

Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.21 of 2011

Dated : 30th January, 2012

**Coram; HON'BLE MR. RAKESH NATH, TECHNICAL
MEMBER
HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL
MEMBER**

In the matter of :

Gujarat Urja Vikas Nigam Limited

Sardar Patel, Vidyut Bhavan,

Race Course, Vadodara- 390 007

.... Appellant

Versus

1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower, Ashram Road,
Ahmedabad- 380 009,
Gujarat
2. Torrent Power Limited
Torrent House, Off. Ashram Road,
Ahmedabad- 380 009
Gujarat

3. State Load Despatch Centra
132 KV Gotri Sub-station Compound,
Near T.B. Hospital, Gotri Road,
Vadodara- 390 021
Gujarat ... Respondents

Appeal No.22 of 2011

In the matter of :

Gujarat Urja Vikas Nigam Limited
Sardar Patel, Vidyut Bhavan,
Race Course, Vadodara- 390 007 Appellant

Versus

1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower, Ashram Road,
Ahmedabad- 380 009,
Gujarat
2. S.A.L. Steel Limited
Survey No. 254, Paiki
Kidana- Bharpur Road, Village: Bharpur
Taluka Gandhidam, Dist: Kutch- 370 625
Gujarat

3. State Load Despatch Centre

132 KV Gotri Sub-station Compound,

Near T.B. Hospital, Gotri Road,

Vadodara- 390 021

Gujarat

... Respondents

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

These two appeals are being disposed of together as they arise out of common facts though through separate but identical orders passed by the Gujarat Electricity Regulatory Commission, being order dated 8.12.2010 concerning petition No. 1044 of 2010 and the order dated 18.12.2010 in relation to petition no. 1048 of 2010. The orders dated 8.12.2010 and 18.12.2010 relate to the present appeal nos. 21 of 2011 and 22 of 2011 respectively.

2. In appeal No. 21 of 2011 the appellant is Gujarat Urja Vikas Nigam Ltd., a successor entity of the erstwhile Gujarat Electricity Board, now engaged in the undertaking of bulk purchase of electrical energy from the generating Companies and others and bulk supplier thereof to the distribution companies in the State. The respondent No. 2 in this appeal is Torrent Power Ltd. carrying on the business of power generation in the State of Gujarat and also distribution of power in the

cities of Ahmedabad, Gandhinagar and Surat. It has a generating station of 3x 382.5 MW Combined Cycle Power Plant at Surat in addition to 500 MW in Ahmedabad. The third respondent is the State Load Dispatch Centre operated by Gujarat Energy Transmission Corporation Ltd., while the respondent No. 1 is the Gujarat Electricity Regulatory Commission.

3. It was on 4th of January 2000 that the Central Electricity Regulatory Commission (CERC) passed an order concerning implementation of Availability Based Tariff (ABT) in terms of which unscheduled interchange charges and energy imbalance charges were introduced vis-à-vis inter State dealings of generating companies and distribution utilities within the State. The introduction of intra-State ABT system was left to the State Commissions to implement. The appellant contends that the entire effect of the Unscheduled Interchange Charges and Energy Imbalance Charges involved in the Inter-State dealings is absorbed by the State Electricity Board or the Principal Company in the State undertaking the job of bulk purchase and bulk Supply activities in the capacity of being a member of the Regional Pool Account, such as was the appellant in the State of Gujarat. To the limited extent of generating companies in the State of Gujarat giving availability and dispatching electricity to purchasers outside the State of Gujarat pursuant to grant of Open Access based on the Scheduling given by such outside purchasers, the generating companies were subjected to settling the UI

charges with the appellant based on the deviation attributable to them. These State Utilities were not sharing either the benefits of or the burden of energy imbalances on pooled basis as between the State of Gujarat entities as a whole and other States/Regional entities. Such energy imbalances with other States and other State Utilities as well as Central Public Sector entities were settled treating the appellant as the net purchaser and net seller of electricity. According to the appellant, the introduction of the intra-State ABT system in the State was considered by the Commission by the order dated 11.8.2006 whereby the Commission dealt with the aspects of bringing the generating system, the distribution licensee and the other persons under the purview of intra-State ABT mechanism. That order provided for a trial run for three months i.e. up to 30.11.2006, which according to the appellant, continued till 4.4.2010 and during this trial period all the commercial settlements were to be based on the existing arrangement according to which the energy imbalance account including the un-scheduled interchange (UI) was to be settled between the appellant and the inter-State agencies excluding the State Utilities, the respondent No. 2 included. The CERC framed and notified Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 (hereinafter referred to as Open Access Regulations, 2008) of which Regulation 20 which the appellant laid stress upon will be discussed in the course of this

decision. By the order dated 7.5.2008 the Central Commission decided that the Regional Load Dispatch Centre will coordinate the scheduling of Ultra Mega Power Projects and that of the other large privately owned generating stations (of 1000 MW or larger size)in which the States other than the host State had substantial permanent share of 50 % or more , while the generating stations not meeting this criterion were to be scheduled by the State Load Dispatch Centre. By the letter dated 4.10.2008 the respondent No. 2 sought clarifications in respect of applicability of ABT for supply of firm power from Sugem Mega Power Project (Generating plant of TPL at Surat), and in a meeting held on 14.10.2008 it was clarified that ABT system would be applicable to Sugem Mega Power Plant and the decision was communicated to the respondent No.2 by an order dated 23.10.2008. According to the appellant, the methodology was settled in a meeting held on 28.5.2009 and the minutes of the meeting were circulated by a letter dated 11.6.2009. In the course of judgement we will see the methodology fixed by the respondent No.3.

4. Then, the Central Commission on 7.8.2009 notified the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and related matters) Regulation, 2009 of which regulation 30 which the appellant banks upon will be discussed in the sequel. According to the

appellant, till the intra-State ABT mechanism was not implemented, the energy imbalance charges, namely UI charges for over-drawal or under-generation and for under drawl or over generation in the case of generating companies and utilities within the State undertaking inter-State activities were to be determined as provided for in the Regulation 20 of the Open Access Regulations, 2008 and Regulation 30 of the Open Access Regulations, 2009. The charges applicable to them were related specifically to the energy supplied by the generating stations in the State of Gujarat measured at their periphery. These generating stations were not concerned with the Inter-State pooled energy imbalance charges applicable to the state utility dealing with unscheduled inter-changes vis-à-vis outside utilities such as the case of the appellant in Gujarat.

5. Before implementation of the Intra-State ABT Mechanism in the State of Gujarat, the UI of all the State entities were settled with the appellant herein. The appellant herein was responsible for the payment of States' composite dues in the Regional Pool Account. Accordingly, the net UI of all the open access customers in the State were considered as UI charges, either payable or receivable by the appellant. There was, therefore, no resultant UI imbalance, nor was there any UI Pool Account out of which any of the State entities can claim a share. In other words, there was no issue of any imbalance on account of UI in the Gujarat Grid because it was considered that the power injected in the Gujarat Grid

under the UI Mechanism was supplied by or to the appellant which is a residual entity. Accordingly, the entire commercial settlement of UI of the Inter-State level was only with the appellant. The Respondent No. 2 was entitled to claim UI charges only in respect of its schedule and/or injection or drawal and not the UI charges on a back to back basis with what the appellant settled at the Inter Regional level. This is more particularly so as the settlement of UI at the inter State level by the appellant would involve interaction of various aspects which have nothing to do with the respondent No.2 herein or the other similarly placed generators. The claim of the respondent No. 2 sharing in the UI charges on a back to back basis prior to the introduction of the Intra-State ABT would amount to the respondent No.2 sharing benefits of UI in respect of activities for which the respondent No. 2 has not contributed at all.

6. Despite that the third respondent by ignoring the two Central Commission's Regulations 2008 and 2009 erroneously determined the energy imbalance charges payable/receivable on the basis as if Intra-State mechanism had been implemented. When the error was brought to the notice of the third respondent, it revised the statement of imbalance charges removing the error of adjustment and issued the statement of imbalance charges for the period from 14.12.2009 to 4.4.2010 without adjustment. The Intra-State ABT Mechanism in the State of Gujarat was

implemented by the Commission's order dated 1.4.2010 only with effect from 5.4.2010. On 6.7.2010 the respondent No. 2 filed petition No. 1044 of 2010 before the Commission claiming apportionment of the adjustment amount to which the appellant made a response but the Commission's order dated 8.12.2010 made the respondent No. 2 eligible for imbalance energy charges receivable on back to back basis at the Inter-State level of UI Account for the period from 13.7.2009 to 13.12.2009 and directed the appellant to pay a sum of Rs.16, 24, 23, 761 to the respondent No.2. This is the order which is appealed against.

7. The Respondent No. 2 Torrent Power Ltd. filed a 50-page counter affidavit contending inter-alia as follows:-

- a) In the meeting held by the Government of Gujarat and attended to by the appellant, it was decided that intra-State ABT is applicable to Sugem Mega Power Project (1145.7 MW), Surat Distribution Licensee and Ahmednagar Distribution Licensee.
- b) The methodology finalised by the respondent No.3 stipulates that these three entities and short term open access users are constituents of UI quasi pool account, hence UI charges applicable as per CERC norms at Gujarat periphery is balanced back to back with intra-State drawal.

- c) The appellant's contention that during the mock trial it would deal with inter-State ABT pool account and WRLDC for all other entities attached to intra-State ABT of the State would lead to the position that the person carrying out inter-State transaction is kept out of the purview of inter-State transaction which is against the spirit of the Act. Inter-State transaction done by the entities are based on inter-State open access taken by them and the impact of inter-State transactions is the cumulative effect of all the constituent members of the energy pool account so much so that it would be unjust not to pass back to back transaction to the entity concerned.
- d) Once the intra-State entities are paying the imbalance charges with respect to inter-State transaction for before adjustments, they are also eligible to get the same treatment after adjustment of UI charges.
- e) The respondent No. 3 revised the energy pool account without giving any opportunity to the respondent No.2 of being heard.

- f) As per the procedure laid down for the imbalance energy accounting within the intra-State the UI settlement for inter-State transaction will be shared by all intra-State entities and apportionment to be made between them. The entities that are part of the imbalance charges and bearing the charges before adjustment are eligible to get the charges after adjustment on the principle of equity. Thus, if the respondent No.2 pays UI charges for creating imbalance in the system by under injection/over-drawal from the grid in quasi pool account of the intra-State to match back to back payment of inter-State imbalance energy charges which is consistent with ABT principle then it is also eligible to get the imbalance energy charges from the intra-State quasi pool account if it is supporting the grid by over injection/under-drawal.
- g) The CERC by the order dated 4.1.2000 directed implementation of the inter-State ABT in the Western Region by 1.10.2000.

- h) The Ministry of Power notified the National Electricity Policy on 12.2.2005 that advised the Commissions to introduce ABT regime at the State level within a year.
- i) The Gujarat Commission on 31.3.2005 notified the Gujarat Electricity Regulatory Commission(Terms and Conditions of Tariff) Regulations, 2005 which according to the respondent No.2 bolsters its case.
- j) Similarly, the State Commission notified the Gujarat Electricity Regulatory Commission (Open Access in Intra-State Transmission and Distribution) Regulations, 2005 which also according to the respondent supports its case.
- k) Like the appellant the respondent No.2 also extensively relies on the order dated 11.8.2006 passed by the State Commission which in course of deliberation of the relevant issues we will reproduce.
- l) Like the appellant the respondent No.2 also lends credence to CERC Open Access Regulations, 2008.
- m) An order dated 7.5.2008 passed by CERC which finds place in the memo of appeal also finds place in respondent No.2's counter affidavit. This order of the Central Commission mentions inter-alia that it is the

RLDC to coordinate the scheduling of Ultra Mega Power Projects and of other privately owned large power plants in which the States other than the host State have substantial permanent power shares.

- n) Pursuant to the CERC's order dated 7.5.2008 a meeting of the WRPC took place on 18.8.2008 which agreed that scheduling, monitoring and issuing of UI accounts of Torrent Power Sugem will be the responsibility of the respondent no.3
- (o) In response to the respondent No.2's communication to the appellant, the latter by communication dated 23.10.2008 clarified that the ABT would be applicable to Torrent Power Sugem as well as to its beneficiaries and the entire 1147.5 MW of Torrent Power Sugem will be scheduled by the respondent No.3.
- (p) On 7.8.2009 the CERC notified its Open Access Regulations, 2009 which is also relied on by the respondent No.2.
- (q) Then on 25.8.2009 the respondent No.3 settled the methodology of scheduling and accounting treatment of TPL Sugem and associated beneficiaries to be effective from 1.8.2009 and then issued statements of imbalance

energy charges for the period from 13.7.2009 to 31.12.2009 in accordance with the existing accounting methodology and also in terms of the GERC Open Access Regulations, 2005. Then, on 5.11.2009 the appellant issued a communication to the respondent No.3 for revision of the procedure for accounting and settlement of payments in terms of which adjustment portion of inter-State transaction was not to be apportioned and Gujarat Holding Company as residual entities would bear all adjustment portion of the inter-State transaction. On 13.1.2010 similarly the respondent No.3 issued statements of imbalance energy charges without following the ABT principle of apportioning the adjustment portion of inter State transaction holding inter-alia that the differential amount between before and after adjustment shall be added to the Gujarat Holding Company account. On 10.2.2010 the respondent No.3 issued procedure for imbalance energy accounting within intra-State without changing the existing accounting methodology. On 1.4.2010 the State Commission passed an order directing full implementation of the intra-State

ABT mechanism with effect from 5.4.2010. On 20.5.2010 the Power Grid Corporation of India issued a letter in response to Gujarat Holding Company's letter dated 20.4.2010 stating that the contention of the Gujarat Holding Company that the UI mis-match is only on account of distribution companies and not on other Intra-State entities is wrong.

- (r) It was always recognized and accepted, and within the understanding of all the concerned parties that due to deviations from schedule by individual entities in the State of Gujarat that participates as a single unit connected to the Western Grid stands to gain or lose and it was because of increase in the number of users of State transmission network that Intra-State ABT mechanism was introduced in the first place.
- (s) Since the trial run of three months which ended on 30.11.2006 was not extended further by the Commission the Intra-State ABT mechanism with its commercial implications have to be given effect to. Further, in the order dated 11.8.2006, it was decided that inter State ABT principles would be replicated at the intra-State level and adjustment in UI pool have to

be made in a manner whereby receivable and payable amounts would be equal.

(t) When the first unit of TPL Sugem was nearing commercial operation, a meeting was held on 28.5.2009 which was attended to by the appellant, the respondent No. 2 and the respondent No.3 wherein the following was decided and communicated by the respondent no.3 by a circular on 11.06.2009 as follows.

i) Scheduling and Accounting methodology for Torrent Power-Sugem and its beneficiaries will be accounted through UI energy accounting mechanism of ABT. Imbalance energy accounting for the same would be prepared through UI charges and settled through quasi-pool account system of Respondent No. 3.

ii) Unscheduled Interchange across Gujarat periphery is net summation of deviation of Torrent Power-Sugem and its beneficiaries (Torrent Power-Ahmedabad, Torrent Power-Surat). Therefore, Intra-State ABT is required for this purpose.

- iii) UI charges applicable as per the CERC norms at Gujarat periphery are to be balanced back-to-back with the Intra-State entities. Thereby, UI charges accumulated across Gujarat periphery shall have to be shared amongst the intra state entities effecting inter state drawl.
- iv) Intra-State ABT has effective mechanism to share such UI charges. Hence, the proposed mechanism of quasi pool account is prepared in line with the Intra State ABT as intermediate arrangement.
- u) According to the decisions and accounting methodology finalized above, a quasi pool account was prepared comprising short term open access supplier/buyer/WR/Torrent Power-Sugen/Torrent Power Ahmedabad /Torrent Power-Surat and the appellant in line with Intra -State ABT wherein UI charges accumulated across Gujarat were to be balanced back to back and shared with intra-state entities. In view of Torrent Power-Sugen's 1st Unit being under commercial operation from 18.7.2009 and since the appellant had withdrawn its stand-by contract demand for Torrent

Power-Ahmedabad and Torrent Power-Surat, on 25.8.2009, the respondent No. 3 issued a revised methodology of Scheduling and Accounting treatment of Torrent Power-Sugen and its associated beneficiaries to be effective from 1.8.2009. It was stated that over drawl and under drawl by torrent Power-A and Torrent Power-S is to be accounted for under UI charges, which would be applied for as per the CERC UI Regulations, 2009, till implementation of intra-State ABT. It was reiterated that UI charges at Gujarat periphery was to be balanced back to back and shared with intra-state entities. Therefore, having participated in the entire process of developing and finalizing the accounting methodology of Torrent Power-Sugen and agreeing to the same, the appellant cannot as an after- thought state that the respondent is not entitled to the adjustment amount of UI charges, specially in view of the fact that Torrent Power-Sugen contributes to deviation/mismatch at the Inter-state level which affects the deviations at the Intra-State level.

- v) With the commissioning of Torrent Power-Sugen and under multi users model Gujarat Holding Company is now one of the State entities and a part of the pool

account. The transactions in Gujarat system involved not only the transactions through Gujarat Holding Company but also the transactions of TPL-Sugen , TPL-Surat, short term open access customers and WR, and this was recognized in clause 16 of the procedure for imbalance energy account wherein it was observed that UI charges received from WRLDC due to deviation are to be distributed to all Intra-State entities including the appellant company and such UI charges shall be called “UI charges after adjustment”. The procedure envisages the following:-

- i) Imbalance energy account is prepared by creating pool among STOA supplier/buyer, WR, Torrent Power-Sugen, Torrent Power-Ahmedabad, Torrent Power-Surat and Gujarat Holding Company through a quasi-pool account.
- ii) The existing mechanism of energy accounting of Gujarat Holding Company carried out as per Power Purchase Agreement shall remain intact without any change. The deviation from

schedule by all entities shall be accounted for as per the provisions of PPA which is to be absorbed into Gujarat Holding Company account. All other transactions which include short term open access and Torrent Power – Sugden & its associated beneficiaries will be accounted for as per UI mechanism under the ABT principle.

- iii) Transaction with Western Region would be a common transaction and the same shall be balanced back to back with the intra-State entities as per the calculation received from WRPC on weekly basis.
- iv) The communications dated 26.7.2010 and 17.9.2010 whereby two cheques were forwarded to the respondent no.2 by the State Load Despatch Centre would reveal that a pool account for the purposes of maintaining and managing UI charges was very much in place even prior to 5.4.2010.

8. The appellant has filed a rejoinder in response to the counter affidavit of the respondent No. 2 and for the sake of the brevity of treatment, we will continue to discuss the contentions of the rejoinder as we will be entering into the discussion on the merit of the appeal. Meanwhile, it may be recorded that the respondent No. 3, State Load Dispatch Centre has filed a one page counter affidavit stating that at the request of the appellant the respondent No.3 revised the statement of the imbalance energy charges as per the then applicable methodology instead of calculating such charges on the basis that intra-state ABT stood implemented. During the period till 5.4.2010 the intra-state ABT had not been implemented in the State of Gujarat but pursuant to the decision of the Commission dated 11.8.2006 the intra-state ABT was on trial run and during the trial run period all commercial settlement would be based on the then existing arrangements.

9. The appellant in Appeal no 21 of 2011 is also the appellant in the Appeal no 22 of 2011 and the second respondent in this appeal is the S.A.L. Steel Limited. Being aggrieved by the Commission's similar order dated 18.12.2010 passed in petition no.1048 of 2010 whereby it decided upon the settlement of imbalance energy account unscheduled interchange and directed the same to be done on pooled account basis in favour of the S.A.L. Steel Limited, the respondent no 2, in respect of the

period allegedly prior to the implementation of the intra-state ABT mechanism in the state of Gujarat the same appellant preferred another identical appeal.

10. The second respondent who has set up a captive power plant of 45 MW at its manufacturing facility in Kutch, Gujarat sold the surplus power to the appellant initially and then through Indian Energy Exchange. The appellant submits that till the introduction of intra-state ABT, the entire effect of the unscheduled interchange and energy imbalance charges were absorbed by the State Electricity Board or the principal company in the state undertaking the bulk purchase and bulk supply activities such as the appellant in the State of Gujarat.

11. The second respondent filed a petition no. 1048 of 2010 before the State Commission claiming that the second respondent was also entitled to receive the UI charges which are apportioned of the adjustment amounts in the imbalance charges and paying for direction to the respondent no 3, the State Load Despatch Centre, to pay the amount of Rs.2,62,00,000 with interest. The Commission decided that the respondent no. 2 was eligible to imbalance energy charges receivable from quasi-pool energy account for the period from 31.3.2009 to 21.12.2009 and directed the third respondent to re-work the intra-state energy account and refund the amount of Rs. 2,62,00,000 recovered from the second respondent .

12. It is the case of the appellant that the Commission failed to consider the various specific aspects raised by the third respondent in the proceeding before the State Commission bringing out the reasons as to why the respondent no 2 is not entitled to share in the Inter State Pool Account. The Commission proceeded without considering that the sharing UI charges from the Inter State Pool Account before 5.4.2010 was not applicable and the UI charges to the second respondent was to be settled with the appellant on the basis of actual energy injected by the second respondent at their periphery.

13. The second respondent in its reply challenged the contention of the appellant that ABT mechanism was not fully implemented until 5.4.2010. The respondent no 2 first made an application on 27.11.2008 for no-objection /or standing clearance for export of power on Indian Energy Exchange, which was rejected by the third respondent on 01.12.2008 where after it approached the Commission with the case no 957 of 2008 . The Commission allowed the same by the order dated 16.12.2008. Since the respondent no.2 was required to meet all technical parameters it installed ABT meters on 30.01.2008 which is evidenced by letter dated 3.2.2009 at an expense of Rs.15 lac to the knowledge of the appellant.

14. Alternatively, it is contended that since the second respondent starting exporting power it did so with a clear understanding that the same is under the ABT regime. At no point of time was the second respondent made aware that when the order dated 11.08.2006 was passed the same would be treated as being not implemented. The accounts of the second respondent were prepared by the third respondent after the ABT principle that it was entitled to UI charges and ABT mechanism was in place. The system continued till January,2010. That apart, the order dated 11.08.2006 mandated implementation of the ABT mechanism. The third respondent was not authorised to change the account treatment retrospectively without affording any hearing to the second respondent and make changes retrospectively. It is denied that the ABT mechanism was put to mock trial and continued till 5.4.2010.

15. The appellant filed a rejoinder to the effect that it is the SLDC which is the only statutory authority to ensure implementation of the ABT system. The appellant further contends that after the settlement of the deviations at its periphery meter the second respondent is not entitled to further participation in the UI pool account for the state of Gujarat, and it was the appellant who was the sole participant in the UI Pool Account of the WRLDC prior to 5.4.2010 and the respondent no 2 was only an intra- state entity and not a participant to the UI Pool Account of the WRLDC.

16. The pleadings as aforesaid give rise for consideration the following issues:-

- a) Whether the State Commission was right in directing the appellant to share the inter-state UI charges on pooled basis amongst the intra state entities including the respondents for a period prior to 5.4.2010?
- b) Whether the respondent no.2 was entitled to apportionment of 'adjustment amount' on account of imbalance charges accumulated across Gujarat periphery for inter-state transaction?
- c) Whether the State Commission was justified in reversing the revised accounting methodology of calculating imbalance energy charges made by the respondent no.3 when the same respondent no.3 had earlier made accounting statement entitling the respondent no.2 to share adjustment amount along with other intra- state entities?
- d) Whether the Commission was justified in ignoring the contents of the order dated 11.8.2006 as alleged by the appellant?
- e) Whether the Commission acted contrary to the regulation 20 of the Central Open Access Regulations, 2008 and regulation 30 of the Central Open Access Regulation ?

17. Mr. M.G. Ramachandran, learned Advocate appearing for the appellants submitted as follows:

- a) Intra-State ABT with commercial settlement of UI Charges amongst Intra-State entities became effective only on 05.04.2010. Ld. Commission's Order dated 11.08.2006 provided for intra-state ABT only on mock trial basis which continued until 05.04.2010 as reflected in Commission's Amendment Order dated 01.04.2010.
- b) Until 05.04.2010 i.e. during the mock-trial, all commercial settlements were to be based on existing arrangements i.e. energy imbalance account at the Inter-State level was to be settled only by the appellant and none of the Intra-State entities such as Torrent Power were entitled to participate in Inter-State pool account of UI charges.
- c) As such, prior to 05.04.2010 energy imbalance account at the inter-state level was to be settled only by GUVNL based on UI Charges being determined in terms of Regulations 20 of CERC (Open Access in Inter-State Transmission) Regulations, 2008 ("Open Access Regulation, 2008") and Regulation 30 of the CERC (Grant Of Connectivity, Long Terms Access and Medium Terms Open Access in Inter-State Transmission and related

matters) Regulations, 2009 (“Open Access Regulations, 2009”).

- d) None of the intra-state entities (as defined in the Open Access Regulation) such as Torrent Power and the second respondent in the other appeal were entitled to participate in Inter-state pool account of UI charges. Such entities were not entitled to any amount other than 105% (for over drawl or under generation) and 95% (for under drawls or over generation) of UI rate at the periphery of regional entity.
- e) As such, immediately after the wrong statements of imbalance energy charges were issued by SLDC, the same were rectified in terms of its communication dated 10.01.2010. This was a mere rectification requiring no notice or hearing to be given to the two respondents.
- f) The appellant was responsible for the payment of State’s composite dues in the Regional Pool Account. Accordingly, as UI charges were payable or receivable by the appellant there was no issue of any imbalance on account of UI in the Gujarat grid as it was considered that the power injected in the grade under the UI mechanism was supplied by or to the appellant which is a residual

entity. The respondents were only entitled to claim UI charges only in respect of its schedule or injection/drawal and not the UI charges on back to back basis with what the appellant settled at the inter regional level.

g) The State Commission directed implementation of intra-state ABT in the state of Gujarat only with effect from 5th April, 2010.

h) The commercial settlement was to be as per Regulation 20(5) of the CERC Open Access Regulations, 2008 and then the CERC Open Access Regulations 2009. If the trial run or mock exercise had continued till 1st April, 2010 then obviously the aforesaid two Central Regulations would be applicable.

i) Annual report of the State Commission for the year 2008-09 dated 21st July, 2009 mentioned that the Commission issued the Intra-State ABT order on 11.8.2006 providing for carrying out mock exercise by the SLDC prior to implementation and it was observed by the team that the SLDC was adequately prepared for implementation of the intra-state ABT and the Commission will issue necessary orders per commercial operation of intra-state ABT separately.

- j) The annual report of the State Commission for the year 2009-10 also mentioned that the implementation of intra-state ABT with its full commercial implication was in process.
- k) The order dated 5-10-2010 passed by the Commission also made it clear that mock trial continued till 4.4.2010.
- l) The letter dated 24th September, 2008 issued by the respondent no 2 also suggested to have one more appraisal meeting to discuss the remedial measures to be taken for successful implementation of intra-state ABT.
- m) The proceeding of the 5th meeting of the Coordination Forum held on 15.12.2009 mentioned that the SLDC carried out mock trial successfully for the intra-state ABT.
- n) In the petition filed by the SLDC before the State Commission on 25th March 2009 it was prayed that operationalisation order from 1st April, 2009 for implementation of intra-state ABT might be issued.

18. Mr. Amit Kapoor learned Advocate for the respondent no. 2 made lengthy submissions which can be summarized as below:

- a. The respondent no 2 is eligible to receive from GUVNL the following amounts with interest:

- i. Rs. 16,24,23,761/- towards imbalance energy charges from quasi pool energy account as back to back arrangement of inter state imbalance charges for the period 13.07.2009 to 13.12.2009.
 - ii. Imbalance charges for inter-state transaction made by it as a part of quasi pool account of the Intra-state entity for the period 13.12.2009 to 04.04.2010.
- (b) UI charges across Gujarat periphery is the net summation of deviation of Torrent Power Generation company as well as its beneficiaries and such UI charges have to be balanced back to back with the intra-state entities. Therefore, UI charges accumulated across Gujarat periphery have to be shared amongst the intra-state entities.
- (c) The role of the RLDC and that of the SLDC as provided for in section 28 and 32 of the Electricity Act, 2003 read with Open Access Regulations, the order dated 7.5.2008 issued by the Central Commission and the order dated 11th August, 2006 issued by the State commission support the case of the respondent no. 2.

- (d) The minutes of the WRPC meeting dated 8th August 2008, the minutes of the meeting held by Gujarat GETCO on 14th October, 2008 and forwarded by the appellant on 23rd October, 2008, minutes of the meeting of Gujarat GETCO dated 28th May, 2009, the clarification made by the appellant itself on 14th July, 2009, the weekly statements of sharing of imbalance energy charges issued by SLDC to both the appellant and the respondent no 2 for 22 weeks between 13th July, 2009 and December, 2009, the SLDC's revised methodology of scheduling an accounting treatment of the respondent no 2 issued on 25 August, 2009, cheques received by the respondent 2 for a period of 32 weeks between July, 2009 and December, 2009 towards imbalance energy charges with in intra-state, and procedure for imbalance energy accounting with in intra-state for the interim period till implementation of intra-state ABT issued by Gujarat SLDC on 10.2.2000-----all tend to show that UI charges accumulated across Gujarat periphery were decided to be shared amongst the intra-state entities.

- (e) It was the decision of the State Commission to implement the scheme of the Intra-State ABT following the decision of the Central Commission dated 4th January, 2000 to implement Inter- State ABT with effect from 1st July, 2002. The benefits of ABT were recognised by the Forum of Regulators. The National Tariff Policy, the GERC Tariff Regulations, 2005 and the Indian Electricity Grid Code clearly establish the point that with the participation of Intra-State entities in the Inter-State UI transaction the imbalance energy charges within Intra-State are to be balanced back to back amongst the Intra-State entities which include the respondent no 2 and short term open access customers besides the appellant.
- (f) It was the responsibility of the SLDC for effective implementation of intra-state ABT according to the order dated 11.8.2006 passed by the State Commission.
- (g) The trial run was only for a period of three months that expired on 30th. November, 2006.
- (h) The question of sharing of imbalance energy charges was not relevant when the Torrent Power Ltd dealing

with inter-state generating power system in Gujarat did not come into being but now the transactions of Torrent Power—both generation and distribution, other short term open access customers, Gujarat holding company represent Gujarat in the Western Region Pool Account.

- (i) The Central Commission's order dated 4th January, 2000 introducing the concept of inter-state ABT in the western region with effect from 1st July, 2000 led the State Commission to introduce the same scheme amongst the intra-state entities in a same line and there is no reason to exclude the respondent no 2 because the inter-state ABT principles have to be replicated at the intra-state level.
- (j) The intra-state ABT was held to be applicable to all the private generators supplying power to the distribution companies including the appellant.
- (k) The commercial settlement of UI charges is based on the principle that if total payment receivable in the UI pool account is more or less than UI payable, then UI payable/receivable will be suitably adjusted to make the payable and the receivable amounts equal.

- (l) Since intra-state ABT was introduced on a mock trial basis, an intermediate accounting methodology named “quasi-pool account” was devised by Gujarat SLDC in the presence of the appellant along with Torrent Power, which was to remain in place till the full implementation of the intra-state ABT in all aspects in the state.
- (m) Subsequent to 1st Unit of Torrent Power achieving COD on 18.07.2009 and appellant’s withdrawal of its stand-by contract demand for Torrent Power Distribution, on 25.08.2009, a revised methodology of Scheduling and Accounting treatment of Torrent Power-Generation and Distribution was issued by Gujarat SLDC. It is pertinent to note that as per the said methodology it was reiterated that deviations caused by Torrent Power was to be accounted for under UI Charges, which would be applied as per CERC UI Regulations 2009, till implementation of intra-state ABT.
- (n) From 8th August, 2008 when WRPC constituted the meeting to decide that SLDC Gujarat would be responsible for scheduling an accounting of Torrent

Power till 18th July, 2009 when the said TPL achieved COD it was decided in the presence of the appellant that imbalance energy accounting would be prepared through UI Charges settled through quasi pool account system of Gujarat SLDC and TPL would be entitle to such UI charges collected across Gujarat periphery. The doctrine of legitimate expectation would be applicable here and cannot be withdrawn in view of the decisions in *National Buildings Construction Corporation Vs. Raghunath [(1998)7SCC 66]*, *Sethi Auto Service Station & Anr. Vs. Delhi Development Authority & Ora. [(2009) 1 SCC 180]*, *Delhi Electricity Regulatory Commission Vs. BSES Yamuna Power Ltd. [(2007) 3 SCC 33]*.

- (o) The SLDC arbitrarily and without assigning any reason issued revised statements of imbalance energy charges for the period from 13th July, 2009 to 13th December, 2009 removing thereby the adjustment portion of receivable/payable by various pool members.
- (p) On 10th February, 2010 the Gujarat SLDC issued a procedure for imbalance energy accounting within

intra-state which was to remain for the interim period till implementation of the Intra-State ABT. It was stated that all pool members participating in energy accounting had accepted the same methodology which was being carried out by Gujarat SLDC since 22nd September, 2008. The relevant extracts of the said procedure are as follows:

- *Applicability of UI Charges: Open Access Regulation 2008 issued by CERC provides that UI rate can be applied to such open access transaction where ABT based accounting mechanism is not in place...The applicability of UI charges as above is further extended for transaction of TPL-Sugen Intra State open access users in order to maintain back to back mechanism.*
- *Transaction with Western Region would be a common transaction and same shall be balanced back to back with Intra State entities as per calculation received from WRPC on weekly basis.*
- *Whereas the deviation of generator/supplier power having agreement other than GUVNL or agreement do not covers the provision of deemed generation and*

non deemed generation will be calculated by applying UI charges. The deviation between drawl schedule and actual drawl by distribution licensee receiving power from supplier other than GUVNL will be governed as per provision of ABT and same would be computed by applying Unscheduled Interchange Charges.

- *The inter state transaction entered into the pool account provides the adjustment component. Therefore, the same component is apportioned to intra state entities proportionately.*
- *The retrospective revision will be limited to the computational error or data discrepancy or revision in schedule. However, the revision due to change in procedural methodology would be effective from the date on which it is finalized by SLDC-Gujarat after concurrence of every pool members.*
- *Settlement of UI charges with WRLDC for Inter State transaction will have to shared by Intra State entities. The UI charges received from WRLDC due to deviation of Intra State entities comprises share of Intra State entities. Such UI Charges is to be*

distributed among intra state entities. However, recently GUVNL is settling and dealing with WRLDC, same will be continued....”

- (q) Having participated in the entire process of developing and finalizing the accounting methodology of Torrent Power and agreeing to the same the appellant cannot say now that the respondents in either of the appeals is not entitled to the imbalance energy charges particularly when the respondents contributed to deviation at the inter state level. UI of Gujarat system as a whole at the inter state level is on account of collective action of the intra state entities in Gujarat.
- (r) Though the letter dated 5.11.2009 has been submitted during the hearing of the appeal the copy of the same was not made available to the respondent no 2 or any of the pool members. The methodology of imbalance energy accounting for calculating UI Charges was revised unilaterally without hearing the respondent no 2 which is completely illegal in view of the decisions of the Hon'ble Supreme Court in *State of Maharashtra Vs. Jalgaon Municipal Council*[(2003) 9

SCC 731], Indu Bhushan Dwivedi Vs. State of Jharkhand [(2010) 11 SCC 278] and Biecco Lawrie Ltd.v. State of West Bengal [(2009) 10 SCC 32].

- (s) Such unilateral revision of accounting methodology is also contrary to the procedure for imbalance energy accounting within intra state issued by the Gujarat SLDC on 10th February, 2010 which provides that retrospective revision could be done only for computational error, data discrepancy or revision in schedule and the revision pertaining to change in procedure of methodology could be made effective only after concurrence from each pool member.

19. The issue is one but paraphrased differently, so a comprehensive treatment is called for. The question is whether prior to 4.4.2010 the procedure laid down for the imbalance energy accounting within the Intra-State UI settlement for intra-State consumption will be shared by all intra-State entities within the State of Gujarat and apportionment to be made between them. The issue concerning the appeal is not at all whether the Commission's order is violative of any provision of the Act, 2003 or of Tariff Regulations, 2005 notified by the Gujarat Electricity Regulatory Commission. The question is whether the parties involved in litigation understood very well whether prior to 4.4.2010 intra-State ABT

mechanism had been implemented on commercial principles. Unscheduled interchange (UI) is the mechanism developed to improve grid efficiency, grid discipline, accountability and responsibility by imposing charges on those who deviate from their scheduled generation or drawl. Unscheduled generation and drawl of electricity puts the whole grid and many other electrical equipment into danger by what is called dumping large fluctuations in frequencies. Unscheduled interchange is a part of three part tariff put forward by the CERC in the name of Availability Based Tariff on 4th January, 2000 at inter-state level. It is the common knowledge that in the ABT mechanism three components operate in the field namely (a) capacity charge, (b) energy charge and (c) payment for deviations from schedule at the conditions prevailing at the time of deviation. The third part would signify that the payment is made by the generator for deviating from the schedule. Introduction of open access in the State and the decision of the control area of the generation unit of the respondent No. 2 at Surat and its associated beneficiaries has resulted in a major change in the electrical grid operation in the State and the corresponding energy accounting. Hitherto, all transactions took place with the appellant being the sole bulk buyer and the bulk supplier but the single buyer system has been changed into multi buyer system in the commercial transaction of electrical energy. Thus, ABT mechanism effectively addresses grid operational and accounting issues of multi user

system. In this scenario, the State Load Dispatch Centre which in the instant case is the Gujarat Energy Transmission Corporation Ltd. has to play a statutory role as mentioned in the section 33 of the Act. Integrated grid operations is what a State Load Dispatch Centre is mandated to perform under the law. There is no dispute that with the advent of multi buyer system the State Load Dispatch Centre has to reckon with each of the intra-State entities for effective implementation of intra-State ABT. If until before unilateral revision of methodology of accounting of imbalance energy charges the respondent No.3 had really implemented the intra-State ABT mechanism well to the knowledge of all such entities including the appellant and if such methodology conforms to the law as it is bound to be so, then perhaps none can raise any cavil on the ground that a formal announcement was yet to be made,---a ground not appearing to be convincing in view of the GERC Regulations,2005 and the order dated 11.08.2006 and other correspondences. It is the basic case of the respondents that if an entity within the State engaged in the work of generation of power is carrying out inter-State transaction in the multi buyer system and pays imbalance charges with respect to inter-State transaction for before adjustment, then there is no earthly reason as to why and under what provision of law or equity such an entity would be denied the legitimate entitlement to after adjustment of such UI charges. A comprehensive survey of the documents submitted by both the parties

will perhaps make the position clear. If in a particular area, a clear law is absent then the party who does equity in commercial transaction is entitled to equity. Equally and conversely, if an act equitable is done in consonance with the essence of the law, then such an act becomes both legal and equitable.

20. The Central Commission's observation in the order dated 4. 1.2000 where Inter –State ABT was directed to be implemented in the Western Region by 1.10.2000 is relevant:-

“5.10.4... Under the proposed arrangement any portion of UI as and when received is to be distributed pro rata to the outstanding of all parties. Alternatively from the records, it should be possible to link up over draws and under draws on a regular basis. This can be adjusted on every 48 hours basis from Central Room Readings. In this way a composite scheme can be evolved by which at the end of the month the balance portion for distribution of the UI could be finalized by the REB. The arrangement has to be organized by the RLDC in consultation with REB. The net UI charges after these regular adjustments should be distributed, billed and paid at the end of each month”.

21. As we are informed through the contents of the counter affidavit, the Ministry of Power, Government of India notified the National Electricity Policy on 12.02.2005 which inter alia provided as under:-

“5.7.1(b) The ABT regime introduced by CERC at the national level has had a positive impact. It has also enabled a credible settlement mechanism for intra-day power transfers from licenses with surpluses to licenses experiencing deficits. SERC are advised to introduce the ABT regime at the State Level within one year”.

22. Annexure A to the memo of appeal is the order dated 11.8.2006 passed by the Gujarat Electricity Regulatory Commission which is relied upon by both the parties to buttress claim as against each other and it is therefore, necessary to reproduce certain relevant paragraphs of the said lengthy order. In paragraph 6 it has been observed as follows:-

“In the existing Inter-state ABT, Gujrat percolates as a single unit connected to the Western grid and also gains or loses in case of deviations from schedule. This may be due to deviation from schedule by individual entities in the State and therefore such deviating entities have to bear the consequences. The increase in users of the State Transmission network calls for efficient energy accounting and balancing mechanism. Hence Inter State ABT principles have to be replicated at the intra-state level. In view of

the above, the Commission hereby resolves to implement the scheme of Intra-State Availability Based Tariff (Intra-State ABT).”

In paragraph 20 it has been stated that *“since the Intra-State ABT is being introduced in the State for the first time, the Commission would like to operate it as trial run (as a mock exercise) for a period of three months i.e. upto 30th November, 2006. During this period all the commercial settlement will be based on the existing arrangement.”*

23. The GERC (Terms and Conditions of Tariff) Regulations, 2005 (GERC Tariff Regulations) notified on 31st March 2005 specify that the Commission will issue detailed orders for operationalisation of ABT after consulting the stakeholders and considering their degree of preparedness for its implementation. Further, the Gujarat Electricity Regulatory Commission (Open Access in Intra-State Transmission and Distribution) Regulations, 2005 provide for implementation of the Intra-State ABT System for operationalising Open Access.

1. Short title and commencement:

(1) These regulations may be called the Gujarat Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005.

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

(3) The Commission shall come out with detailed orders regarding the operationalisation of ABT after consultation with all stakeholders and considering their degree of preparedness for implementing the same.

(4) Regulations shall be applicable to distribution projects during the Control period. Further, the tariffs for distribution licensees shall be governed as may be specified by the Commission in the Multi Year Tariff Principles1 at the end of the Control Period.

23. Unscheduled Interchange (UI):

(1) Variation between actual generation or actual drawal and scheduled generation or scheduled drawal shall be accounted for through Unscheduled Interchange (UI) charges. UI for a generating station shall be equal to its actual generation minus its scheduled generation. UI for a beneficiary shall be equal to its total actual drawal minus its total scheduled drawal. UI shall be worked out for each 15-minute time block. Charges for all UI transactions shall be based on average frequency of the time block and the following rates shall apply.

(2)(i) Any generation up to 105% of the declared capacity in any time block of 15 minutes and averaging up to 101% of the average declared capacity over a day shall not be construed as gaming, and the generator shall be entitled to UI charges for such excess generation above the scheduled generation (SG).

- (ii) *For any generation beyond the prescribed limits, the State Load Despatch Centre shall investigate so as to ensure that there is no gaming, and if gaming is found by the State Load Despatch Centre, the corresponding UI charges due to the generating station on account of such extra generation shall be reduced to zero and the amount shall be adjusted in UI account of beneficiaries in the ratio of their capacity share in the generating station.”*

26. Scheduling:

Read with the provisions of Gujarat State Grid Code, the methodology of scheduling and calculating availability shall be as under:

- (i) *The generator shall make an advance declaration of capability of its generating station. The declaration shall be for that capability which can be actually made available. The declaration shall be for the capability of the generating station to deliver exbus MW for the next day either as one figure for the whole day or as different figures for different periods of the day. The capability as declared by the generator, also referred to as the declared capacity, shall form the basis of generation scheduling.*
- (ii) *While making or revising its declaration of capability, the generator shall ensure that the declared capability during peak hours is not less than that during other hours. However, exception*

to this rule shall be allowed in case of tripping/re-synchronisation of units as a result of forced outage of units.

- (iii) Generation scheduling shall be done in accordance with the operating procedure stipulated in the Indian Electricity Grid Code.*
- (iv) Based on the declaration of the generator, the State Load Dispatch Centre shall communicate their shares to the beneficiaries out of which they shall give their requisitions.*
- (v) Based on the requisitions given by the beneficiaries and taking into account technical limitations on varying the generation and also taking into account transmission system constraints, if any, the State Load Dispatch Centre shall prepare the economically optimal generation schedules and drawal schedules and communicate the same to the generator and the beneficiaries. The State Load Dispatch Centre shall also formulate the procedure for meeting contingencies both in the long run and in the short run (Daily scheduling).*
- (vi) The scheduled generation and actual generation shall be ex-bus at the generating station. For beneficiaries, the scheduled and actual net drawals shall be at their respective receiving points.*
- (vii) For calculating the net drawal schedules of beneficiaries, the transmission losses shall be apportioned to their drawal schedules for the time being. Provided that a refinement may be specified by*

the Commission in future depending on the preparedness of the respective State Load Dispatch Centre.

(viii) In case of forced outage of a unit, the State Load Dispatch Centre shall revise the schedules on the basis of revised declared capability. The revised declared capability and the revised schedules shall become effective from the 4th time block, counting the time block in which the revision is advised by the generator to be the first one.

(ix) In the event of bottleneck in evacuation of power due to any constraint, outage, failure or limitation in the transmission system, associated switchyard and sub-stations owned by the State Transmission Utility or any other transmission licensee involved in intra-state transmission (as certified by the State Load Dispatch Centre) necessitating reduction in generation, the State Load Dispatch Centre shall revise the schedules which shall become effective from the 4th time block, counting the time block in which the bottleneck in evacuation of power has taken place to be the first one. Also, during the first, second and third time blocks of such an event, the scheduled generation of the generating station shall be deemed to have been revised to be equal to actual generation, and the scheduled drawals of the beneficiaries shall be deemed to have been revised to be equal to their actual drawals.

- (x) *In case of any grid disturbance, scheduled generation of all the generating stations and scheduled drawal of all the beneficiaries shall be deemed to have been revised to be equal to their actual generation/drawal for all the time blocks affected by the grid disturbance. Certification of grid disturbance and its duration shall be done by the State Load Dispatch Centre.*
- (xi) *Revision of declared capability by the generator(s) and requisition by beneficiary(ies) for the remaining period of the day shall also be permitted with advance notice. Revised schedules/declared capability in such cases shall become effective from the 6th time block, counting the time block in which the request for revision has been received in the State Load Dispatch Centre to be the first one.*
- (xii) *If, at any point of time, the State Load Dispatch Centre observes that there is need for revision of the schedules in the interest of better system operation, it may do so on its own, and in such cases, the revised schedules shall become effective from the 4th time block, counting the time block in which the revised schedule is issued by the State Load Dispatch Centre to be the first one.*
- (xiii) *Generation schedules and drawal schedules issued/revised by the State Load Dispatch Centre shall become effective from designated time block irrespective of communication success.*

(xiv) For any revision of scheduled generation, including post facto deemed revision, there shall be a corresponding revision of scheduled drawals of the beneficiaries.

(xv) A procedure for recording the communication regarding changes to schedules duly taking into account the time factor shall be evolved by the State Transmission Utility in consultation with SLDC as well as other stakeholders and it shall be to the extent possible in line with the prevailing practices at the national level.

Note:

In case of a generating station, contracting to supply power to two or more States, the scheduling, metering and energy accounting shall be carried out by the Regional Load Dispatch Centre.

24 On 29.5.2005 the State Commission notified Gujarat Electricity Regulatory Commission (Open Access in Intra- State Transmission Regulations, 2005. The relevant provision of the GERC Open Access regulation is as under:

“15. UI Charges under Intra-State Availability Based Tariff (ABT)

The Commercial settlement of Unscheduled Interchange charges (UI charges) under Intra-State ABT shall be done according to the Inter-

State ABT being followed for Inter-State Transactions with the following, additions/variation.

- (i) A consumer opting for open access shall continue to be treated according to the rules applicable to a normal consumer in the equivalent category of the Discom. Thus he will be penalized for deviating from his scheduled drawl which may be detrimental to the grid either by way of frequency or voltage of the grid. At the same time he will not be paid any UI charges for changing his schedule even if it be helpful to the grid.*
- (ii) A generating station with a total capacity of generation upto 15 MW may operate under UI regime and inject power (specially during peak load condition) when there is an overall shortage and will be paid for such injection of generation into grid at the UI rate as determined by SLDC.*
- (iii) Generating Stations with a total capacity above 15 MW shall be regulated as follows according to CERC stipulations to avoid gaming.:*

(a) Any generation up to 105% of the declared capacity in any time block of 15 minutes and aggregated averaging up to 101% of the average declared capacity over a day shall not be construed as gaming, and the generator shall be entitled to UI charges for

such excess generation above the declared capacity scheduled generation (SG).

(b) For any generation beyond the prescribed limits, the State Load Despatch Centre shall investigate so as to ensure that there is no gaming, and if gaming is found by the State Load Despatch Centre, the corresponding UI charges due to the generating station on account of such extra generation shall be reduced to zero and the amount shall be adjusted in UI account of beneficiaries in the ratio of their capacity share in the generating station.”

25. The reorganization of the erstwhile Gujarat Electricity Board (GEB) has resulted in creation of seven independent entities, namely one generating company, one transmission licensee and four distribution licensees and one holding/trading company. Moreover, two private distribution licensees and the State controlled as well as private generating companies are also functioning in the State of Gujarat .In addition, new generating companies are likely to come up in the near future. Under the State Captive Power Policy-1998 some of the owners of CPPs are also supplying power to their group companies using the state grid. Further, under the Wind Power Policy-1993 and 2002 of the Government of Gujarat some of the owners of wind farm are supplying

power to grid and some are wheeling power to their manufacturing units for their own use. Moreover, the Regulations notified by the Commission for Open Access and Power Purchase from Renewable Sources do also contribute to the increase in the number of players using the State Grid. The monopoly of the appellant has to be now the thing of the past.

26. A bare reading of the above provisions as we find in the Gujarat Open Access Regulations 2005 and the order dated 11.08.2006 as also the Tariff Regulations, 2005 reveal that the principle of intra-state ABT mechanism has been introduced and a generator or a licensee participating in the inter state dealing would be entitled to receive or pay UI and imbalance charges. The CERC order dated 4th January 2000 laid down the principle of ABT mechanism to be followed by the intra-state entities. The question involved is whether the intra-state entities are entitled to only 105% and 95% of the UI charges, and not to any adjustment since intra-state ABT with its commercial implications was, according to the appellant implemented only from 5th April 2010. Before we proceed to consider the merits and demerits of each other's case it is better to deal with the documents relied on by the parties and the proper interpretation thereof.

27. The appellant greatly relied on regulation 20 of the Central Electricity Regulatory Commission (Open Access in Inter-state Transmission) Regulations, 2008 which is reproduced below.

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

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

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

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

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

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

28. Learned Advocate for the appellant also relies on regulation 9 of the Central Electricity Regulatory Commission (unscheduled interchange charges and related matters) Regulations 2009 which is as follows:

“9. Unscheduled Interchange Charges Accounting. A statement of Unscheduled Interchange charges levied under these regulations shall be prepared by the Secretariat of the respective Regional Power Committee on weekly basis based on the data provided by the concerned RLDC and shall be issued to all constituents by Tuesday, for seven day period ending on the penultimate Sunday mid-night.

(I) All payments on account of Unscheduled Interchange charges including Additional Unscheduled Interchange charges levied under these regulations and interest, if any, received for late payment shall be credited to the funds called the “Regional Unscheduled Interchange Pool Account Fund”, which shall be maintained and operated by the concerned Regional Load Despatch Centres in each region in accordance with provisions of these regulations. Provided that the Commission may be order direct any other

entity to operate and maintain the respective “Regional Unscheduled Interchange Pool Account Funds Provided further that separate books of accounts shall be maintained for the principal component and interest component of Unscheduled Interchange charges and Additional Unscheduled Interchange charges by the Secretariat of the respective Regional Power Committees.

(II) All payments received in the “Regional Unscheduled Interchange Pool Account Fund” of each region shall be appropriated in the following sequence:

(a) First towards any cost or expense or other charges incurred on recovery of UI charges

(b) Next towards over dues or penal interest, if applicable

(c) Next towards normal interest

(d) Lastly, towards UI charge collected from a regional entity shall be retained in the “Regional Unscheduled Interchange Pool Account Fund” of the concerned region where the regional entity is located.”

29. On 7-5-2008 the CERC in Petition no.58 /2008(suo motu) passed a clarificatory order regarding control areas and demarcation of scheduling

responsibility between RLDCs and SLDCs. We quote the relevant paragraph of the order which is as follows:

“7. Coming to the matter of scheduling and despatch, the approach followed in India since introduction of Availability Tariff (ABT) in 2002-2003 can be summarized as follows:

(i) Each State power system has been treated as a notational control area;

(ii) To define precisely, a State power system is the system bounded or enclosed by the metering interfaces between the STU and CTU/ISGS/other STUs;

(iii) The SLDC monitor, supervise and control the State power system, and are totally responsible for scheduling and dispatch of all intra-State generation, as also the load management within their State;

(iv) The SLDC also decide an/or coordinate the schedule for drawal of States' entitlements in Central generating stations, i.e. the generating stations belonging to Central Government owned or controlled corporation (NTPC, NHPC, etc.). The RLDC basically coordinate the scheduling of Central generating stations which are contracted to supply power to more than one State, commonly referred to as ISGS(Inter-State generating stations);

(v) The ISGS are allowed to self-despatch, i.e. deviate from the given schedule, at their discretion under the UI mechanism and subject to certain provisions in the Indian Electricity Grid Code (IEGC);

(vi) Certain generating stations owned by Central Government Corporation are dedicated to one State only. They are scheduled by the concerned SLDC only, even though their tariff is determined by the CERC (as specified in the Act); and

(vii) CERC has further specified in IEGC that in case the State in which an ISGS is located has a predominant share in that ISGS, the concerned parties may mutually agree (for operational convenience) to assign the responsibility for scheduling of the ISGS to the State's LDC”.

30. Again, at paragraph 11 of the order the CERC laid down the guidelines to be adopted in future by the RLDC. In these words;

“As for the approach to be adopted in future, it would be logical and in line with the foregoing for RLDC to coordinate the scheduling of Ultra-Mega power projects, and of other large privately-owned power plants (of 1000 MW or larger size) in which States other than the host State have substantial permanent shares (50% or more). We need to emphasise on plant size (1000 MW and above) and share of other States (50% or more), to retain

the philosophy of decentralization as also for operational expediency. Such plants may already be planned to be connected directly into the CTU network, and metering of the plants' injection may have already been contemplated by the CTU. This would be another reason for RLDC to be coordinating their scheduling. Power plants not meeting the above criteria regarding plant size and share of other States should be scheduled by the SLDC of the State in which they are located."

31. In the order dated 11-8-2006 the State Commission observed that since intra-State ABT in being introduced in the State for the first time the Commission would like to operate it as the trial run (as a mock exercise) for a period of 3 months that is up-to 30-11-2006 and during this period all the commercial settlement would be based on the existing arrangement. It was further observed that the actual working of intra-state ABT mechanism may necessitate adjustments and the SLDC/STU would be responsible for the implementation of intra state ABT mechanism according to the said order. It was also directed that SLDC/STU should study and document the working of intra-state ABT for a period of 6 to 9 months and submit a detailed report to the Commission. The question involved in this appeal is whether Intra-State ABT mechanism continued till 4.4.2010 as contented by the appellant or ceased to have effect after a period of 3 months that expired on 30th November 2006. It is pertinent to

note that in the Gujarat Regulations 2005 the principle of intra-state ABT mechanism was introduced and the CERC by its order dated 4th January 2000 while introducing inter state ABT left to the state commissions for similar introduction or implementation of intra-state ABT mechanism. On 8-8-2008 the Western Regional Power Committee (WRPC) decided that the functioning of scheduling, monitoring and issuing UI statement and also accounting of the respondent's Sugem mega project would be done by the SLDC. On 4-10-2008 the respondent no.2, Torrent Power Ltd. wrote a letter to the appellant seeking clarification as to whether ABT would be applicable for supply of firm power from Sugem mega power project. The letter was answered by the appellant on 23-10-2008 in the terms that as regards application of limited ABT for Sugem for dispatch of firm power the same shall be applicable to SUGEN CCPP as well as to Surat Distribution licensee and Ahmedabad Distribution licensee. Accordingly, the respondent no.2 was advised to install ABT compliant meters at injection points and also at drawl points prior to commencement of injection of firm power. It was clarified that the entire 1147.5 MW SUGEN CCPP shall be scheduled by Gujarat State Load Dispatch Centre as per CERC order dated 07-05-2008 and decision taken in the WRPC meeting. Further, the SLDC shall be responsible for energy accounting, UI charges, gaming etc. for the entire 1147.5 MW SUGEN CCPP as per the CERC order dated 07-05-2008.

32. A meeting was held on 28-5-2009 at the behest of the respondent no.3, SLDC for finalization of scheduling and accounting treatment of Sugan mega power project, Ahmedabad distribution licensee and Surat distribution licensee. The minutes of the meeting was circulated by a letter dated 11-6-2009 and the methodology was adopted for scheduling and accounting arrangements which we have noticed earlier.

33. On 7th August 2009 the Central Commission notified the CERC(Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter- State Transmission and related matters) Regulation, 2009 which is commonly called Open Access Regulation. Learned Advocate for the appellant banks upon regulation 30 of the said Regulations which is reproduced below for proper appreciation of the case.

“30. Unscheduled Inter-change (UI) Charges

(1) Scheduling of all transactions pursuant to grant of long-term access and medium-term open access shall be carried out on day-head basis in accordance with the Grid Code.

(2) Based on net metering on the periphery of each regional entity, composite accounts for unscheduled Interchanges shall be issued for each regional entity on a weekly cycle:

Provided that Unscheduled Inter-changes accounting for intra-State entities shall not be carried out at the regional level.

(3) *The State utility designated for the purpose of collection or disbursement of the Unscheduled Interchanges charge from or to the intra State entities shall responsible for timely payment of the State's composite dues to the regional Unscheduled Interchanges Pool Account Fund.*

(4) *Any mismatch between the Scheduled and the actual drawl at drawl points and scheduled and the actual injection points for the intrastate entities shall be determined by the concerned State Despatch Centre and covered in the intra-State Unscheduled Interchanges accounting scheme.*

(5) *Unless specified otherwise by the State Commission concerned, the Unscheduled Interchange rate for intra-state entity shall be 105% (for over draws or under generation) of the Unscheduled Interchanges rate at the periphery of regional entity.”*

34. As earlier stated, in reply to the letter dated 4th October 2008 issued by the respondent no. 2 the appellant on 23rd October 2008 informed the respondent no. 2 that ABT mechanism would be applicable to Sugem CCPP as also to the distribution licensees of Ahmedabad and Surat. As further earlier observed, the meeting held on 28th May 2009 by the respondent no. 3 which is also the Gujarat Energy Transmission corporation Ltd. was very important in this that in the minutes of the meeting drawn on 11th June 2009 it was clearly observed inter alia that

Intra State ABT is required for the purpose of Unscheduled Interchange across Gujarat periphery which would be the net summation of deviation of Sugen and its associated beneficiaries and also other short term open access users and distribution licensees who would be purchasing power from the appellant. Accordingly, the scheduling and accounting scheme for Sugen and its associated beneficiaries was proposed. The minutes of the meeting which was drawn up in the presence of the appellant clearly stipulated that since intra- state ABT has effective mechanism to share UI charges the proposed mechanism of quasi pool account was being prepared in line with the inter state ABT. Thus, the resolution dated 11th June 2009 which was adopted following the meeting 8th May 2009 laid down the methodology for implementation of intra State mechanism in which connection the appellant's letter dated 14th July 2009 addressed to the respondent no. 2 is a sequel to the resolution dated 11th June 2009 and the said letter dated 14th July 2009 does not deal with anything that can strongly vouchsafe the case of the appellant. In the said letter it was observed that the imbalance energy injection by Sugen CCPP against firm scheduled would be accounted through UI accounting and settled through semi-pool account of the SLDC. Regulation 30 of the CERC Open Access Regulations 2009 deals with the manner of settlement of UI charges in cases where intra-state ABT is not implemented and provided

for UI rates of 105% for overdraws and under generation and 95% for under drawls and over generation.

35. On 24th July 2009 the appellant wrote a letter to the respondent no.2 informing that since the Torrent Power Ltd. was becoming self sustained to fully meet the demand of TPL's Ahmedabad and Gandhinagar area as well as the areas of Surat distribution the Stand - by demand of TPL-Ahmedabad and TPL-Surat with GUVNL was not required and thus stood withdrawn. On 25th. August 2009 the respondent no.3 wrote to the appellant as also to the respondent no 2 that since the contract demand with GUVNL was withdrawn it was being made clear that energy computation part stood modified for set-off infirm generation and purchase of balance infirm power between GUVNL and Torrent Power Ltd. was null and void. However, the statements of imbalance energy charges were issued by the respondent no 3 for the period from 13th. July 2009 to 13th December, 2009. As already observed, the revised methodology of scheduling an accounting treatment of Torrent Power-Sugen and associated beneficiaries issued by the respondent no3 made it clear that UI Charges applicable as per CERC norms at Gujarat periphery are to be balanced back to back with intra-state entities. The letter dated 11th August, 2009 addressed by the respondent no 3 to all the parties concerned deals with statement of imbalance energy charges within intra-

state for the period from 13th July 2009 to 19th July 2009 and in the said letter it was observed as follows:

“All participants of quasi pool account are requested to confirm account and settle through SLDC (GETCO) pool account within seven days. Infirm energy injection by TPL-Sugen is set off to its beneficiaries TPAECL, TPSECL and balance power is set off of GUVNL as per mutual agreement between agreement between TPL-Sugen and GUVNL. Unit 10 of TPL-Sugen is declared under commercial operation by TPL from 00.00 hrs of 19th July 2009. Infirm energy injection by M/s. APL is set off to GUVNL as per the agreement between GUVNL & APL as per letter of M/s. APL dated 29th May 2009. General Notes (attached herewith) covered various aspects, changes and modification in weekly account bill.”

36. While these correspondences would indicate that intra-state ABT mechanism was understood by the parties to have been implemented with back to back arrangement with all intra-state entities it was on 10th January 2010 that the SLDC on the application of the appellant reversed the methodology for excluding adjustment portion of inter state WR Transactions as a result of which the differential amount before and after adjustment figure of inter state transaction was added to the account of the appellant. This is here that the controversy arises as this revised letter

was issued by the SLDC at the request of the appellant but without hearing the other intra state entities including the respondent no 2 who participated and who was required to pay UI charges for creating imbalance in the system by under injection or overdrawal from the grid in quasi pool account of the intra state to match back to back payment of inter state imbalance energy charges.

37. On 23rd. January, 2010 the respondent no 2 wrote a letter to the SLDC stating that the procedure adopted for not apportioning the adjustment portion of the inter state transactions should be revisited with and the various Regulations based on which statements of Imbalance Charges were prepared upto now also support that *“If total payment receivable in the UI pool account is more or less than UI payable, then UI payable/receivable will be suitably adjusted to make the payable and receivable amounts equal”*. Accordingly a procedure was adopted for imbalance energy accounting with intra state for the interim period till implementation of the intra state ABT. The respondent no 3 with reference to the letter dated 23rd January 2010 issued to the respondent no 2 wrote back on 28th February, 2010 reiterating the revised methodology adopted only at the request of the appellant.

38. A letter dated 20th May 2010 addressed to the appellant by the Power Grid Corporation of India Ltd. is in this connection most relevant and the said letter is in connection with the letter dated 20th. April, 2010

issued by the appellant to the Western Regional Power Committee regarding weekly accounts for Unscheduled inter change energy charges. In this letter dated 20th. May, 2010 the Power Grid Cooperation India Ltd which is a Government of India enterprise concluded the following:

“It appears from your letter that a similar mismatch does arise when the UI Account is prepared at the intra state level. We find it difficult to agree with your contention that the UI amount mismatch is only on account to DISCOMs and not other intrastate entities. The UI of Gujarat system as a whole reflected at the Interstate level is on account of the collective action of all the intrastate players (and not only the DISCOMs) in Gujarat. Any further segregation of the UI worked out for Gujarat control area as a whole is neither possible nor meaningful. SLDC Gujarat might work out the methodology for preparation of UI account at the intra state level in consultation with all the intra-state entities and approval of the state regulator”.

39. Meanwhile, the State Commission in continuation to their order dated 11th August, 2006 passed an order on 1.4.2010 directing full implementation with all its commercial implications of the intra state ABT with in the state of Gujarat with effect from 5 April, 2010 This order is relied on by the appellant in order to buttress their point that intra state ABT mechanism was until 5th April, 2010 was in the state of mock

trial with no commercial implications. On the other hand, the respondent no 2 assails this order dated 1st April, 2010 on the ground that by this order retrospectively cannot be unjustly resorted and restored back to the detriment to the interest of the respondent no 2 as well as other intra-state entities and, furthermore, Intra State ABT mechanism came to be reinforced just after expiry of 3 months as stipulated in the order dated 11-8-2006 and the methodology was circulated in the letter dated 11th June 2009.

40. The respondent no 2 in the Appeal no.21 of 2011 being aggrieved with the SLDCs letter reversing the methodology adopted by the SLDC filed a petition before the State Commission praying for an order so that the respondent no 2 becomes entitled to receive apportionment of adjustment amounts for the period from 13th. July 2009 to 13th. December, 2009 and to issue a statement of imbalance energy charges with applicable apportionment of adjustment amounts for the period from 14th. December, 2008 to 4th April, 2010 the Commission upon hearing passed the impugned order dated 8th December, 2010 setting aside the decision of the SLDC that was made in favour of the appellant.

41. We repeat to say that the question involved is simply not as to from which date the intra state ABT mechanism within Gujarat periphery was implemented in line with the CERC's order dated 4.1.2000. The larger question is whether the methodology of accounting in respect of UI and

imbalance energy charges adopted by the SLDC that entitled the respondent no 2 to the proportional adjustment amount of imbalance energy charges was lawfully made especially in view of the unchallenged fact that with the advent of Torrent Power Sugan, Torrent Power Surat, Torrent Power Ahmedabad and other short term Open Access Customers participated in the inter state ABT pool account at WRLDC. The legal question involved is whether an intra state entity when it pays the imbalance charges with respect to inter state transaction 'before adjustment' can be denied the same treatment for 'after adjustment' of such UI charges. The procedure for energy accounting within intra state has behind it the fundamental fact that the single buyer system was changed into multi buyer system where different transaction between supplier and buyer other than the transaction with the entity like the appellant exist. The appellant carries out the activities of bulk purchase and bulk supply.

42. The State Commission in the impugned order after recording the submissions of both the parties assigned the following premises in support of the conclusion in favour of the respondent No 2.

- (a) The Commission introduced the intra-state ABT by the order dated 11.8.2006 strictly on the basis of the principles of inter-state ABT.

(b) The Respondent no 3 SLDC had been preparing the quasi-pool state energy account wherein the Respondent no 2 was one of the constituents.

(c) The respondent no 2, TPL Sugan Power Project is mega power project. The control area for the applicability of ABT including scheduling, metering arrangement and open access in the state system was decided in the meeting held by Principal Secretary, (Energy), Govt of Gujarat and Chairman, GUVNL. In the aforesaid meeting, it was decided that intra-state ABT is applicable to Sugan Mega power Projects, TPL-Surat and TPL-Ahmedabad. All these entities were considered as separate and distinct legal entities for the applicability of intra-state ABT. They should give schedule separately and their energy accounting, gaming, UI charges be decided in line with the decision taken in meeting of Commercial Committee of Western Region Power Committee held on 8th August, 2008.

(d) The respondent no 3 finalized and adopted the scheduling and accounting methodology by a circular letter dated 11.6.2009 .

(e) According to CERC norms, UI charges applicable at Gujarat periphery is to be balanced back to back with the intra-state entities as per the principle adopted by the SLDC in its letter dated 11.6.09.

(f) If the intra-state entities like the respondent no 2 and short term open access users are constituents of UI quasi-pool account then UI charges applicable as per CERC norms have to be balanced back to back with inter-state drawal.

(g) The SLDC issued statements of imbalance energy charges for all the intra-state entities showing energy charges payable and receivable by each one of them as per the methodology so finalized.

(h) Accordingly, the SLDC issued various bills for the period between 13th July, 2009 and 13th December, 2009 indicating thereby that the weekly imbalance charges consisted of before adjustment and after adjustment charges up to 13th December, 2009.

(i) Keeping an entity which is carrying out intra-state transaction out of the purview of inter-state transaction is against the spirit of the Electricity Act 2003 because the inter-state transaction done by the entities are based on inter-state open access taken by them. The impact of inter-state transaction is cumulative effect of all the constituent members of energy-pool account. Thus, it is unjust not to pass the benefit of back to back transaction to the entity concerned.

(j) Once the intra-state entities are paying the imbalance charges with respect to inter-state transaction for before adjustment they are also eligible to get the same treatment for after adjustment of UI charges.

(k) The respondent no 3 did not issue any notice to the respondent no 2 for change of methodology for calculation of applicability of imbalance energy charges which was agreed to by and between the parties.

(l) The procedure laid down for imbalance energy accounting within the intra-state by the SLDC would reveal that UI settlement for inter-state transaction will be shared by all intra-state entities and apportionment to be made between them.

(m) On the principle of equity whenever an entity pays UI charges for creating imbalance in the system, in quasi pool account of the intra-state to match back to back payment of inter-state imbalance energy charges which is consistent with ABT principle then they are eligible to get the imbalance energy charges from the intra-state quasi-pool account.

43. The documents furnished by the parties in support of each one's contentions unmistakably would point out that it is not the formal announcement of the date by a formal order that is of paramount importance as is contended by the appellant here. It is the conduct of the parties, the methodology adopted and the practice followed which are discernable from the documents, minutes of the meetings and correspondences exchanged between the parties that will be relevant for consideration of the question as to whether the parties had intended to effect intra-state ABT mechanism after the mock trial period was over. It is again unmistakably clear that after the mock trial period was over

during which the then existing procedure was followed the parties adopted by mutual discussion a methodology to put into practice the intra-state ABT mechanism. An important question has been raised by the Commission ,namely if an intra-state entity pays UI charges for creating imbalance in the system by under injection or over drawal from the grid than such an entity is entitled to the imbalance energy charges from the intra state quasi- pool account. The question raised is also a question of law apart from the fact that the equity demands that an intra-state entity which is carrying out inter-state transaction can not be denied the domain of inter-state transaction because of the fact that the inter-state transaction done by the entities are based on inter-state open access taken by them. Having analysed the reasons assigned by the Commission we hardly find any point to say that the reasons are infirm, invalid and not in consonance with the law. Rather, they have explained the law and in view of the State Regulations and diverse orders we find that with the expiry of the trial run period the ABT mechanism was put in to practice well to the knowledge and active participation of all the intra –state entities.

44. The starting point for any discussion on interpretation of contracts/documents is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would be equally available to the warring

parties at the time they entered into the commercial transaction. The contents of a document may be at variance with one another, or a series of documents which the parties are aware of may be inconsistent, but if the conduct of the parties are such as they clearly or impliedly tell their intention then such intention has to be reckoned with.

45. It is the Central Electricity Regulatory Commission which was the pioneer in the field of introduction of Availability Based Tariff (ABT) mechanism and it passed an order on 4.1.2000 giving out the background of the concept of the existing system then prevalent for tariff and the introduction of the ABT. As earlier noticed, in ABT there are three parts, namely, a) capacity charge, b) energy charge and c) payment for deviation from schedule at the conditions which were existing at the time when deviation occurred. The questions broadly are as to what the orders of the Commission would reasonably convey, how the parties reacted to the situation, and whether it could be said that the system was or was not deliberately put into place much prior to 5.4.2010. On objective consideration we find that the system was implemented much prior to 5.4.2010.

46. As has already been stated, the Ministry of Power, Government of India in its National Electricity Policy advised the State Commissions to introduce the ABT mechanism at the state level within one year and it is important to note that this directive in the NEP was issued on

12.02.2005. The State Commission came out with somewhat a detailed order on 11.08.2006 after the State Tariff Regulations, 2005 and the Open Access Regulations, 2005. What is emphasized upon is that the order dated 11.8.2006 is not the beginning of the movement because the order dated 11.8.2006 admits that State Open Access Regulations, 2005 provide for implementation of the intra-state ABT system for operationalizing open access. This 23-page order says:

“Hence, Inter State ABT principles have to be replicated at the intra-state level. In view of the above, the Commission hereby resolves to implement the scheme of Intra State Availability Based Tariff (Intra –State ABT)”

47. The interpretation of a document being an objective exercise, the meaning of the words will ordinarily be such as are understood in common parlance, and when the words used in an order are clear, the effect has to be given to them, and it could not be anybody's case that the order dated 11.8.2006 has no discernible commercial purpose. Further, whatever the parties might say at a distant point of time the intention of the parties reflected through their actions following a certain order of an authority is decisive, and such intention cannot be, in the absence of the actions being contrary to the law or a lawful order of an authority, defeated by an order at a much later day saying that the meaning was not such as the parties intended them to be so. It has been rightly argued by

the learned counsel for the respondent nos.2 in both the appeals that the word 'resolved' connotes 'decided' in terms of The New Shorter Oxford English Dictionary(1993 edition) .

48. At the cost of repetition we again read the following lines only to say that the meaning is clear and admits of no other legal interpretation.

“ Since Intra State ABT is being introduced in the State for the first time, the Commission would like to operate it as trial run (as a mock exercise)for a period of three months i.e. up to 30th November,2006. During this period all the Commercial settlement will be based on the existing arrangement.”

49. Short of two months the period between 11.8.2006 and 1.4.2010 is a period of four years and during the period of four years there has not been any order extending the trial run period of three months, say for another three months, and the State Load Dispatch Centre as also the generators contributing to the ABT at the inter State level quite well understood that the Intra State ABT had been put in place. The NEP as far back as the year 2005 directed the State Commissions to implement the ABT system at the intra state level, and the State Commission passed Open Access Regulations in the same year and following the Regulations the order dated 11.08.2006 was lawfully passed.

50. On 25.1.2008 the CERC notified the CERC Open Access Regulations,2008 and the learned counsel for the appellant attacked the impugned orders of the State Commission as being contrary to regulation 20 of the said Regulations 2008. These Regulations are also relied upon by the respondents in support of their case. Sub-regulations (2) and (5) as interpreted by the learned counsel for the appellant do not at all appear to be inconsistent with the impugned orders, rather the Regulations read as whole emphasized upon the necessity of carrying out the ABT system at the intra-state level.

51. Again, regulation30 of the Central Open Access Regulations,2009 notified on 7.8.2009 does not militate against the implementation of the intra-state ABT system prior to 5.4.2010 and equitable sharing of adjustment of imbalance energy charges of intra-state entities.

52. Both the parties relied upon the order dated 7.5.2008 passed by the Central Commission. The said order passed by the Central Commission in Petition No.58 of 2008 (Suo-motu) gives clarity regarding control areas and demarcation of scheduling responsibility between RLDCs and SLDCs.

53. In the meeting held with the Government of Gujarat, the appellant and the respondents it was decided that intra-state ABT was applicable to 1147.5 MW Sugan Mega Power Project as well as to Surat Distribution Licensee and Ahmedabad Distribution Licensee. It has been rightly

argued that if the appellant's contention to the effect that during the mock trial it would deal with inter-state ABT pool account at WRLDC for all other entities attached to intra-state ABT of the state it would entail that even the entity carrying out the inter - state transaction shall be kept out of the purview of inter-state transaction in view of the fact that inter-state-transactions are based on the inter-state open access taken by them. If the effect of inter - state transactions is the cumulative one of all the constituent members of energy pool account , then definitely it would be inequitable not to extend benefit of back to back transaction to the entity participating in the inter-state level.

54. It is quite logical to argue that once the entities are paying the imbalance charges with respect to inter- state transactions prior to adjustment the post-adjustment benefit can hardly be legally denied to them on the principle of equality.

55. In consonance with the Central Commission's order dated 7.5.2008 it was in the meeting convened by the Commercial Committee of Western Regional Power Committee that scheduling, monitoring issuing of UI accounts of Torrent Power- Sugem will be the responsibility of the third respondent. It is not denied that on 4.10.2008 the Torrent Power-Sugem issued a communication to the appellant seeking clarification regarding control area, applicability of ABT, scheduling , metering arrangement and open access in the state system for supply of firm

power and a meeting was also held on 14.10.2008 attended by all concerned and it was unanimously agreed that ABT shall be applicable to the Torrent Power Sugan , Torrent Power Ahmedabad and Torrent Power Surat.

56. Reference can be made to the Central Commission (Unscheduled Interchange charges and related matters) Regulations, 2009 as pointed out by the respondents and which we reiterate and it clearly provides for the modalities in details concerning unscheduled interchange charges accounting and following the modalities a meeting was held by the Gujarat Holding Company on 28.5.2009 wherein it was decided as follows:-

- (i) *“ Scheduling and Accounting methodology for Torrent Sugan and its beneficiaries will be accounted through UI energy accounting mechanism of ABT. Imbalance energy accounting for the same would be prepared through UI charges and settled through semi-pool account system of the Respondent No.3.*
- (ii) *Unscheduled interchange across periphery is net summation of deviation of Torrent Power- Sugan and its associated beneficiaries (Torrent Power- Ahmedabad, Torrent Power-Surat), other STOA user and other generator/distribution licensee purchasing power through Gujarat Holding Company. Intra State ABT is required for the purpose.*

(iii) UI charges applicable as per CERC norms at Gujarat periphery are to be balanced back-to-back with intra-State entities. Thereby, UI charges accumulated across Gujarat periphery shall have to be shared among the intra state entities affecting inter state drawal.(emphasis ours)

57. The very thesis of the appellant that the Central Open Access Regulation 2008 and the Central Open Access Regulations 2009 will have to be acted upon because intra- state ABT system was not implemented is difficult to concede to in view of the Gujarat Regulations, 2005, the order dated 11.08.2006 passed in conformity with such Regulations, the meetings convened by the parties, their correspondences, the accounting methodology adopted by the respondent no 3, the legal existence of the intra state entities, their lawful participation in the inter- state level, their payment of deviation charges prior to adjustment , absence of extension of three months mock run during a period of four years, absence of communication/order upon the parties that the mechanism was yet to be introduced even after 30th November, 2006, the National Electricity policy, equitable principles and all other attenuating circumstances all considered together do not inspire confidence that impugned orders warrant interference.

58. The CERC norms provide that UI charges applicable at Gujarat periphery are to be balanced back to back with the intra-state entities in the bills for the period between 13.7.2009 and 13.12.2009 by the third respondent.

59. The SLDC' letter dated 11.6.2009 consists of the following:-

“Unscheduled interchange across Gujarat periphery is net summation of deviation of Sugan Mega Power Project and Surat and Ahmedabad distribution areas, other STOA users and other generators and distribution licensees power purchasing power through GUVNL.

UI charges applicable as per CERC norms at Gujarat periphery are to be balanced back-to-back with intra-state entities. There UI charges accumulated across Gujarat Periphery have to be shared among intra state entities affecting inter-state drawal.”

60. In the conspectus of the case the question is seriously not whether there was any formal announcement of introduction of intra-state ABT mechanism when in fact the mechanism had been put in place. The appellant in Appeal no 21 of 2011 is a member of intra –state entity; and it is eligible legally to participate in the inter-state transactions. The argument of the appellant that the commercial settlement of UI at the Inter-state level was only with the appellant is difficult to accept.

61. On 10.2.2010 the Gujarat SLDC held inter alia in paragraph 4.0 in the procedure for imbalance energy accounting within intra state as follows:-

“Transaction with western Region would be a common transaction and same shall be balanced back to back with Intra State Entities as per calculation received from WRPC on weekly basis.”

62. The most important fact is that with the entry of the private players in the power sector the appellant’s plea that UI mismatch is only on account of the bulk distribution entity like the appellant alone to the exclusion of other recognised legal intra state entities is legally erroneous. The UI of Gujarat system as a whole at the inter state level is the logical outcome of collective joint participation of all the intra state players in Gujarat.

63. The reasoning applicable to the appellant in the Appeal no 21 of 2011 is equally applicable to the Appeal no. 22 of 2011 and sans certain dates and figures the facts are broadly the same. Hence, no separate treatment is called for.

64. Thus, in addition to what we have said earlier we summarise our reasoning as follows:-

- a) The intra- state ABT mechanism was put into practice with the expiry of the three months’ trial run period.

- b) The trial run period was not extended after the expiry of the period.
- c) The order dated 1.4.2010 was passed long after the intra –state ABT mechanism was implemented.
- d) The Central Regulations,2008 and the Central Regulations,2009 did not stand in the way of implementing the intra- state ABT principle in the State of Gujarat.
- e) The intra- state entities and the SLDC acted upon the implementation of the order of the State Commission dated 11.8.2006.
- f) The SLDC prepared the quasi- pool state energy account treating the respondents as constituents of the pool account.
- g) The SLDC finalized and adopted the scheduling and accounting methodology by a circular dated 11.6.2009 which we have discussed earlier.
- h) The view of the Commission that once the intra- state entities are paying the imbalance charges with respect to inter-state transaction for before adjustment they are eligible to the same treatment for after adjustment of UI charges is unassailable, being conforming to law.

- i) GERC Open Access Regulations, 2005 provide that commercial settlement of UI charges under Intra- State ABT shall be done according to the Inter- State ABT principle being followed for Inter- State transactions.
- j) The order of the CERC dated 7.5.2008 was to the effect that the power plants in which host states have more than 50% share scheduled by the SLDC.
- k) The outcome of the meeting held on 28.5.2009 was that the accounting procedure with respect to the respondent no 2 in the appeal no.21 of 2011 would be finalized as per the ABT mechanism.
- l) The letter of the Gujarat Holding Company dated 14.7.2009 is very clear and decisive in favour of implementation of the ABT mechanism.
- m) With the advent of multi-buyer model clause 16 of the Procedure for Imbalance Energy Accounting with Intra State for the interim period makes it clear that the UI charges received from WRLDC are on account of deviation to be distributed to all intra- state entities including Gujarat Holding Company and such UI charges are to be termed as UI charges after adjustment.

- n) The Annual Report of the State Commission for the year 2008-09 dated 21. 7.2009 is a clear pointer to the fact that the ABT mechanism had been really put into practice, and decision to issue a separate order to the effect subsequently leads one to nowhere because the question of issuance of further necessary order cannot alter the position of law.
- o) Similarly, the Annual Report for the year 2009-10 dated 31.3.2010 is of no effect and it failed to take note of the fact that the trial period in terms of its own exhaustive order dated 11.8.2006 had expired about four years back, and this report as also the order dated 1.4.2010 came into existence after the dispute had erupted, and the Commission slept an unexplained slumber as to why it thought as late as 31.3.2010 or 1.4.2010 that a formal order declaring a date for commercial implementation of the intra- state ABT mechanism would be in order when it knew very well that implementation with full commercial implication had already taken place and the respondent no 3 in either of the appeals had initially performed its statutory functions although at the instance of the appellant it without letting any interested party know subsequently and unilaterally altered the situation, which happily the Commission itself corrected by the impugned orders.

65. In ultimate analysis we are of the opinion that the analyses rendered by the Commission are cogent, convincing and upon correct appreciation of the facts and the legal position obtaining in the given situation. Therefore, we dismiss both the appeals but without costs.

(Justice P.S.Datta)

(Rakesh Nath)

Judicial Member

Technical Member

Reportable/Un-reportable

KS