with the determination of tariff by the CERC. The provision for injection of infirm power was in the context of providing for consideration of revenue before CoD in the determination of tariff. As admitted by the Respondent, the provision in the 2009 Regulations was only with respect to injection of infirm power. It is unlawful and contrary to the Regulations in that context and in the teeth of the 2009 Regulations that the 4<sup>th</sup> Respondent has been allowing drawl of power for start up.
- 4.45 The submission that the grounds raised in the review petition were within the scope and ambit of section 94(1)(f) and Order 47 Rule 1 CPC is without any basis. No submission is made on which of the specific and limited grounds allowed in Order 47 Rule 1 were applied. The Commission has also not considered the admissibility and maintainability of the review petition in the impugned order.
- 4.46 There is no issue so far as there is a observation / direction to initiate consideration of an amendment to regulations. But the issue is whether the Commission could make an order clearly contrary to the Regulations to come into effect immediately. The Commission cannot stay or interdict the operation of its own Regulations by any order made in petitions. The Commission has no such power.
- 4.47 The judgments quoted by the Respondents are not applicable and are cited out of context. The power of the Commission to re-visit its orders is limited by the terms of the power of review specifically conferred by the Act. The Commission does not have absolute power as contended.

In the UP Power Corporation case cited was with respect to revisiting tariff and limited to that context. The facts in the present case are different and the issue

is distinct. This decision is no authority at all to contend that the Commission can make an order contrary to the Regulations at any time.

The Dharmander Prasad case cited also has no application here. That case was concerned with the power to cancel a permit, and it was held that the regulatory power to issue a permit extends also to revoke or cancel it as an incidental or supplemental power to grant.

4.48 The distribution licensee is under an universal obligation to supply within its area of supply. Only a person duly licensed can supply electricity for consumption either being a distribution licensee or a trading licensee, and a generating company can supply for consumption through only open access. Unless a person obtains electricity for consumption under open access, the only other lawful source is from the distribution licensee.

Moreover, when power for consumption is sourced from other than the distribution licensee, the distribution licensee is entitled to cross subsidy surcharge as held by the Hon'ble Supreme Court in the Sesa Sterlite case.

4.49 In RR Energy case, this Hon'ble Tribunal considered that the definition of consumer provides for a person supplied with electricity for his own use. In the circumstances in that case where the start up power was drawn from the distribution licensee for the purpose of thereafter supplying the energy generated to the distribution licensee itself, the Hon'ble Tribunal considered that the start up power was drawn to the benefit of the distribution licensee and therefore the generating company in those facts and circumstances cannot be considered to be a consumer. The decision is limited to the facts of that case. This case does not lay down any general principle that no generating company is a consumer under any circumstances.

The facts of the case in ISA Power case is similar to that of RR Energy. The observation that the generating company is connected for the purpose of

supplying energy and not for receiving energy is incorrect and *per incuriam*. The observations may be correct only in cases where the generating company does not at all draw power from the connection with the licensee (by reason of having captive plant for start up or otherwise) and the connection is wholly and exclusively for supplying power. The words “time being” have not been considered. If drawl of start up power is an essential requirement and precedent to supplying power, then it cannot be said that the connection to the licensee is not for receiving power but only for supplying power. So far and so long as power is being drawn and consumed, the connection for the time being has to be considered as for receiving supply.

- 4.50 The impugned order is contrary to the Regulations and this cannot be justified on the basis of an abstract plea of larger public interest. The lawful position is that the power required can be sourced from the distribution licensee or through open access according to the applicable rules and regulations. The avoidance of the lawful alternatives and the denial of cross subsidy surcharge payable to the distribution licensee cannot be in any public interest.
- 4.51 The Central Commission has expressly held that para 6.2 of the detailed procedure so far as it purports to allow drawl of power is contrary to the Regulations. The impugned order also does not say otherwise. The Respondent has failed to see and appreciate that Clause 8(7) of the Regulation is an exception to Clause 8(6) which clearly provides that interchange cannot be allowed unless open access is obtained.
- 4.52 The contentions have no application in the present case. The cases cited have no application or relevance. There are Regulations framed and notified. The Commission is bound by the Regulations which have to be followed. Even this Hon’ble Tribunal is bound by the Regulations in force. The Commission has the power to amend the Regulations following the procedure prescribed by law; but

till such amendment is done according to law, the Commission has to obey and follow the Regulations. The issue in the present case is the passing of an order contrary to the Regulation.

4.53 There cannot be a situation where a person consumes electricity and there is neither a sale nor purchase. In fact, the electricity is consumed, the title to the electricity has passed to the person who has consumed it, consideration by way of UI charges has been paid. Necessarily and consequently there must be a seller / supplier for the energy consumed. The Respondents, while admittedly supplying through their lines, deny selling any power. In that case, it is not clear as to who is the seller of electricity that is purchased and consumed by the generating company.

4.54 It appears to be suggested that the beneficiary of the purchase money for the power (UI charges) would be the Power System Development Fund. Can it then be said that the trader of electricity through the mechanism provided by the impugned order would be the CERC and/or its Fund ? That would be impermissible. It also appears that the said Fund is to be maintained by the NLDC/RLDC, being part of POSOCO, for the benefit of the inter-state transmission system or parts thereof which indirectly amounts to funding the obligations of the inter-state transmission licensees.

**5. The submissions made by learned counsel, Mr. S. Vallinayagam, appearing for the Appellant in Appeal No. 102 of 2014 are given below:-**

5.1 The Central Commission notified the Central Electricity Commission (Grant of Connectivity, Long Term Access and Medium-Term Access in inter-State Transmission and related matters) Regulations, 2009, dated 07.08.2009.

*Clauses 8(6) and 8(7) in Chapter 3 of the said 2009 Regulations, read as follows:*

(6) *The grant of connectivity shall not entitle an applicant to interchange any power with the grid unless it obtains long-term access, medium –term access or short-term access.*

- (7) *A generating station, including captive generating plant which has been granted connectivity to the grid shall be allowed to undertake testing including full load testing by injecting its infirm power into the grid before being put into commercial operation, even before availing any type of open access, after obtaining permission of the concerned RLDC, 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 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 as a result of this testing shall also be charges as UI rates.*

5.2 The aforesaid Clause 8(7) was amended by Clause 2(1) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in Interstate Transmission and Related Matters) (Second Amendment) Regulations, 2012, dated 21.03.2012 which reads as under:

*“7. Notwithstanding anything contained in clause (6) of this regulation and any provision with regard to sale of infirm power in the PPA, a unit of a generating station, including a captive generating plant which has been granted connectivity to the grid shall be allowed to inject infirm power into the grid during testing including full load testing before its COD for a period not exceeding six months from the date of first synchronization after obtaining prior permission of the concerned Regional Load Despatch Centre;*

*Provided that the Commission may allow extension of the period for testing including full load testing and consequent injection of infirm power by the unit, beyond six months, in exceptional circumstances on an application made by the generating company at least two months in advance of the completion of six months period;*

*Provided further that the concerned Regional Load Despatch Centre while granting such permission shall keep the grid security in view;*

*Provided also that the onus of proving that the injection of infirm power from the units of the generating station is for the purpose testing and commissioning shall lie with the generating company and the respective RLDC shall seek such information on each occasion of injection of power before COD. For this, the*

*generator shall provide RLDC sufficient details of the specific testing and commissioning activity, its duration and intended injection etc.*

*Provided also that the infirm power so injected shall be treated as Unscheduled Interchange of the units of the generating station and the generator shall be paid for such injection of infirm power in accordance with the provisions of the CERC (Unscheduled Interchange Charges and Related Matter) Regulations, 2009 as amended from time to time.”*

*The parent regulation of 2009 as well as the amended regulation of 2012 both provide for only injection of power into the grid by a generator under the CERC (Unscheduled Interchange Charges and Related Matter) Regulations, 2009. There is no provision of drawl of power provided in either the parents regulation of 2009 the amended regulation of 2012.*

5.3 Clause 27 of the 2009 Regulations, requires Central Transmission Utility [CTU] to chalk out the procedure for Making Applications for Grant of Connectivity in ISTS. This procedure was approved by the CERC's order dated 31.12.2009.

*Sub clause (1) of Clause 27 of the Regulations specifically state as under : Subject to the provisions of these Regulations the Central Transmission Utility shall submit the detailed procedure to the Commission for approval within 60 days of notification of these regulations in the Official Gazette.*

*Clause 6 of the said procedure, comprising of Clauses 6.1 to 6.3 is as follows:*

*“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 access or 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 into 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 RLDC, 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 as UI rates.*

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

*The introduction of a new term “including drawl of power” in 6.2 of the detailed operating procedure by PGCIL is in violation of sub-clause (1) of Clause 27 and sub-clause (6) and (7) of Clause 8 the parent Regulation of 2009 as well as Clause 2(1) of the amended Regulations of 2012. The said inclusion of “including drawl of power” is not in consonance with 6.3 of the detailed operating procedure itself. 6.3 of the detailed operative procedure requires a generating station to submit the likely date of synchronisation, likely quantum and period of injection of infirm power before being put into commercial operation to the concerned SLDC and RLDC at least one month in advance.*

- 5.4 In the above circumstances, Neyveli Lignite Corporation Ltd filed Petition No 117/MP/2012 seeking directions regarding injection of infirm power and drawl of power for the commissioning activities under UI mechanism till declaration of COD of NLC TPS II Expansion due to delay in declaration of COD as a result of numerous teething problems resulting in prolonged injection of infirm power.
- 5.5 The reason given by NLC in its petition for not continuing with the arrangement of start-up power with TANGEDCO was that the HT power from the distribution licensee is costlier than the UI power.
- 5.6 The Central Commission vide proceedings dated 26.04.2012 observed that the UI is not a mechanism to draw power for testing during commissioning and directed that the NLC should make arrangement through some form of open access to meet its requirement.
- 5.7 After hearing the contentions of the Appellant and NLC, the Central Commission passed a final order dated 02.11.2012 in Petition No 117/MP/2012 granting extension of the period of injection of infirm power. In this order the



Hon'ble Commission also held that the 2009 Regulations do not provide for drawl of power under UI testing and commissioning, and that the detailed procedure issued under the Regulations cannot travel beyond the scope of the Regulations to allow drawl of start-up power under UI. The Hon'ble Commission declined to reconsider its directions dated 26.04.2012 and directed that the words "including drawl of power for commissioning activities" in Clause 6.2 of the detailed procedure shall stand deleted with immediate effect.

5.8 The impugned order of the Central Commission holds as under:

*"Though the generator is free to try start-up power through short-term open access or through distribution licensee, the most viable alternative is drawl from the Regional Grid since the generator is connected to the ISTS. Any drawl of power by the generator to Regional Grid without any open access shall have to be paid for at the applicable UI rates."*

The above finding of the Central Commission is patently erroneous as the same is in violation of what is provided under clause 8 (6) and (7) of the Central Commission notified the Central Electricity Commission (Grant of Connectivity, Long Term Access and Medium-Term Access in inter-State Transmission and related matters) Regulations, 2009 and the second amendment of 2012. Both the parent as well as amended regulations do not provide for drawl of power under UI mechanism.

5.9 The Central Commission under Review Jurisdiction cannot go to the merits of an issue decided by it in the main petition when there is no error apparent on the face of the record. Review under section 94(f) read with Order 47 Rule 1 CPC it is not permissible in the facts of the case. The Review Petition merely sought a re-consideration and reversal of the reasoned decision in the main petition.

5.10 The Commission can amend or modify its regulations by following the due process of law prescribed under the Electricity Act, 2003. Existing Regulations cannot be amended by passing an order in a Review Petition.

5.11 Power Grid has no locus standi to oppose the present appeal. The parties aggrieved are the distribution licensees and the generators, Power Grid was and is only a proforma respondent as stated by the counsel for Power Grid. Neither

NLC nor any of the generators argued the case. The generators only adopted the arguments of Power Grid which is a proforma respondent.

5.12 The Central Commission grievously erred in consciously and openly passing the impugned order contrary to the Regulations. The decision of the Hon'ble Commission has to be in conformity with the Regulations, not openly contrary to it. The Hon'ble Commission could not have lawfully decided to pass the impugned order consciously contrary to the Regulations, purporting and intending it to be operative forthwith, and then direct its staff to process a proposal for amendment of the Regulations based on the impugned decision. Such an approach is repugnant to the Rule of Law and wholly unsustainable.

5.13 The UI mechanism was evolved by statutory Regulations for a specific purpose. The impugned order of the Hon'ble Commission is contrary to the very purpose and scheme of UI as set out in the UI Regulations and violates the provisions of the UI Regulations and the Open Access Regulations. It is tantamount to abuse of the UI mechanism for an improper purpose. The impugned order is therefore unsustainable and is liable to be set aside.

6. **The learned counsel, Mr. Nikhil Nayyar has made the following common submissions in Appeal No. 86 of 2014 and Appeal No.102 of 2014 on behalf of Central Electricity Regulatory Commission:-**

6.1 The present appeal has been filed challenging the order dated 18.9.2013 passed by the Central Electricity Regulatory Commission (hereinafter referred to as 'the Central Commission'). The said order was passed in two petitions filed before the Central Commission, namely, an application for clarification of the order dated 2.11.2012 (Petition No. 117/MP/2012) preferred by EMCO Energy Ltd. and in a review petition filed by M/s. KSK Mahanadi Power Ltd. against the same order dated 2.11.2012.

6.2 The order dated 2.11.2012 was passed on an application by Neyveli Lignite Corporation Ltd. (NLC) seeking directions regarding injection of infirm power and drawl of power for commissioning activities under the UI mechanism till

declaration of commercial operation of NLC TPS-II. In the present appeal, the Appellant is aggrieved only with regard to certain directions pertaining to the drawl of power from the grid under the UI mechanism during testing and commissioning by a generating station.

- 6.3 Under the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Access in Inter-State Transmission and Related Matters) Regulations, 2009, Regulation 8(7) made a provision for a generating station to inject infirm power into the grid before being put into commercial operation. There is no reference in the said Regulation to drawl of power from the grid during testing and commissioning. Under Regulation 27 of the 2009 Regulations, a detailed procedure is to be formulated by the Central Transmission Utility, i.e. Power Grid. Clause 6(2) of the procedure approved under Regulation 27, however, also included a provision for drawl of power for commissioning activities, contrary to Regulation 8(7) of the 2009 Regulations.
- 6.4 In these circumstances, while disposing of Petition No. 117/MP/2012, the Central Commission had directed that the words ‘*including drawl of power for commissioning activities*’ under Clause 6.2 of the detailed procedure shall stand deleted with immediate effect. The Central Commission, however, realized that there was a possible lacuna in the 2009 Regulations with regard to drawl of start-up power and accordingly directed:

*“However, if a provision is required to be made for drawl of start-up power under UI, it should be done through an amendment to the Connectivity Regulations after taking into account all relevant factors including grid security. We direct the staff to examine the issue whether UI power should be allowed to be drawn by the generators during commissioning and testing without jeopardizing grid security, how such drawl of power can be regulated by the RLDCs, the duration for which such drawl shall be allowed and the rate at which such UI power can be drawn and submit for consideration of the Commission.”*

- 6.5 In compliance with the aforesaid order of the Central Commission, respective RLDCs advised inter-State generating stations in their region to draw start-up

power from the grid only after availing some type of open access. This caused some difficulty to generating stations which were in advanced stages of commissioning. This is evident from the Central Commission's observations in the Interim Order dated 07.12.2012 in the Petition No. 257/MP/2012 as below:

*“8. We have considered the issues raised in the petitions. The Commission in its order dated 02.12.2012 in Petition No. 117/MP/2012 had directed to delete the words including drawl of power for commissioning activities” in clause 6.2 of the Detailed Procedure issued under the Connectivity Regulations, as the same was not in conformity with the provisions of the Connectivity Regulations. At the same time, the Commission had directed the staff to examine the issue of making provision for drawl of start-up power under UI in the Connectivity Regulations through proper amendment. On account of the above decision, a number of generators, who had arranged their affairs to conduct testing and commissioning by drawing UI power from the grid, are facing difficulties to arrange power for their activities through some form of access at such short notice, affecting their schedules for completion of testing and commissioning activities. Considering the fact that a generic issue of drawl of start-up power for testing and commissioning affecting the generating stations is involved, we admit the petitions and issue of notice to the respondents. The respondents shall file their replies to the petitions by 30.12.2012. Rejoinders if any shall be filed by 10.1.2013 ”*

6.6 Subsequently, as mentioned hereinabove, two petitions came to be filed by EMCO and M/s. KSK Mahanadi Power Ltd. Since the issues raised in the two petitions were identical, they were clubbed and heard together for convenience and to avoid any inconsistent decision.

6.7 During the course of the hearing of the aforesaid petitions, the representative of NTPC, who was also present, submitted that NTPC is also facing similar difficulties in respect of its generating stations under commissioning such as Mauda, Barh-II etc. It was submitted that most tariff orders issued by State Commissions do not have a category of consumers for supply of 220 kV/400 kV voltage level and therefore, for enabling the generating stations to draw start-up power as a consumer at 220 kV/400 kV from the state system, a separate category of consumers would need to be created by the concerned State Commission which

may take time. He further submitted that as the drawl would be through the transmission systems of CTU or inter-State transmission licensees, open access and energy accounting issues would also need to be settled which may take time and may delay the commissioning activities.

- 6.8 By the impugned order, the Central Commission took the view that drawl of start-up power as deviations could be allowed. In consonance with the observations made earlier in the order dated 2.11.2012 (extracted in Para 3 hereinabove), the Central Commission directed the staff of the Commission to process the proposal for amendment of the 2009 Regulations in conformity with the aforesaid decision.
- 6.9 Pursuant to the impugned order, the Central Commission has proposed amendment to Regulation 8(7) of the 2009 Regulations and a draft notification in this regard was issued on 18.2.2014. Objections from the public have also been called for and the last date for receipt of the same was 14.3.2014. The Appellant has submitted its comments to the proposed amendment only on 9.4.2014.
- 6.10 It is submitted that the Appellant's contention that the impugned order goes beyond the scope of a review is misconceived and ignores the background in which the impugned order came to be passed, apart from the fact that a petition was also pending by EMCO seeking substantive reliefs. It is well settled that a review is maintainable against an order passed without hearing the party whose interests are affected by that order. In any event, there is no real deviation, as alleged, between the impugned order and the earlier order dated 2.11.2012 as the Central Commission in the order dated 2.11.2012 had already contemplated amendment of Regulation 8(7). The direction given in the impugned order only gives effect to the earlier order and does not violate any principle of review jurisdiction.
- 6.11 The Appellants have attempted to create an impression that the Central Commission has passed the Impugned Order contrary to the Regulations. However, it is submitted that the Central Commission passed the Impugned Order

exercising its regulatory power as there was lacuna in the Connectivity Regulations. This is evident from the Central Commission's order dated 02.11.2012 where in the Central Commission observed:

*“It is observed that the Connectivity Regulations do not provide for drawl of power under the UI during testing and commissioning.”*

It is thus clear that there was no prohibition but rather an absence of a regulation in this sphere.

6.12 Further, even assuming that there is no regulation in place pertaining to the drawl of power from the grid during testing and commissioning, it is well settled that the existence of a regulation is not a precondition for the Central Commission to exercise its power. A Constitution Bench of the Hon'ble Supreme Court in **PTC India Ltd. Vs. CERC (2010) 4 SCC 638** has held: -

*“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178.....”*

6.13 The term 'regulate' has consistently been held by the Hon'ble Apex Court to have a broad impact and has a wide meaning encompassing all facets including those incidental to the regulation envisaged and powers exercised in good faith. The context and for which the power is used by the Regulator and the purpose of the Statute are important considerations when attempting to ascertain the validity of the exercise of regulatory power. A Constitution Bench of the Hon'ble Supreme Court has held in the case of **U.P. Cooperative Cane Unions Federation V/s West U.P. Sugar Mills Association** (2004) 5 SCC 430, held as follows:

*“20. The preamble of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 is an Act to regulate the supply and purchase of sugarcane for use in sugar factories, gur-, rab- or khandsari sugar-manufacturing units. The various provisions of the Act show in unmistakable*



*terms that it regulates the supply and purchase of sugarcane required for use in sugar factories. “Regulate” means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute.”*

- 6.14 Subsequent to the Impugned Order and Draft Notification, the Central Commission has already notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in Interstate Transmission and Related Matters) (Fourth Amendment) Regulations, 2014 dated 12.08.2014 amending the Regulation 8(7).
- 6.15 As a result of amendment to the Connectivity Regulations, this Appeal has practically become infructuous and academic. Appellant has failed to demonstrate how it has been prejudiced by the Impugned Order. Neither EMCO nor M/s. KSK Mahanadi Power Ltd. was drawing power from the Appellant. The entities from whom the said parties were drawing power were heard by the Commission and they have not challenged the impugned order.
- 6.16 Consequently, the contention with regard to the violation of the principles of natural justice is also baseless. Since the Appellants are not aggrieved by the impugned direction there was no occasion to hear the Appellants before passing the Impugned Order, a proceeding to which Appellants were not even a necessary party.
- 6.17 In any event, it is well settled that even assuming there is a breach of natural justice, actual prejudice must be shown. As such no purpose will be served by remanding the matter back to the Central Commission on the application of the doctrine of “useless formality” as recognized by the Hon’ble Supreme Court in *Aligarh Muslim University v. Mansoor Ali Khan*, (2000) 7 SCC 529 wherein it was held that:

*“24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L.*

*Tripathi v. State Bank of India*[(1984) 1 SCC 43 : 1984 SCC (L&S) 62] *Sabyasachi Mukharji, J. (as he then was)* also laid down the principle that not mere violation of natural justice but *de facto* prejudice (other than non-issue of notice) had to be proved. It was observed, quoting *Wade's Administrative Law* (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

“[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.”

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717]. In that case, the principle of “prejudice” has been further elaborated. The same principle has been reiterated again in *Rajendra Singh v. State of M.P.* [(1996) 5 SCC 460]”

As stated above, no prejudice has been shown by the Appellant.

6.18 In light of the above it is submitted that the Appeal is without merit and is liable to be dismissed by this Hon’ble Tribunal.

**7. The Learned Counsel, Mr. M.G. Ramachandran, appearing for the Respondents has made the following submissions in Appeal No.86 of 2014 and Appeal No.102 of 2014 on behalf of Power Grid Corporation of India Limited, Respondent No.3 and Power System Operation Corporation Limited, Respondent No.4 :-**

7.1 The Central Commission in the impugned Order has held that drawl of start-up power under Unscheduled Interchange (UI) Mechanism shall be permitted in respect of generating stations which have been approved for direct connectivity to the Inter State Transmission System (ISTS) by the CTU. Such power will be



allowed to be drawn subject to Grid security. The Central Commission has, further, clarified that the generators are not precluded from making alternative arrangement for start-up power through open access.

7.2 On 07.08.2009 the Central Commission Notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Open Access and Medium Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009 (herein after referred as the ‘**Connectivity Regulations, 2009**’) providing the terms and conditions for grant of open access in respect of inter-State transmission system.

7.3 Neyveli Lignite Corporation Ltd (Herein after ‘**NLC**’) had filed a petition being Petition No. 117 of 2012 before the Central Commission seeking directions regarding injection of infirm power and drawl of power for the commissioning activities under UI mechanism till declaration of the commercial operation of NLC expansion. The Central Commission vide order dated 02.11.2012, inter alia, held as under:

“ 15. ....It is to be noted that the 2004 Tariff Regulations was valid till 31.3.2009. There is no provision in the 2009 tariff Regulations or the UI Regulations or Connectivity Regulations which allow a generator to avail start-up power under UI from the date of first synchronization till the date of commercial operation. As already observed, the provision in the detailed procedure cannot enlarge the scope of the regulations and accordingly, we have directed for deletion of the said provision from the detailed procedure. However, if a provision is required to be made for drawl of start-up power under UI, it should be done through an amendment to the Connectivity Regulations after taking into account all relevant factors including grid security. We direct the staff to examine the issue whether UI power should be allowed to be drawn by the generators during commissioning and testing without jeopardizing grid security, how such drawl of power can be regulated by the RLDCs, the duration for which such drawl shall be allowed and the rate at which such UI power can be drawn and submit for consideration of the Commission.”

7.4 Thereafter M/s EMCO Limited had filed Petition No 259 of 2012 before the Central Commission, inter alia praying as under:

*“(a) Hold that the direction contained in the Order dated 02.11.2012 in Petition No. 117/MP/2012 directing the amendment of the procedure for drawl of power in Clause 6.2 of the Detailed Procedure shall not affect the generators who have commenced the pre-commissioning and are in the process of commissioning and declaring commercial operation as the case of the Petitioner herein;*

*(b) Direct the WRLDC to allow the Petitioner to draw power for testing and commissioning purposes through UI till declaration of COD of the generating units subject to the final decision / outcome of the present proceedings before the Hon'ble Commission;*

*(c) Pass urgent and immediate orders in terms of Prayers (a) and (b) above;*

*(d) Initiate proceeding to consider the implication of the withdrawal of UI mechanism for drawl of power for commissioning and hear all interested and concerned parties.*

*(e) Pass any such further order or orders as this Hon'ble Commission may deem fit in the facts and circumstances of case.”*

7.5 Subsequently KSK Mahanadi Power Co Ltd had filed Review Petition No. 27 of 2012 in Petition No. 117 of 2012 for review of the order dated 02.11.2012, inter alia praying as under;

*“(a) Review the order dated 2.11.2012, passed in Petition No.117 of 2012, to the extent of the amendment of the CTU procedure regarding drawl of power in clause 6.2 of the regulations;*

*(b) Alternative, direct the WRLDC to allow the Review Petitioner as a special case to draw power till the testing and commissioning of the Unit No.3 (1st unit of the project) is completed on UI rates from the ISTS, in terms of the detailed procedure; and*

*(c) Pass such other and further order or orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”*

7.6 In the above proceeding, the Central Commission vide interim order dated 07.12.2012 directed the concerned RLDCs to permit the generators to draw power from the grid under the UI for testing and commissioning activities.

7.7 Thereafter on 18.9.2013, the Central Commission passed the impugned order, inter alia, holding as under:

*“20. We find force in the submission of the petitioners that the huge quantum of power needed for undertaking pre-commissioning activities and start-up cannot be drawn through the normal distribution network which operates at 33 kV level. This has also been accepted by TANGEDCO that 33 kV lines available for drawing the power for construction cannot cater to the requirement which is of the order of 30 to 40 MW. TANGEDCO has suggested that the generator should avail power for construction purpose by laying lines at higher levels of voltage. It is true that it may be possible to take such power from the State Discom after laying the distribution line which may withstand the requirement of load. However, it may not be cost effective to develop infrastructure for the generating stations connected to the ISTS for the start-up power, which would be required initially before commercial operation and thereafter only occasionally in the eventuality of outage of all units of the generating station. However, the generator in its discretion can take start-up power from the distribution company.*

.....  
.....

*25. In the light of above discussion, it is directed that drawl of start-up power under UI shall be permitted in respect of the generating stations which have been approved for direct connectivity to the ISTS by the CTU. While allowing drawl of start-up power, the concerned RLDC should satisfy itself that the power drawn is for the purpose of start-up only and not for the purpose of construction activities in the generating station which should be met by making arrangement with the concerned distribution company. The generator shall be obliged to furnish all necessary information called for by the RLDC while permitting start-up power. It is however clarified that the generators are not precluded from making alternative arrangement for start-up power through some form of open access.”*

7.8 The Appellants in the above Appeal have broadly raised the following issues:

- i) The impugned order is contrary to law and without jurisdiction as the Central Commission became functus officio in respect of the order passed in the main petition as soon as it has been made and the Central

Commission has no jurisdiction to re-appraise, reconsider and revise its order.

- ii) The appellants have the exclusive right to supply electricity in the State of Chhattisgarh in its capacity as the sole distribution licensee and the Appellant is entitled to claim cross subsidy surcharges in the event the generating company procures electricity from any person through open access.
- iii) The Impugned order which permits the drawl of start up power and clause 6.2 of the Detailed Procedure is contrary to the applicable Regulations.
- iv) The Central Commission by this impugned order is allowing trading of electricity by the entities prohibited and/or disintitiled by law to engage in trading.

Before dealing with the issues raised by the Appellants, it is submitted on behalf of the Respondents 3 and 4 that they are implementing the orders and decisions of the Central Commission. The decision to allow the generating stations connected to ISTS to draw power from the grid in the circumstances mentioned above under UI mechanism is of the Central Commission. There cannot therefore, be any grievance against Respondents 3 and 4 who are discharging statutory functions. The said Respondents do not in any manner gain by allowing such drawl of power by generating companies under UI Mechanism.

***RE :The impugned order is contrary to law and without jurisdiction***

- 7.9 The Appellants have contended that the Central commission becomes functus officio in respect of the order passed in the main petition and except for reviewing the order under Section 94 of the Act it has no jurisdiction to revisit the order. The contention of the Appellants is without any merits. It is submitted that the grounds raised in the review petition were within the scope and ambit of the Section 94 (f) and order 47 Rule 1 of the Civil Procedure Code.

7.10 The Central Commission by its order dated 02.11.2012 in Petition No. 117 of 2012 had directed for deletion of the provision for drawl of Start up power from the detailed procedure. However on the contrary observed that if a provision is required to be made for drawl of Start up power under UI it should be done through an amendment to the Connectivity Regulations, 2009 after taking in to account all relevant factors including grid security, and also directed the staff to examine the issue for consideration of the Central Commission. There is no irregularity in the review order as alleged by the Appellant.

7.11 It is all well settled that the Central Commission as a regulator has the power to revisit the orders from time to time and power of the Central Commission are wider. In this regard, the judgments of the Hon'ble Supreme Court are as under-

(a) **Uttar Pradesh Power Corporation Limited v National Thermal Power Corporation Limited and Others** (2009) 6 SCC 235

(b) **State of U.P. v. Maharaja Dharmander Prasad Singh**, (1989) 2 SCC 505

*RE : The appellants have the exclusive right to supply electricity in their States in their capacity as the sole distribution licensee and the Appellants are entitled to claim cross subsidy surcharges in the event the generating company procures electricity from any person through open access.*

7.12 The claim of the Appellants is contrary to law as the above rights of the distribution licensee under the provisions of the Electricity Act, 2003 is with reference to the Consumer as defined in Section 2 (15) of the Act. The Generating Company or a Generating Station/ Unit can avail power either from any distribution licensee as a consumer or can purchase power through open access or avail through UI mechanism as per the order of the central Commission.

7.13 The functions , privilege etc. of the Appellants as a distribution licensee will apply for the supply of such powers only if the generating company or

generating station voluntarily applies to become consumer within the meaning of Section 43 of the Electricity Act, 2003 and the applicable regulations and not otherwise.

7.14 The issue that the Generating Company using start up power is not a consumer stand settled by this Hon'ble Tribunal in the case of Chhattisgarh State Power Transmission Company Limited –v- M/s. R.R. Energy Ltd and Others, Appeal No 166 of 2010 decided on 24.5.2011. The Hon'ble Tribunal inter alia held as under:

*“48.Further, consumer as defined in the Act is a person who is supplied with electricity for his own use. Here start up power is supplied to Respondent -1 to start up its generating unit. Once generating unit is synchronized with the grid, the power so generated is supplied to Appellant. Without start up power, generators cannot start and produce power. Thus, in way, start up power is supplied for the benefit of Appellant only. From this point of view, a generator taking start up power from distribution licensee and supply power to same licensee on start up, cannot be termed as a consumer.”*

The Hon'ble Tribunal has also taken the same view in the case of Appellant itself in Chhattisgarh State Power Distribution Company Limited –v- ISA Power Limited, Appeal No 47 of 2011 vide order date 17.04.2012.

7.15 In terms of the above, the impugned order of the Central commission does not in any manner interfere with the distribution and supply of electricity by the appellant to its consumers in the State of Chhattisgarh. The generating companies drawing power from the grid for the purposes of testing, commissioning etc or start-up or injecting the infirm power, both to be adjusted towards unscheduled interchange charges, cannot be said to be within the scope of the activities of the distribution and supply of electricity within the meaning of Section 12 read with Section 14 the Electricity Act, 2003.

7.16 The only exception to the above is where the generating companies require the electricity for the activities of construction of the power plant namely the



generating station. The power required for the construction of the generating station is not allowed to be drawn from the grid under the mechanism of unscheduled interchange charges. The injection of power by the generating company at any time prior to the commissioning and commercial operation is of infirm nature and such injection can be done in to the grid under the unscheduled interchange mechanism in terms of the Connectivity Regulations, 2009 notified by Central Commission.

7.17 Without prejudice to the above it is submitted that the drawl of the start up power by the generating stations to bring back the generating units into operation is in larger public interest of all concerned including the Appellant herein as the same enables generation of electricity to meet the schedules of electricity requirements in the grid. The Appellant therefore is benefitted by such facility being made available to the generating station rather than being affected or prejudiced and therefore being aggrieved to challenge the order of the Central Commission.

***RE : Detailed procedure is contrary to Regulations***

7.18 The Connectivity Regulations, 2009 under Regulation 1, inter alia provides as under:

*“(2) These regulations shall come into force on such date as the Commission may notify:*

*Provided that the date for the coming into force of these regulations shall be after the ‘detailed procedure’ of the Central Transmission Utility has been approved by the Commission.”*

7.19 Regulation 1 clearly provides that the date for coming into force of Regulations shall be after the approval of the detailed procedure by the Central Commission. Accordingly the detailed procedure providing for drawl of start up power was approved by the Central Commission as per the mandate of Regulation 27 of the Connectivity Regulations, only after due public notice and after inviting



suggestions from the affected parties. Therefore there is no merit in the contention of the Appellant that the detailed procedure is contrary and in violation of the Connectivity Regulations, 2009.

7.20 Without prejudice to the above, the fundamental mistake in the approach of the Appellant is to look at the connectivity Regulations and other Regulations to see whether there is a specific provision permitting the scheme of allowing UI Mechanism for testing, commissioning, start up power etc. the enquiry should be whether there is any prohibition. In this regard, it is well settled principle of law as noted by the Hon'ble Supreme Court in Rajendra Prasad Gupta –v- Prakash Chandra Mishra (2011) 2 SCC 705 that as a matter of general principle prohibition cannot be presumed.

Reference may also be made to the following cases

- (i) New India Assurance Co. Ltd –v- R. Srinivasan (AIR 2000 S.C. 941)
- (ii) P.R.M. Abdul Huq –v- Katpadi Industries Ltd (AIR 1960 Mad. 482)

7.21 It is also well settled that framing of Regulations is not a precondition for exercise of Regulatory Power as laid down in the following cases.

1. **U.P. State Electricity Board, Lucknow –v- City Board, Mussoorie** (1985) 2 SCC 16 at 20, para 7

*“Section 46 (1) of the ES Act does not say that no grid tariff can be fixed until such regulations are made. It only provides that the Grid Tariff shall be in accordance with any regulations made in this behalf. That means that if there were any regulations, the Grid Tariff should be fixed in accordance with such regulations and nothing more.”*

2. **The Mysore State Road Transport Corporation v Gopinath Gundachar** (AIR 1968 SC 464) at page 465, para 3.
3. **Surinder Singh –v- Central Government & Others** – (AIR 1986 SC 2166) at page 2169 [para 6]

4. **T. Cajee –v- U. Jormanik Siem** (AIR 1961 SC 276) at page 281, para 10
5. **Rajiv Anand -v- Union of India** - (AIR 1998 Delhi 259) at page 263 – para 12

The exercise of power by the Central Commission in the present case need to be considered in the above context.

**RE : The Central Commission is allowing trading of electricity by the Respondent Nos. 3 and 4**

7.22 It is denied that the effect of the impugned order is to allow trading of power either by Respondent No. 3 or Respondent No. 4. It is submitted that the drawl of power through Unscheduled Interchange Mechanism or injection of infirm power compensated through Unscheduled Interchange Mechanism do not amount to either sale of power by the Respondent 3 or 4 or purchase of power from the said Respondents. The Respondent No. 3 and 4 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 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 Respondent No. 3 and 4 are to discharge the coordination and operation of the power system in accordance with the Regulations notified by the Central Commission.

7.23 The Central Commission has notified **Central Electricity Regulatory Commission (Power System Development Fund) Regulations, 2010** to deal with the surplus funds available under various account and to bring it under the

Power System Development Fund. Regulation 3 of this Regulations, 2010 provides as under:

*“3. Constitution of the Fund:*

*(1) There shall be constituted a fund to be called the “Power System Development Fund” and there shall be credited thereto.-*

*(c) Unscheduled Interchange charges standing to the credit of the “Unscheduled Interchange Pool Account Fund” after final settlement of claims of Unscheduled Interchange Charges in accordance with the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 as amended from time to time;”*

7.24 It is further clarified that the Unscheduled Interchange Mechanism has been evolved by the Central Commission as a commercial mechanism to deal with under injection, under drawl, over injection and over drawl. The injection of power in the above scheme is by a generating company either by themselves or at the instance of any intermediary trader or grid connected entities and the drawl of power is by the generating companies, distribution licenses and end-users. The Respondent No.3 and 4 are not either generator of power or seller of power in the above scheme, notwithstanding that the Inter State Transmission System is maintained by Respondent No.3 and scheduling and dispatch functions are undertaken by Respondent No.4. The power supply is, therefore, not by the Respondents.

In the circumstances mentioned herein above there is no merit in the issues raised by the Appellant and therefore the Appeal is liable to be dismissed.

**8. We have heard at length the learned counsel appearing for the Appellant 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 common issues emerge in Appeal Nos. 86 of 2014 and Appeal No.102 of 2014 for our consideration:-**

**Issue No.1:-** Whether the impugned order dated 18.09.2013 passed in Review Petition No.27/RP/2012 in Petition No. 11/MP/2012 by the Central Commission is contrary to law and violative of principle of natural justice?

**Issue No.2:-** Whether the Central Commission was justified in making the interim order permitting drawl of power from the grid under UI mechanism for testing and commissioning activities despite the fact that the Commission itself had held that the same was contrary to its Regulations?

**Issue No.3:-** Whether the impugned order passed by the Central Commission is in contravention of the very purpose and scheme of UI, as set out in UI Regulations and Open Access Regulations?

**Issue No.4:-** Whether the impugned order does not allow the abuse of UI mechanism allowing drawl and purchase of power by a generating company for start up, testing and commissioning and creates a device by which the liability and obligations to source power through open access duly paying cross-subsidy surcharge to the distribution licensees is by passed and evaded?

**The issues raised by the Appellants in both the Appeals are common. Hence, we will decide on the present appeals by this common judgment.**

9. **Our findings and analysis**

**Issue No.1**

9.1 The Appellants have submitted that the review petition was not maintainable and the Central Commission briefly heard in entertaining the same and passing the order therein without making out any specific ground for review permissible under section 94(f) read with order 47 Rule 1 CPC. In fact, the review petition merely was a reconsideration and reversal of the recent decision in the main petition which is not permissible in law because as soon as an order is passed in the main petition, the Central Commission becomes *functus officio* and is thereafter without limitation to re-apprise or reconsider its order except the very limited ground for review. The Appellants have further contended that the impugned order also goes beyond the scope and prayer in main Petition No.117/M)/2012 in contravention of the Regulations. It has been alleged by the Appellants that the Central Commission has passed the order contrary to the

Regulations more particularly when the main order has asserted the provisions of the Regulations and upon an unwarranted premise that the Regulation would be amended in terms of the impugned order.

9.2 The Appellant have further brought out that the Central Commission did not give notice of proceedings/petition to all the stakeholders affected by the order to be passed and likely to be so affected including the Appellants and sufficient opportunities was not accorded to be heard in the matter in gross violation of principles of natural justice.

9.3 *Per contra*, the Respondents have submitted that the grounds raised in the review petition were within the scope and ambit of the Section 94(1)(f) and Order 47 Rule 1 of the CPC. It is further contended by the Respondents that though by its order dated 2.11.2012 in Petition no. 117 of 2012, the Central Commission had directed for deletion of the provision of the drawl of start up power from the Detailed Procedure but at the same time it also observed that if a provision is required to be made for drawl of start up power under UI, the same should be done through an amendment to the Connectivity Regulations, 2009. It is a well-settled fact that the Central Commission as a Regulator has the powers to re-visit its orders from time to time and powers of the Central Commission are wider in nature. The Respondents have relied upon following two judgments of the apex court, in this regard.

(a) **Uttar Pradesh Power Corporation Limited v National Thermal Power Corporation Limited and Others (2009) 6 SCC 235**

(b) **State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505**

9.4 The Generating Company or a Generating Station / Unit can avail power either from any distribution licensee as a consumer or can purchase power through open access or avail through UI mechanism as per the order of the Central

Commission. *The Hon'ble Tribunal in its judgment dated 24.5.2011 in Appeal No. 166/2010* has held as under:-

*“48. Further, consumer as defined in the Act is a person who is supplied with electricity for his own use. Here startup power is supplied to Respondent No.1 to startup its generating unit. Once generating unit is synchronised with the grid, the power so generated is supplied to Appellant. Without startup power, generators cannot start and produce power. Thus, in way, startup power is supplied for the benefit of Appellant only. From this point of view, a generator taking startup power from distribution licensees and supply power to same licensee on startup, cannot be termed as a consumer.”*

9.5 The Hon'ble Tribunal has also taken the same view in the case of one of the Appellants itself in *Chhattisgarh State Power Distribution Company Limited – v- ISA Power Limited, Appeal No.47 of 2011* vide order dated 17.04.2012.

9.6 Regulation 1 clearly provides that the date for coming into force of Regulations shall be after the approval of the detailed procedure by the Central Commission. Accordingly the detailed procedure providing for drawl of start up power was approved by the Central Commission as per the mandate of Regulation 27 of the Connectivity Regulations, only after due public notice and after inviting suggestions from the affected parties. Therefore there is no merit in the contention of the Appellant that the detailed procedure is contrary and in violation of the Connectivity Regulations, 2009.

9.7 The Respondent No.1, the Central Commission has further emphasised that even assuming that there is no regulation in place pertaining to the drawl of power from the grid during testing and commissioning, it is well settled that the existence of a regulation is not a pre-condition for the Central Commission to exercise its powers. **The constitution bench of the Hon'ble Supreme Court in *PTC India Ltd. vs. CERC(2010)4SCC 638* has also held in same conformity.** It is also stated by the Central Commission that since the Appellants were not aggrieved by the impugned direction, there was no occasion to hear the

Appellants before passing the impugned order, a proceeding to which Appellants were not even a necessary party as such there is no violation of the principles of natural justice. Besides it is well-settled that even assuming, there is a breach of natural justice, actual prejudice must be shown on the application of the doctrine of “useless formality” as recognized by the Hon’ble Supreme Court in *Aligarh Muslim University Vs. Mansoor Ali Khan, (2000)7SCC 529*.

### **Our Findings :**

9.8 We have gone through the details of submissions made by the Appellants as well as Respondents along with their reliance on various Authorities. We find that it was indicated by the Central Commission in its order that there is a necessity to bring resonance between the Regulations and the Detailed Procedure on account of an anomaly regarding drawl of power from the grid for testing & commissioning. However, pending amendment in the Regulations, the Central Commission is empowered to pass an order by exercising its regulatory powers which are wider in nature. Keeping this in view, it is relevant to note that even if there is no regulation in place pertaining to the drawl of power from the grid during testing and commissioning, it is well-settled that the existence of a regulation is not a pre-requisite for what the Central Commission is to exercise its powers. **It has become a principle of law vide the decision of the Constitution Bench of the Hon’ble Supreme Court in *PTC India Ltd. vs. CERC(2010)4SCC 638***. It is further opined that as the Appellants were not a necessary party in the proceedings of the Central Commission before the impugned order, there was no rationale in giving the notice to the Appellants for being heard. Accordingly, we do not find any cognitive violation of natural justice by the Central Commission while passing the impugned order.



## **Issue No.2**

9.9 The Appellants have submitted that as per the main provision Clause 8(6), the connectivity shall not entitle interchange of any power unless open access is obtained. As per Clause 8(7), the generating stations are permitted to only inject power during testing before being put into commercial operation. It has been contended that the Appellants are seriously affected by the impugned order which permits drawl or consumption of electricity without arranging for and availing open access and in the process avoiding the obligation of payment of cross-subsidy surcharge. In other words, the supply of electricity by way of UI mechanism is tantamount to supply and sale of electricity for consumption within the area of supply of a distribution licensee and bypassing the legitimate rights of the Appellants.

9.10 The Appellants have further brought out that Regulations have been notified by the Central Commission in exercise of its delegated legitimate power which brings into effect a statutory instrument having force of law. It is further argued that the mere intention or contemplation of the Commission to amend the Regulations in future cannot be the basis or consideration to pass orders contrary to the Regulations. The Regulation once notified continues to be in full force and effect till it is amended by a notification after following the requisite procedures under the law. It is a settled principle that the Regulation is binding on all parties and the Commission cannot be in better and different footing so far as the binding nature of a Regulation is concerned. The Appellants have highlighted that Clause 6.2 of the detailed procedure clearly went beyond the scope of Clause 8(7) of the 2009 Regulations and purports to allow in addition to the injection of the infirm power during full load testing, interchange by way of drawl of power for commissioning activities.

9.11 The Central Commission had rightly held in the order dated 2.11.2012 that the 2009 Regulations do not provide for drawl of power under UI for testing & commissioning and that the detailed procedure issued under Regulations cannot travel beyond this scope of regulations. However, contrary to its stipulation in the said order dated 2.11.2012, the Central Commission has erroneously made a complete turnaround (in the interim order dated 7.12.2012) permitting drawl of power from the grid under UI for testing and commissioning activities.

9.12 As per the Appellants, if such orders are passed by the Central Commission from case to case, there is every danger that the Central Commission would be exercising its power improperly and beyond its lawful limits (perhaps for example by permitting consumers connected to the ISTS to draw power under the UI mechanism created by it for an entirely different purpose), encroaching into the regulatory jurisdiction of the State Commissions, interfering with the rights of the distribution licensees in a manner not contemplated or permitted by law and/or fraying the statutory framework of the Act itself.

9.13 The Appellants have further brought out that the UI mechanism was evolved by statutory regulations for specific purpose. It was never meant for allowing drawl and purchase of power by a generating company for start up, testing & commissioning and sabotaging the legal rights and obligations of the distribution licensees in which area the generating companies are drawing such power which is prohibited by law.

9.14 *Per contra*, the Respondents have contended that though no reference was there in the Connectivity Regulations for drawl of power from the grid during testing and commissioning but under the Detailed Procedure formulated by CTU (Power Grid) and duly approved under Regulation 27 by the Commission, a provision for drawl of power for commissioning activities was included at Clause 6(2). The Central Commission realising the possible lacuna in the 2009 Regulations

with regard to drawl of power from the grid for commissioning activities and the anomaly with the Detailed Procedure for connectivity directed to take requisite measures for appropriately correcting the anomaly and sorting out the visible lacuna in the Regulations. However, pending amendment in the said Regulations, a number of generators who had arranged their affairs to conduct testing and commissioning by drawing UI power from the grid started facing difficulties to arrange power for their activities through some form of access at such short notice. Accordingly, the Central Commission vide interim order dated 7.12.2012 allowed the drawl of start up power for testing and commissioning and simultaneously directed for the necessary amendments in the Connectivity Regulations. It would thus emerge that the Central Commission passed the impugned order exercising its regulatory powers even considering the fact that there was a possible lacuna in the Connectivity Regulations. It is thus clear that there was no prohibition to the Central Commission for passing the necessary orders but rather an absence of Regulations in this sphere.

### **Our Findings**

9.15 We have analysed the submissions of both the parties and find that the Central Commission has passed the order well within the jurisdiction of its Regulatory powers. The Detailed Procedure for connectivity formulated by the CTU and duly approved by the Commission clearly stipulates for the drawl of power from the grid for commissioning activities but the same was inadvertently not included in the 2009 Regulations. It is well-settled that the existence of a regulation is not a pre-condition for the Central Commission to exercise its regulatory powers. This aspect has been deliberated and analysed by a number of legal and judicial proceedings including the Apex court. **A Constitution Bench of the Hon'ble Supreme Court in *PTC India Ltd. vs. CERC(2010)4SCC 638* has held as under:-**

*“55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178.....”*

It would thus be evident from above that the term regulate has a broader impact and bears the wider meaning encompassing of facets including those incidental to the Regulations envisaged and powers exercised by the Regulatory Commission. Hon’ble Supreme Court has also held on similar lines in the case *U.P. Cooperative Cane Unions Federation V/s West U.P. Sugar Mills Association* (2004) 5 SCC 430. **Besides, the meaning of powers as exercised has to be ascertained in the context in which it has been used and the purpose of the statute.** Considering all these facts and legal provisions, we find no infirmity or unjustness in the decision of the Central Commission in the impugned order to allow drawl of power from ISTS for testing and commissioning activities as envisaged in the Connectivity Procedure, approved by it under Regulation 27.

### **Issue No.3**

9.16 The Appellants have contended that UI mechanism was evolved by the Central Commission for the specific purpose and the impugned order of the Commission goes contrary to the very purpose set out in the UI Regulations and also, violates Open Access Regulations. The Appellants have further submitted that the effect of the impugned order is to allow the abuse of the UI mechanism allowing drawl and purchase of power by a generating company for start-up, stand-by and/or for any other purposes contrary to the express provisions of the statutory regulations and to create a device by which the liability and obligation to source power for consumption through open access duly paying cross subsidy surcharge to the distribution licensee is bypassed and evaded. Alternatively, it is to create a device for the trading of power without arranging for the same lawfully under

open access or by arrangement with the distribution licensees which have the exclusive right to supply electricity in their area of operation. It thereby amounts to permitting an activity prohibited by law to be undertaken, and to subvert and evade the provision of cross-subsidising tariff established by the State Commission for taking start-up power by generating companies from the distribution licensees, and to allow trading in power by entities prohibited and/or disentitled by law to engage in trading.

9.17 *Per contra*, the Respondents have brought out that the claims of the Appellants as an exclusive right to supply electricity in their respective state are contrary to law under the provisions of Electricity Act, 2003 or with reference to the “consumer” as defined in Section 2(15) of the Act. The Generating Company or a Generating Station/ Unit can avail power either from any distribution licensee as a consumer or can purchase power through open access or avail through UI mechanism as per the order of the Central Commission.

9.18 The Respondent have further submitted that drawl/injection of power through UI mechanism does not amount to either sale of power by the Respondents or purchase of power from the said Respondents. The Respondents do not either receive any money under the UI mechanism or pay any money to the person injecting power into the system under this mechanism. The energy accounting of such UI mechanism are settled between the beneficiaries who are drawing or injecting power into the grid on the frequencies prevalent at a relevant time. The functions of Respondents are only to coordinate and operate this power system in accordance with the Regulations notified by the Central Commission. The respondents have further mentioned that surplus fund available in the various accounts arising out of UI mechanism are credited to the Power System Development Fund (PSDF) notified by the Central Commission. This fund is further disbursed to utilities for renovation, modernisation and augmentation of power system of all the states.

## **Our Findings**

9.19 We have gone through the detailed submission of the Appellants as well as Respondents and analysed the same with respect to the UI Regulations as well as the Rulings of various judgments cited by the parties and find that there has been no visible violation in exercise of the UI mechanism. In fact, the UI mechanism has been evolved with the primary objective of safe and secure operation of the grid by maintaining desired grid frequency band and in the process, it allows drawl/injection of power in its true spirit of grid discipline. The energy, thus, drawn or injected are accounted for, and settled between the beneficiaries and passed on the principle of helping the grid in a positive manner or affecting the grid in a negative manner. The surplus fund on this account goes to Power System Development Fund after final settlement of claims of UI charges in accordance with the UI charges Regulations 2009 as amended from time to time. It is amply clear that the Respondents remain revenue neutral and do not either receive any money on account of such power drawl or pay money on account of injection of power into the system by the generating companies. As such, it is neither supply nor trading of power by the Respondents as alleged by the Appellants.

## **Issue No.4**

9.20 The Appellants have claimed that they have the exclusive right to supply electricity in their states in their capacity as the sole distribution licensee and they are entitled to get cross-subsidy surcharge, in the event of generating companies procuring power from any person through open access. The Appellants have further contended that drawl and purchase of power by a generating company for start up or for any purpose is contrary to the provisions of the statutory regulations as the distribution licensees of the State where such generating companies are located are being by-passed. Such evasion is depriving the

distribution licensees to get their entitled cross subsidy surcharges or energy charges in case of their supply of power for such commissioning activities. The Appellants have alleged that such evasion or bye-passing of distribution licensees of the area is causing financial loss to them and in other words it is a clear misuse of UI mechanism allowing trading in power by entities prohibited by law to do so.

9.21 *Per contra*, the Respondents have submitted that the functions and privileges of the Appellants as distribution licensees will apply for supply of such power only if the generating company voluntarily applies to become consumer within the meaning of Section 43 of the Electricity Act, 2003. It has further been contended by the Respondents that the issue of generating company using start up of power is not a consumer stand, settled by this Hon'ble Tribunal. In case of *Chhattisgarh Power Transmission Corporation Ltd. Vs. RR Energy Ltd. and Others, Appeal No.166 of 2010 decided on 25.4.2011 as under:-*

*“48. Further, consumer as defined in the Act is a person who is supplied with electricity for his own use. Here start up power is supplied to Respondent No.1 to start up its generating unit. Once generating unit is synchronised with the grid, the power so generated is supplied to Appellant. Without start up power, generators cannot start and produce power. Thus, in way, start up power is supplied for the benefit of Appellant only. From this point of view, a generator taking start up power from distribution licensees and supply power to same licensee on start up, cannot be termed as a consumer.”*

The Respondents have contended that in terms of the above judgment, the impugned order of the Central Commission does not in any manner interfere with the distribution and supply of electricity by the Appellants to its consumers in the state of Chhattisgarh as well as Tamilnadu.



## **Our Findings**

9.22 After careful consideration of the materials put before us, we are of the considered opinion that the very objective of evolving UI mechanism by the Central Commission was for enforcing the grid discipline with specific reference to the grid frequency at a particular time / block. There is no conflict of interest as far as drawl / injection in the grid, through ISTS and distribution of electricity by the distribution licensees of a particular state is concerned. Both have definite and demarcated role to play in the ISTS or Intra State Transmission System.

9.23 What as such emerges is that drawl/injection of power from / in the grid is not an activity of distribution or trading by the respondents namely Power Grid/CTU, POSOCO/NLDC/ RLDC. Needless to mention, the surplus fund emerging from the UI charges after accounting are credited to the Power System Development Fund which is available for all the utilities in the power system for a specific purpose as notified by the Central Commission.

### 9.24 **Summary of our findings :-**

In view of our analysis and findings placed at supra, we do not observe any infirmity or unjustness in the impugned order passed by the Central Commission. Accordingly, the instant Appeals are liable to be dismissed.

## **ORDER**

We are of the considered opinion that the issues raised in the present appeals being Appeal No. 86 of 2014 and Appeal No.102 of 2014 are devoid of merits. Hence, these Appeals are dismissed and the impugned order of Central Commission dated 18.09.2013 is hereby upheld.

In view of the above, IA No. 156 of 2014 in Appeal No.86 of 2014 stands disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **11<sup>th</sup> day of May , 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**