

COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 26 OF 2013, APPEAL NO. 49 OF 2013,
APPEAL NO. 144 OF 2014 & IA NO.244 of 2014,
&
APPEAL NO. 166 OF 2015 & IA NO.269 of 2015

Dated: 16th April, 2019

Present: Hon'ble Mr. Justice N. K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Technical Member

APPEAL NO. 26 OF 2013

In the matter of:

State Load Despatch Centre, Karnataka
Karnataka Power Transmission Corporation Limited
Transmission Billing Centre,
Race Course, Cross Road,
Bangalore – 560001.

.....Appellant

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
Janpath, New Delhi - 110001
2. Sadashiva Sugars Limited,
Venus Building, 1/2, III Floor,
Main Road, Kalyanamantapa Road,
Jakkasandra,
Bangalore – 560034.
3. Karnataka Electricity Regulatory Commission
6th and 7th Floors, Mahalakshmi Chambers,
9/2, M.G. Road, Bangalore – 560001.Respondent(s)

APPEAL NO. 49 OF 2013

In the matter of:

State Load Despatch Centre, Karnataka
Karnataka Power Transmission Corporation Limited
Transmission Billing Centre,
Race Course, Cross Road,
Bangalore – 560001.

.....Appellant

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
Janpath, New Delhi - 110001
2. M/s Falcon Tyres Limited
KRS Road, Metagali,
Mysore – 570016.
3. Karnataka Electricity Regulatory Commission
6th and 7th Floors, Mahalakshmi Chambers,
9/2, M.G. Road, Bangalore – 560001.Respondent(s)

APPEAL NO. 144 OF 2014 & IA NO.244 of 2014

In the matter of:

State Load Despatch Centre, Karnataka
Karnataka Power Transmission Corporation Limited
Transmission Billing Centre,
Race Course, Cross Road,
Bangalore – 560001.

.....Appellant

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
Janpath, New Delhi - 110001

2. Dhruvesh Metasteel Private Limited
Hirebaganal Village, Ginigera Post-583228,
Koppal District.
3. Karnataka Electricity Regulatory Commission
6th and 7th Floors, Mahalakshmi Chambers,
9/2, M.G. Road, Bangalore – 560001.Respondent(s)

APPEAL NO. 166 OF 2015 & IA NO.269 of 2015

State Load Despatch Centre, Karnataka
Karnataka Power Transmission Corporation Limited
Transmission Billing Centre,
Race Course, Cross Road,
Bangalore – 560001.

.....Appellant

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
Janpath, New Delhi - 110001
2. Shamanur Sugars Limited
No.374, 4th Main. PJ Extension,
Davanagree-577002
Karnataka
3. Karnataka Electricity Regulatory Commission
6th and 7th Floors, Mahalakshmi Chambers,
9/2, M.G. Road, Bangalore – 560001.Respondent(s)

Counsel for the Appellant : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Ritu Apurva
Mr. Utkarsh Singh

Counsel for the Respondent(s) : Mr. Samarth Mishra for R-1
Mr. Basava Prabhu Patil, Sr.Adv.
Mr. Shridhar Prabhu

Mr. Anantha Narayana M.G. for R-2

Mr. Manu Seshadri

Mr. Samarth Chowdhary for R-3

J U D G M E N T

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

1. The Appellant, State Load Despatch Centre(SLDC) herein prayed the following reliefs in Appeal Nos.26 of 2013, 49 of 2013, 144 of 2014 and 166 of 2015:-
 - (a) Allow the appeal and set aside the orders dated 19.11.2012, 24.12.2012, 20.01.2014 and 29.04.2015 passed by the Central Commission to the extent challenged in the present appeal.
 - (b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.
- 1.1 The Appellant, State Load Despatch Centre (SLDC) has filed the Appeal No.26 of 2013 under Section 111 of the Electricity Act, 2003 questioning the legality, validity and propriety of impugned Order dated 19.11.2012 passed by the Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') in Petition No. 1/MP/2012 whereby the Central Commission has held that the Respondent No. 2, Generating Company (Sadashiva Sugars Limited) is not liable to pay the supply charges determined by the Karnataka Electricity Regulatory Commission for consumption of electricity and is only to be levied Unscheduled Interchange charges for the consumption of electricity.
- 1.2 The Appellant, State Load Despatch Centre (SLDC) has filed the Appeal No.49 of 2013 under Section 111 of the Electricity Act, 2003 questioning the legality, validity and propriety of impugned Order dated

24.12.2012 passed by the Central Electricity Regulatory Commission in Petition No. 124/MP/2012 whereby the Central Commission has held that the Respondent No. 2, Generating Company (M/s Falcon Tyres Limited) is not liable to pay the supply charges determined by the Karnataka Electricity Regulatory Commission for consumption of electricity and is only to be levied Unscheduled Interchange charges for the consumption of electricity.

1.3 The Appellant, State Load Despatch Centre (SLDC) has filed the Appeal No.144 of 2014 under Section 111 of the Electricity Act, 2003 questioning the legality, validity and propriety of impugned Order dated 20.01.2014 passed by the Central Electricity Regulatory Commission in Petition No. 82/MP/2013 whereby the Central Commission has held that the Respondent No. 2, Generating Company (Dhruvesh Metasteel Private Limited) is not liable to pay the supply charges determined by the Karnataka Electricity Regulatory Commission for consumption of electricity and is only to be levied Unscheduled Interchange charges for the consumption of electricity.

1.4 The Appellant, State Load Despatch Centre (SLDC) has filed the Appeal No. 166 of 2015 under Section 111 of the Electricity Act, 2003 questioning the legality, validity and propriety of impugned Order dated 29.04.2015 passed by the Central Electricity Regulatory Commission in Petition No. 10/MP/2014 whereby the Central Commission has held that the Respondent No. 2, Generating Company (Shamanur Sugars Limited) is not liable to pay the supply charges determined by the Karnataka Electricity Regulatory Commission for consumption of electricity and is only to be levied Unscheduled Interchange charges for the consumption of electricity.

1.5 The Appellant is aggrieved by the aforesaid Impugned Orders and has preferred the present appeals.

2. Brief Facts of the Case(s):-

2.1 The Appellant is the State Load Despatch Centre for the State of Karnataka and is presently a part of the Karnataka Power Transmission Corporation Limited, the transmission licensee and the State Transmission Utility for the State of Karnataka. The Appellant has its office at Karnataka Power Transmission Corporation Limited, Transmission Billing Centre, Race Course, Cross Road, Bangalore - 560001.

2.2 The Respondent No. 1, Central Commission is the Central Regulatory Commission exercising powers and discharging functions under applicable provisions of the Electricity Act, 2003.

2.3 In Appeal No. 26 of 2013, the Respondent No. 2, Sadasshiva Sugars Ltd. is a company incorporated under the provisions of the Companies Act, 1956. It is a generating company having established a generating station of capacity of 15.5 MW at Bagalkot district in the State of Karnataka.

2.4 In Appeal No. 49 of 2013, the Respondent No. 2, M/s Falcon Tyres Ltd. is a company incorporated under the provisions of the Companies Act, 1956. It is a generating company having established a generating station of capacity of 6 MW at Mysore district in the State of Karnataka.

2.5 In Appeal No. 144 of 2014, the Respondent No. 2, Dhruvesh Metasteel Private Limited is a company incorporated under the provisions of the

Companies Act, 1956. It is a generating company having established a generating station of capacity of 10MW at Koppal district in the State of Karnataka

2.6 In Appeal No. 166 of 2015, the Respondent No. 2, Shamanur Sugars Limited is a company incorporated under the provisions of the Companies Act, 1956. It is a generating company under Section 2(28) of the Electricity Act which owns and operates a 20 MW bagasse based co-generation power plant in the State of Karnataka.

2.7 The Respondent No.3, Karnataka Electricity Regulatory Commission (Respondent Commission/ State Commission) is the Electricity Regulatory Commission for the State of Karnataka exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

3. Questions of Law:-

The following questions of law have been raised in the present appeals for our consideration:-

3.1 Whether the Respondent No. 2 consuming electricity falls within the definition of a consumer as per the Electricity Act, 2003?

3.2 Whether the Central Commission has jurisdiction to deal with the aspect of consumption of electricity by a consumer?

3.3 Whether the Central Commission was justified in dealing with the charges for consumption of electricity by the Respondent No. 2?

3.4 Whether the consumption of electricity by the Respondent No. 2 as a consumer could be equated with deviation from generation schedule for application of UI charges?

3.5 Whether the Central Commission could hold that the Regulations of the Karnataka Commission is not applicable, when the same is applied pursuant to the directions of the Karnataka Commission and uniformly to all generators in the State?

3.6 Whether the tariff categorization for consumption of electricity decided by the Karnataka Commission could be gone into by the Central Commission?

4. **The issues involved in all these appeals are common in nature, therefore, we decide to adjudicate the batch of appeals by this common judgment.**

5. **Learned counsel, Mr. Anand K. Ganesan, appearing for the Appellant has filed his written submissions for our consideration as follows :-**

5.1 The present batch of appeals arise out of various Orders passed by the Central Electricity Regulatory Commission (**‘Central Commission’**) allowing the petitions filed by private generating companies in the State of Karnataka who are connected to the State Grid but are selling their electricity outside the State.

5.2 The details of the appeals, impugned orders and Respondents / Generating Companies are as under –

Appeal No.	Impugned Order	Respondent No. 2 / Generating Company	Relation with Gem Sugars Order of CERC
26 of 2013	19.11.2012 in Petition No. 01/MP/2012	Sadashiva Sugars Ltd	Prior to Janki Corp Ltd
49 of 2013	24.12.2012 in Petition No.	Falcon Tyres Ltd	Prior to Janki Corp Ltd

	124/MP/2012		
144 of 2014	20.01.2014 in Petition No. 82/MP/2013	Dhruvesh Metasteel Pvt Ltd	Prior to Janki Corp Ltd
166 of 2015	29.04.2015 in Petition No. 10/MP/2014	Shamanur Sugars Ltd	Later than Janki Corp Ltd

- 5.3** Primarily two issues were raised in the batch of petitions filed before the Central Commission, one pertaining to applicability of Unscheduled Interchange Charges (**'UI Charges'**) and the second pertaining to Back Up Supply Charges (**'BS Charges'**). The Appellant is not raising the first issue of UI Charges in the present batch of appeals and the challenge is restricted to the setting aside of BS Charges by the Central Commission.
- 5.4** While in the first three appeals, namely Appeals No. 26 of 2013, 49 of 2013 and 144 of 2014, the grounds of challenge were on the basis of the jurisdiction of the Central Commission to interpret and deal with the Regulations framed by the Karnataka Electricity Regulatory Commission (**'Karnataka Commission'**) on the aspect of BS Charges, in Appeal No. 166 of 2015, in addition to the same, the grounds pertain to the sheer inconsistencies of the Orders being passed by the Central Commission on the aspect of levy of BS Charges.
- 5.5** The above grounds are in respect of the Central Commission passing another Order dated 03.07.2014 in Petition No. 293/MP/2013 in the matter of Janki Corp Ltd. wherein on the same issue of BS Charges, the Central Commission has held as under –

“12. The petitioner’s next grievance relates to billing of the Backup Supply Charges and fixed charges. The petitioner has contended that no such charges are payable under the Open Access Regulations. We are of the view that in case the petitioner is drawing power from the State Grid for any

propose it cannot repudiate its liability to pay the charges for the power consumed. However, the charges have to be billed and collected in accordance with the regulations or orders of the State Commission. If there are no regulations or orders of the State Commission requiring back-up supply charges and fixed charges, the petitioner cannot be saddled with such charges. In terms of Regulations 20 (6) of CERC Open Access Regulations, no charges other than those prescribed under Regulations 20 (5) is payable by an intra-State entity availing inter-State open access, in absence of any rate specified by the State Commission.

13.

14.

15. *In view of the above discussion, the prayers of the petitioner are allowed as under:*

(a) While availing the inter-State open access, the petitioner is not liable to pay any charges except those specified under the CERC Open Access Regulations.

(b) The petitioner shall be billed for the UI Charges in accordance with clause (5) of Regulation 20 of CERC Open Access Regulations specified by the Commissions.

(c) The petitioner shall be entitled for interest @9% per annum on the UI charges, if any withheld, by the respondent.

(d) The backup supply charges and fixed charges shall be governed by the Regulations of KERC only.

16. *The petition is disposed of in terms of above.”*

5.6 The Central Commission has taken inconsistent stands in different matters and for this reason alone, the Orders cannot be sustained. Further, it was contended by the Respondents that there is an error in

Para 15 (d) of the Janki Corp. Order and all other Orders have held that no BS Charges can be levied by the Appellant. This submission is misconceived.

- 5.7** There is a clear application of mind on the part of the Central Commission to this issue in the case of *Janki Corpn.* and a finding rendered in Para 12 of the said Order (quoted hereinabove). Further, the finding in Para 12 has been rendered after noting the contention of the *Janki Corp* in Para 2 that the issue of BS Charges is covered by earlier Orders of the Central Commission. Therefore, this is not an erroneous finding as being submitted.
- 5.8** The BS Charges are nothing but charges for consumption of electricity by the Generating Companies connected to the State Grid as and when they deviate from the schedule and draw electricity from the grid. The consumption is from the state grid, and is accounted to the distribution licensees. This is nothing but supply of power / distribution of power to the consumer (the generating company being the consumer of power) in the State grid and cannot obviously be regulated by the Central Commission. The consumption is not from the network of Powergrid for the Central Commission's jurisdiction to be invoked. Therefore, the BS Charges are to be levied as per the Regulations and Orders of the Karnataka Commission.
- 5.9** The question to be decided is whether the consumption of electricity by the generating companies located within the State of Karnataka and connected to the transmission/distribution system of the state are liable to pay the back-up supply charges in terms of the Regulations of the

Karnataka Commission when the generating companies consumes electricity during outages or deviations from its schedule.

5.10 In exercise of its powers under Section 182 and other provisions of the Electricity Act, 2003, the Karnataka Commission has framed the Karnataka Electricity Regulatory Commission (Open Access Regulations), 2004 (hereinafter called the **Karnataka Open Access Regulations**).

5.11 The Karnataka Open Access Regulations framed by the Karnataka Commission deals with customers seeking open access for intra-state transmission and also for transactions for inter-state transmission wherein the intra-state network is used as incidental to inter-state transactions. In this regard, Regulations 1 (iii) of the Karnataka Open Access Regulations, inter-alia, provide as under:

"(iii) These Regulations shall apply to the open access customers for use of intra-state transmission system/s and/or distribution system/s of licensee/s in the State, including such system/s, which are incidental to inter-state transmission of electricity."

5.12 The generating companies such as the Respondents provides its schedule for generation of electricity on a day ahead basis in terms of the provisions of the Grid Code. Once the generation schedule is provided and finalised, the generator is required to adhere with the schedule. However, if this schedule is not adhered to, these generators draw electricity from the state grid.

5.13 The Backup Charges levied by the Appellant are only for such consumption. The Generating Companies / Respondents requires electricity for its own use, for example for start-up purposes when the

generator is under outage, synchronisation purposes etc. In such cases, the generator is a consumer of electricity and draws electricity from the grid and the same is accounted for as a supply by the distribution licensee. The licensee in such events levy backup supply charges on the generator. For such consumption of electricity by the generator, the retail supply tariff decided by the State Regulatory Commission is to become applicable and has been made applicable by the various State Commissions in the country.

5.14 The backup supply charges for the generator drawing electricity are levied in terms of the Karnataka Open Access Regulations. The Karnataka Commission, had, vide amendment dated 31.05.2006, amended the provisions of the Karnataka Open Access Regulations and provided that in case of outages of the generator, the drawal of power needs to be charged as per the temporary tariff of the relevant consumer tariff category for such drawal of electricity. In this regard, Regulation 11 (viii) of the Karnataka Open Access Regulations, inter-alia, provides as under –

"Charges for arranging backup supply from the grid shall be payable by the open access customer in the event of failure of contracted supply. In case of outages of generators supply to a consumer on open access, standby arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category as specified by the Commission."

5.15 The above charges are to be collected by the Appellant and then disbursed to the distribution licensees in accordance with the Regulations of the Karnataka Commission. In this regard, Regulation 18 of the Karnataka Open Access Regulations, inter-alia, provide as under –

"Collection and Disbursement of charges

The charges may be collected either by the distribution licensee, the transmission licensee or the STU, depending on whose facilities are used for availing open access. In all cases the amounts collected from a particular consumer should be given to the distribution licensee in whose area the consumer is located. In case of two licensees supplying in the same area the licensee from whom the consumer was availing supply shall be paid the amounts collected.

Provided further that transmission charges shall be payable to the concerned transmission licensee."

5.16 In terms of the above, all the generators and other open access customers who do not have any contracted supply with the distribution licensee but draw electricity for their use are charged temporary tariff of the relevant tariff category as determined by the Karnataka Commission. Since the consumption of electricity is within the exclusive jurisdiction of the Karnataka Commission, the tariff category and the tariff orders as made applicable by the Karnataka Commission is to be implemented by the Appellant and the distribution licensees.

5.17 Factually, in all the cases, the Generating Companies / Respondents applied for and obtained open access to supply power from its generating station in Karnataka. Even though the schedule of generation was given, the Generating Companies / Respondents failed to generate the contracted amount of power supply to the open access customer and further were drawing power from the grid for start-up and other activities.

5.18 Accordingly, Generating Companies / Respondents have been uniformly levied the tariff for the drawal of electricity from the grid as per the temporary tariff applicable. All such levies by the Appellant is remitted to the distribution licensee in accordance with the Regulations and directions of the Karnataka Commission. Such supply is treated as supply by the distribution licensee and the amounts so paid for the consumption by the generators is treated as a part of the revenue of the generators in the tariff determination exercise of the Karnataka Commission.

5.19 The Central Commission has no power either under the Electricity Act, 2003 or any other law to interpret or set aside the levies / charges decided by any State Commission including the Karnataka Commission. It is not that the Central Commission is on a higher pedestal as compared to the Karnataka Commission. The jurisdictions exercised by the Central Commission and Karnataka Commission are distinct. No one Commission can usurp or otherwise interpret the Statutory Regulations framed by another Commission. Otherwise, there will be complete confusion and inconsistencies in the application of the Electricity Act, 2003.

5.20 The finding in the Impugned Order on the BS Charges is as under –

“11. Now we consider the petitioner’s grievance relating to billing of the BPS Charges and Fixed Charges. The petitioner has submitted that no such charges are payable under the Open Access Regulations. The respondent has submitted that the BPS Charges are payable by the petitioner in terms of clause (viii) of Regulation 11 of the Karnataka Open Access Regulations which is extracted hereunder provides for levy of the open access charges:

“11. Open Access Charges

The charges for the use of the transmission/distribution system by an open access customer shall be regulated as under:

(i) to (viii)*****

(viii) Charges for arranging backup supply from the grid shall be payable by the open access customer in the event of failure of contracted supply. In case of outages generators supplying to a customer on open access, stand by arrangements should be provided by the licensee on payment tariff for temporary connection to that consumer category as specified by the Commission.

(ix) *****”

Clause (viii) of the Karnataka Open Access Regulations provides that the charges for arranging back up supply from the grid are payable by the open access customer in the event of failure of contracted supply. “Open Access Customer” has been defined in the Karnataka Open Access Regulations as a “consumer permitted by the Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply and the expression includes a generating company and licensee who have availed of or intends to avail of open access”. It appears that the provision of Regulation 11 (viii) covers the cases where a person, whether a consumer for its demand or a generating company for its start-up power as an open access customer is being supplied power under a contract but is unable to get the contracted supply due to outage of generators supplying to open access customer. In such an event, the arrangement is to be made for backup supply from the Grid to meet the demand and under these circumstances, the person concerned becomes liable to pay the charges for making arrangement for backup supply. The charges payable under clause (viii) do not apply to a generating company exporting power by availing the inter-State open access. Therefore, the levy of the BPS Charges on the petitioner in terms of clause (viii) of Regulation 16 of the Open Access Regulations cannot be justified.

12. *The case of the petitioner is similar to the cases of the co-generation plants, namely, Sadashiva Sugars Ltd, Falcon Tyres Ltd, and BMM Ispat Limited. Therefore, the petitioner is covered by the orders of the*

Commission dated 19.11.2012 in Petition No. 1/MP/2012 and 124/MP/2014 filed by Sadashiva Sugars Ltd and Falcon Tyres Ltd. respectively and dated 1.5.2013 in Petition No. 165/MP/2012 filed by BMM Ispat Limited.”

- 5.21** The Central Commission erred in conferring upon itself the power to interpret the Karnataka Open Access Regulations and declaring that the said Regulations are not applicable to the Generating Companies / Respondents. The Karnataka Commission is an authority of coordinate jurisdiction and the Central Commission cannot sit in appeal or interpret in any manner the Regulations notified by the Karnataka Commission.
- 5.22** The Central Commission has not appreciated that BS Charges for the Generating Companies / Respondents drawing electricity are levied in terms of Regulation 16 (iii) and 11 (viii) of the Karnataka Open Access Regulations. The aforementioned provisions deal with charges to be levied for open access in the intra-state system in Karnataka including for use of intra-state systems in Karnataka including for use of intra-state systems of the distribution/transmission licensee which are incidental to the inter-state transmission of electricity. The provisions are equally applicable for use of the transmission system, which is incidental to inter-state Open access.
- 5.23** The Central Commission's Regulations cannot at all deal with such situations since BS Supply Charges are being levied only when the generator does not generate the power scheduled to be sold through open access but instead draws power from the Grid of the Appellant for its use as a consumer. This has nothing to do with the UI Charges or the Open Access Regulations of the Central Commission.

- 5.24** The Central Commission has erroneously reasoned that Regulation 11 (viii) deals with cases where a consumer for its demand or a generating company for its start-up power (as an open access customer) is being supplied power under a contract but is unable to get the contracted supply due to outage. There is no basis for holding that only in such an event, the arrangement is to be made for backup supply from the grid to meet the demand and under these circumstances, the person concerned becomes liable to pay the charges for making arrangement for backup supply.
- 5.25** The Impugned Order is erroneous to the extent it fails to consider that the Appellant and the Respondents / Generating Companies are bound by the statutory regulations framed by the Karnataka Commission which apply to the use of the system of the transmission/distribution licensee in the State. The Respondents / Generating Companies have not shown any details regarding how the backup supply charges are contrary to the provisions of the Karnataka Open Access Regulations. The Respondents / Generating Companies being an intra-state entity using the system of the state licensees, are bound by the Regulations and charges as prescribed by the Karnataka Commission in addition to that prescribed by the Central Commission.
- 5.26** The Central Commission failed to appreciate that the retail supply tariff as applicable to the consumers is within the exclusive jurisdiction of the Karnataka Commission. The Respondents / Generating Companies for their consumption of electricity from the grid is required to maintain a contracted load with the distribution licensee and in the absence of a contracted load is required to pay the temporary tariff as determined by the Karnataka Commission for supply of electricity. This is consistent

with the tariff as made applicable by various other State Commission for drawal of electricity without having contracted load with the distribution licensee.

- 5.27** The Central Commission has failed to appreciate that as per the Regulations and directions of the Karnataka Commission, the charges for supply of electricity has been levied on all generators in the State of Karnataka and implemented in the state. The Central Commission ought not to have assumed jurisdiction to deal with the matter and over-rule the Regulations and directions of the Karnataka Commission with regard to the levy of charges.
- 5.28** The Central Commission failed by ignoring the Appellant's submission that the Respondents / Generating Companies cannot be expected to be supplied electricity free of cost. These backup supply charges are independent and unrelated to the UI charges which were being levied on Respondents / Generating Companies for under-generation and non-generation of electricity in deviation of its' given schedule. UI is only a mechanism for grid discipline and cannot over each the backup supply charges which are levied for consumption of electricity by generators by drawing electricity from the grid.
- 5.29** The Central Commission has failed to appreciate that its jurisdiction does not extend to sitting over judgment or appeal over the Regulations and directions of the Karnataka Commission or otherwise interpret the Regulations of the Karnataka Commission contrary to the implementation being directed by the Karnataka Commission.
- 5.30** The charges levied on the Respondents / Generating Companies and similarly placed consumers over the years is accounted for in the

revenue requirements of the distribution licensees and forms part of the Annual Revenue Requirements and adjusted in the retail supply tariff. In the circumstances, the Central Commission erred in holding that the Respondents / Generating Companies are not liable for payment of tariff as determined by the Karnataka Commission.

5.31 The Central Commission failed to appreciate that the Appellant is not engaged in the supply of electricity or otherwise entitled to retain any amounts to charges for supply of electricity. The consumption of electricity by the Respondents / Generating Companies is accounted to the distribution licensees and the charges collected are remitted to the distribution licensee. All such charges and revenues to the distribution licensees are regulated by the Karnataka Commission. In the circumstances, the Appellant does not have any avenue for refund which has already remitted to the distribution licensees. In the circumstances, the Impugned Order is liable to be set aside as, amongst other infirmities, being un-executable for want of directions from the Karnataka Commission for payment of amounts to the Appellant.

5.32 The Central Commission failed to appreciate that the Regulations of the Karnataka Commission are clear on its applicability and also its clear wordings, namely, that for standby arrangements the temporary supply charges as per the relevant consumer category is to be applied. The generator being a consumer for the purposes of consumption of electricity, the temporary tariff is to be applied for such consumption.

5.33 The Central Commission has erred in passing inconsistent orders and ignoring its earlier judgment dated 03.07.2014 in the case of *Janki Corporation Limited v. SLDC, Karnataka &Anr.*, Petition No. 293/MP/2013. The Central Commission has held in no uncertain terms

that when the generator draws power from the State Grid for any purpose, it is liable to pay the charges for the power consumed in accordance with the regulations and orders of the Karnataka Commission. In view of the above, there can be no doubt whatsoever that the generators are liable to pay for the supply of electricity consumed from the grid in terms of the regulations and orders of the Karnataka Commission.

5.34 It is also stated that there is no double charging of back-up supply charges by the Appellant and the distribution licensee. The backup supply charges have to be paid by the generator either to the Respondent or to the respective distribution licensee. When proof of such payment to the distribution licensee is produced by the generators, the Appellant adjusts the same from the UI pool account.

5.35 The Tribunal in various cases have settled the position that when the Regulations are framed by the State Commission, it is the State Commission alone which can interpret the Regulations. It is not open for another authority (Central Commission in the present case) to interpret the Regulations of the State Commission, that too contrary to what it has been implemented in the State. The Central Commission does not have any supervisory or appellate jurisdiction over the State Commission.

5.36 In this regard, the Hon'ble Tribunal in the case of Uttar Gujarat Vij Company Ltd v. Gujarat State Electricity Regulatory Commission &Ors, Appeal No. 181 of 2010 dated 22/03/2011, has held as under:

*“13. Now these are the categories made by the Commission in the tariff order dated 31st March, 2007. In the tariff order it has not been expressly mentioned as to under which category the Respondent No. 1 which is a HT consumer running a number of educational institutions not governed by the Government would fall. **Before answering the question***

whether the Commission's impugned order is justifiable on merit or not it is necessary to say who is the competent authority under the statute to clarify, explain, interpret or if need be amend the tariff order. A consumer grievance redressal forum or for that matter an Ombudsman cannot possibly give an interpretation or clarification of what a quasi-judicial or quasi-legislative authority intended to mean by framing a tariff order particularly when they do not have the appellate or revision jurisdiction over the Commission. In fact, private educational institutions running on commercial basis or otherwise do not find mention in express words in either of the three categories. There is word 'etc.' that can act as esjusedem generis to include a private educational institution, if according to the Commission the categorization of HTP-II(A) would include all such private educational institutions and that the said HTP-II(A) category is intended to cover the institutions and entities which are run from commercial view point or that these entities and institutions as mentioned in HTP-II(A) serve a common purpose. There is no word 'etc.' either in HTP-I or HTP-II(B). To our mind, the power of clarification or interpretation or amendment of the order of the Commission lies with the Commission who is the author of the order and it is only in accordance with the tariff determination order that an agreement between a distribution licensee and a consumer follows. Therefore, if a particular entity is of the opinion that it has been wrongly categorized or that there has been wrong application of the tariff order because of misunderstanding or misinterpretation then it is the Commission that has to clarify the confusion and make the position clear. Therefore, in our estimation redressal forum or the Ombudsman cannot give legal interpretation of the tariff determination order made by a Commission and /or entertain a petition of a consumer for change of one category to another which involves powers of adjudication of fixation of tariff."

- 5.37** The above decision squarely applies to the present case, the Central Commission does not have any supervisory or appellate jurisdiction over the State Commission. The author of the KERC Regulations alone is entitled to interpret and apply the Regulations and not the Central Commission.
- 5.38** In line with the above decision of the Hon'ble Tribunal, the Central Commission itself has in the case of Malana Power Company Ltd v. HPSEB Limited, Petition No. 449/MP/2014 dated 10/03/2017, held

that where the dispute is on the applicability of the State Commission's orders, it is only the State Commission that can decide the issue. The Central Commission, has inter-alia, held as under:

59. Both HPSEBL and MPCL have advanced extensive arguments in favour of and against the applicability of the MYT orders issued by HPERC since September 2008 for determination of transmission charges. While HPSEBL has submitted that the orders are applicable in case of MPCL, MPCL has taken the position that these orders are applicable to the consumers of HPSEBL who take supply of power by availing short term open access for their consumption whereas MPCL avails open access in order to deliver its power at ISTS. HPSEBL in response to the query of the Commission has confirmed that there is no generator in the State of Himachal Pradesh supplying electricity outside the State using the system of State Utilities except MPCL. HPSEBL has treated MPCL in the same category as the consumers who procure electricity through inter-State open access and use the system of State Utilities. MPCL has vehemently opposed to be treated as a consumer and has sought separate determination of transmission charges for wheeling power for sale outside the State by using the system of State Utilities. Section 86 of the Electricity Act, 2003 deals with the functions of the State Commission. For the purpose of the present discussion, the following provisions have been extracted:

.....

The State Commission has been vested with the power to determine the tariff for generation, supply, transmission and wheeling of electricity within the State. Further, the State Commission has the power to adjudicate the disputes between the licensees and generating companies. Since HPSEBL is applying the transmission charges and losses determined by HPERC for use of the State network in the course of availing inter-State open access and MPCL is opposing the applicability of the said charges in its case, the parties may approach the HPERC for directions/clarification, as may be advised. This Commission cannot decide the issue whether the transmission charges and losses decided by the HPERC shall be applicable in case of MPCL in the context of Regulation 16(3) of the Open Access Regulations, 2008."

5.39 The Central Commission has itself corrected its position and has now held that when the State Commission's Regulations/Orders are involved, it is only the State Commission that can decide the issue.

5.40 This Hon'ble Tribunal has also examined the issue of jurisdiction in the case of embedded consumers connected to the State Grid and transacting electricity through inter-state open access in **SLDC, Gujarat & Anr v GERC & Anr.** – Judgment dated 07.04.2016 in Appeal No.70 of 2015 and held as under: -

“9. After having gone through all the relevant aspects of the present Appeal as stated above, our observations are as under:-

(i) On perusal of letter dated 30.04.2014 of the Appellant No. 1 to the Respondent No. 2, it has been noted that the Appellants have dealt with the issue in accordance with clause 16(1) of the Intra-State Open Access Regulations, 2011 of the State Commission issued by the State Commission.

(ii) The Respondent No. 2 is an embedded consumer of the Appellant No.2. Any transaction whether bilateral or collective or Intra-State would not change the position of the Respondent No. 2 as an embedded consumer of the Appellant No. 2. Even if we consider that one to one relation of the buyer and seller of power in respect of the power exchange transaction of Respondent No.2 is not known but the drawl point is known on the day one. Even uncertainty of the delivery point does not make it an Inter-State transmission case in light of the fact that drawal point is well known and the fact that the open access as sought by the Respondent No. 2 is for the use of transmission and distribution system of the State located in the command area of the Appellant No. 2. If the dispute arises for users of Intra-State network in collective transaction, it would fall within the jurisdiction of the respective State Commission within whose jurisdiction the Intra-State network falls

(iii) Having regard to the provisions of Section 32 and 33 of the Electricity Act, 2003 pertaining to the functions of the State Load Despatch Centre and compliance of its directions, this case falls within the ambit of Appellant No. 1 and 2. We have further noted that as per the prevailing Regulations of the State Commission, any

dispute arising due to non-issuance of NOC by the Appellants has to be brought before the State Commission which in this case is GERC and for the same reason, the GERC's jurisdiction is attracted.

(iv) We are of the considered view that the State Commission was right in dealing with the present case. The State Commission has the jurisdiction in the present case.

(v) After going through the detailed submissions made by the Appellants before the State Commission regarding the transmission constraints, the State Commission observed that the present issue should have been dealt by the Appellant No. 1 since it is the nodal agency and is equipped with the latest technology to monitor and control the power system round the clock basis and the designated agency is continuously aware of the system loading dynamics and any bottlenecks in the network as such there was no need on the part of the Appellants No. 1 to refer the matter to the Appellant No.2 for consent. On examination of letter dated 30.04.2014 of the Appellant No. 1 which clearly states that the Appellant No. 2 has not accorded consent, it is observed that relevant facts on the system dynamics have not been analyzed or recorded by the Appellant No. 1 which was mandatory for denying the Short Term Open Access permission to the Respondent No. 2 and by just mentioning in the letter that the Appellant No. 2 has not accorded consent, this cannot be considered as justifiable reason for such denial.

(vi) We observed from issues raised by the Appellants regarding their utmost concern for the Grid security which just cannot be overlooked and for this reason, the Appellants have to go into the transmission network contingencies and other related aspects while granting open access and the Appellants are rightly mandated to carrying out these vital functions but in the present case, the reasons stated for denying the Short Term Open Access are not in accordance with the State Commission's Regulations.

(vii) We have also observed that the denial of Short Term Open Access was for May, 2014 only as the Respondent No. 2 has received the NOC for Short Term Open Access for June and July, 2014.

(viii) We agree that the open access should be provided subject to operational constraints but the specific reason for such denial

ought to be given as per the State Commission's Regulations, 2011.

(ix) We fail to understand that the Appellants having a large Intra-State transmission system within the State of Gujarat denied open access to its embedded consumer which is not at all in letter and spirit of the prevailing Regulations and the Electricity Act, 2003."

5.41 The ratio of the above judgment squarely applies to the present case except that in the Gujarat case it was an embedded consumer and in the present cases, it is an embedded generator.

5.42 Further, the Hon'ble Tribunal has also held that where a generator is directly connected to Powergrid network, the State Commission has no jurisdiction since Powergrid is regulated by the Central Commission. On the same principle, where a generator is connected to the State network, the Central Commission will not have jurisdiction as the licensee is regulated by the State Commission.

5.43 In view of the above, the appeals need to be allowed and the Respondents / Generating Companies should be directed to approach the Karnataka Commission for adjudication of any disputes on the BS Charges.

6. Learned counsel, Mr. Anantha Narayana M.G., appearing for the Respondent No.2 has filed his written submissions for our consideration as follows :-

(A) Open Access Regulation and Backup supply charges :-

6.1 It is an admitted position that the answering respondent has been conferred open access under the CERC [Open Access in Inter-State Transmission] Regulation, 2008. It is also an admitted position that SLDC [Appellant] confers No-objection Certificate for this purpose as the

answering respondent is connected to the state transmission system for the purpose of conveying electricity.

- 6.2** It is noteworthy to point out that unlike other generators [generator in the tagged appeals], the answering respondent herein is not having any contract with GESCO/BESCO or any other distribution licensee for supply of electricity to the answering respondent. Also, there is no claim made by any distribution company for BSP charges nor is there any proof of discom having asked SLDC for the said charges.
- 6.3** SLDC [Appellant] issued impugned bills to the answering respondent levying UI charges, Fixed Charges and Backup supply charges. Answering respondent had challenged levy/rate of UI charges on the answering respondent by filing a separate petition [124/MP/2011] before CERC which came to be allowed by order dated 09.10.2012. The appellant herein along with KPTCL [the state STU] had preferred WP. No. 46495/2013 against order dated 9.10.2012 which is pending adjudication. Therefore the issue of UI is not under consideration in the present appeal. The impugned order arises out of separate petition filed by the answering respondent challenging levy of backup supply charges in contravention of CERC[open access] Regulations, 2008 and also question the authority of SLDC to issue impugned invoices.
- 6.4** At this juncture it is pointed out that the answering respondent has specifically questioned the very authority of SLDC to levy backup supply charges through impugned invoice. The said issue has been specifically answered by the answering respondent in the later portion of this written submission.
- 6.5** Relevant regulation of the CERC [open access] regulations, 2008 and KERC [open access] Regulation, 2004 are referred hereinbelow:

CERC (Open Access in Inter State Transmission] Regulations, 2008

Regulation 20 [6] provides:

*“No charge **other than those specified under these regulations** shall be payable by any person granted short-term open access under these regulations”.*

KERC (Open Access] Regulations, 2004

Regulation 11(viii) provides:

Clause	As it stood prior to 2006 Amendment	The clause as it stands now
Clause 11 (viii)	“Charges for arranging backup supply from the grid shall be payable by the open access customer in the event of failure of contracted supply to cover the risk. The amount of back up charges shall be mutually agreed between the parties.”	“Charges for arranging back up supply from the grid shall be payable by the <u>open access customer</u> in the event of <u>failure of contracted supply</u> . In case of outages of generators supplying to a consumer on open access, standby arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category as specified by the Commission:

6.6 It is appellant’s case that backup supply charges are levied for drawl of power from the state grid by the answering respondent in the event the distribution company/generating company which had to supply to the answering respondent fails to supply contracted power. In the facts of

present case, since answering respondent does not have any contract with any distribution company, there is no question of supplying backup power to the answering respondent. Thus, the very sine quo non of applicability of backup supply charges i.e. **'failure of contracted supply'** is not satisfied in the facts of this case.

6.7 The purpose of section 11(viii) is to cover situations where a consumer who has a power supply contract from a licensee other than distribution company in his area of supply, draws power from the grid in the event, the contracting licensee could not meet contracted supply. Thus the purport is to cover risk arising out of short supply by a distribution licensee situated outside the area of supply of the consumer. Moreover, the second sentence in the regulation which provides that in standby arrangements shall be made in event of 'outages of the generator' covers situation where a consumer of a generating company is provided standby arrangement if generator who is supplying to such consume is under outage. None of the situations are present in the instant case at all. The regulation nowhere speaks of its applicability to a generating company who is arguably withdrawing power from the state grid for start-up purposes. Central Commission has rightly held, that such the charges for such startup power must be accounted for as per UI mechanism so that the power consumed is appropriately paid for. It is therefore submitted that the SLDC has completely misconstrued the purport of regulation 11(viii) by seeking to apply it to present situation.

6.8 It is submitted that, any charge levied on the generator is in form of levy and an additional burden on generators and thus must be construed strictly. Unless, CERC [open access] Regulations, 2008 provides for any specific charge for withdrawal of power from grid, no answering respondent cannot be saddled with such levy. The central commission

has taken a very balanced approach by holding that, the energy drawl from the grid must be accounted for as per UI mechanism.

- 6.9** Regulation 20 (6) of the CERC [open Access] Regulations, 2008 makes the legislative intent extremely clear which is to ensure that there is uniformity in charges applied to the short term open access customers. Regulation 20(6) was inserted by amendment Regulations, 2009 [w.r.f. 29.09.2009]. The purpose will be frustrated if a short term open access customer, granted open access under CERC regulations is saddled with charges which are not in contemplation under the CERC [open access] Regulations.
- 6.10** It is also well settled that regulations passed by commissions in exercise of powers under the Electricity Act, 2003 are in nature of delegated legislation. Similar view has recently been reiterated by Hon'ble Supreme Court in ***Reliance Infrastructure Limited v. State of Maharashtra and Ors [2019 SCC Online 49]*** at paragraph 40. It also cannot be disputed that BPS charges are in nature of additional imposition/levy on the generator and is much higher than UI charges. Therefore it is submitted that regulations [subordinate legislation] providing for such charges must be construed strictly and in case of any ambiguity, benefit must be given to the answering respondent. Moreover, entire burden is on the Appellants to prove, how regulation 11(viii) of the KERC [open access] Regulations, 2004 can be made applicable to a case of a short term open access customer engaged in inter-state collective and bilateral transactions.
- 6.11** The appellants, referring to the central commission's order dated **03.07.2014 in Janki Corp. Limited**, contended that the CERC has taken contrary view in the said matter. It is noteworthy that decision in

Janaki corp. was passed before the impugned order was passed in the instant matter. In fact CERC has taken consistent view in all the decisions, whether passed before or after the decision in Janaki Corp. It is submitted that the decision in Janaki must be ignored as the operative portion of the decision is Janaki corp. is ex facie an apparent error. In paragraph 14 of the decision in Janaki corp CERC relies upon its earlier decisions Falcon Tyres and Sadashiva sugars. Janaki corp neither distinguishes Falcon tyres or Sadashiva Sugars nor does it overrule the same. On the contrary it relies upon earlier decisions. However at paragraph 12 and 15(d) of the Janki's decision, due to apparent typographical error, instead of central commission the expression state commission has been used. The appellant is simply taking technical plea by arguing that CERC has taken contrary view. The argument is unsustainable as decision in Janki corp relies upon earlier decisions at paragraph 14 and has to be read in light of the earlier decisions of CERC in Sadashiva Sugars and Flacon Tyres. It is also submitted that, the appellant did not file appeal against decision in Janki Corp, thereby accepting jurisdiction of CERC to decide the issue. **It is also pertinent to note** that the impugned order in the instant case was passed after the decision in Janki was delivered. The appellant did not take Janki's decision as a ground before CERC nor was it brought to notice of the CERC. Moreover, the Appellant has argued that the decision in Janaki was brought to the notice of CERC in **Dalmia Cements (Bharat) Limited [224/MP/2016. decided on 24-03-2017]** which was decided after decision in Janki's matter. Even in Dalmia's judgment, the CERC took consistent view that BPS charges are not payable and that drawl of power from the grid has to be accounted for as per the UI mechanism. Thus it is clear from the above that except in Janki's decision [which is

an apparent error as submitted above], all the decisions starting from Sadashiv Sugar to Dalmia Cement, CERC has taken consistent view.

(B) Role of SLDC and Issue of invoices :-

6.12 It is a fact that the invoices levying backup supply charges were issued by SLDC [signed specifically by chief engineer on behalf of SLDC] and not by any distribution licensee or KPTCL [STU]. THE STU and SLDC in Karnataka may be operated by same company but in discharge of functions they are absolutely separate authorities. The invoices are specifically issued by SLDC and not STU which is extremely clear from the plain reading of the invoice. In this background, it is submitted that SLDC does not have any authority under the Electricity Act, 2003 or regulations framed thereunder to issue invoices for alleged withdrawal of power from the grid. The only function attributed to the SLDC is to issue NOC and clearance under Regulation 8 of the CERC [open acces] Regulations, 2008. In addition to there being no express provision conferring power on SLDC to issue invoices, section 31 of Electricity Act, 2003 expressly prohibits SLDC to carry out trading in electricity. Therefore it is respectfully submitted that on this ground alone, the impugned invoices must be set aside as illegal.

6.13In the present case, there is no proof that any distribution company has laid claim for the powered allegedly withdrawn by the answering respondent from the grid. The distribution company has not done so knowing it fully that the answering respondent does not have any contract with distribution company and that the drawl from grid has to be payable in terms of UI mechanism as per the CERC [open access] Regulations, 2008. SLDC cannot be permitted to make profits by levying inflated charges in nature of BPS without such claim being raised by the distribution company.

6.14 As already pointed out in the arguments on preliminary issue of jurisdiction, SLDC is established under section 31 of the Electricity Act, 2013. Section 31 falls under the heading 'intra-state transmission'. Section 32 provides for functions of SLDC which are pertinent for answering this issue.

“Section 31. (Constitution of State Load Despatch Centres): ---

(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purposes of exercising the powers and discharging the functions under this Part.

(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:

Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity.

Section 32. (Functions of State Load Despatch Centres): ---

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

(2) The State Load Despatch Centre shall –

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

(b) monitor grid operations;

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

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

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure

and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

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

- 6.15** The language of section 31(1) is very plain and unambiguous. SLDC is established only '**for the purpose of exercising such powers and discharging such functions under this part**'. To put it differently, SLDC cannot assume upon itself any function or role beyond what has been envisaged under this part.
- 6.16** Section 32 stipulates the functions of SLDC which are undisputable. SLDC is also conferred upon the power to levy and collect fee or charges from generating company and licensees engaged in **intra-state transmission of electricity**. This written submission contains elaborate submissions to contend that the answering respondents are engaged in '**inter-state transmission**' of electricity by way of collective transaction through power exchanges and bilateral supply transactions to various states. Therefore, the authority to collect and levy fees or charges for intra-state transmission of electricity and intra-state transmission of electricity is well delineated under the Act. No authority can assume powers not vested in it under its parent statute.
- 6.17** It is correct that SLDC's NOC required under CERC [open Access] Regulations, 2008, however, the regulations does not confer upon it the power to levy any charge with open access customer under the CERC [Open access] Regulations, 2008.
- 6.18** Under regulation 8 of the CERC [open access] Regulation, 2008, SLDC is conferred with function to provide NOC/Clearance to the answering respondent, which has been accorded by SLDC time and again. There

is no role attributable to SLDC for collecting any charge/fee from the open access customer under the CERC [open access] Regulation. This is for the obvious reason that SLDC established under section 31 of the Act for the purpose of monitoring intra-state transmission and cannot bypass its role into the inter-state transmission. Regulation 8 of the CERC [open access] Regulation, 2008 is extracted hereunder:

“8. Concurrence of State Load Despatch Centre for bilateral and collective transactions.

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

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

(3) In case the infrastructure required for energy metering and time block wise accounting already exists, and required transmission capacity in the State network is available, the State Load Despatch Centre shall accord its concurrence or ‘no objection’ or standing clearance, as the case may be, within three (3) working days of receipt of the application.

(4) In case SLDC decides not to give concurrence or “no objection” or standing clearance as the case may be, the same shall be communicated to the applicant in writing, giving the reason for refusal within the above stipulated period of 3 days.

(5) Unless specified otherwise by the State Commission concerned, the State Load Despatch Centre may charge a fee of Rupee five thousand (Rs 5000/-) for processing applications for concurrence or “no objection” or prior standing clearance.”

6.19 It is submitted that even the KERC [open access] Regulations, 2004, on which the SLDC relies also does not confer upon SLDC, the authority to levy charges or fees. SLDC is only entitled to operating charges under the regulations and nothing more. Regulation 18 of the KERC [open access] Regulation, 2004 provides as under:

Clause	As it stood prior to 2006 Amendment	The clause as it stands after 2006 Amendment
Regulation 18	<p>“Collection and Disbursement of charges</p> <p>The charges in respect of open access customers shall be payable directly to respective nodal agency. The Nodal Agency shall specify the terms and conditions of payment”</p>	<p>“Collection and Disbursement of charges</p> <p>The charges may be collected either by the distribution licensee, the transmission licensee or the STU, depending on whose facilities are used by the consumer for availing open access. In all cases the amounts collected from a particular consumer should be given to the distribution licensee in whose area the consumer is located. In case of two licensees supplying in the same area the licensee from whom the consumer was availing supply shall be paid the amounts collected.</p> <p>Provided further that transmission charges shall be payable to the concerned transmission licensee.”</p>

The above regulation is extremely clear in describing the authorities entitled to collect charges viz. Distribution Company, Transmission licensee or the STU. In the instant case, none of the three mentioned authorities have levied Backup supply charges upon the answering respondents. Instead SLDC has assumed authority to levy and collect the same.

6.20 In light of the above contentions raised by the 2nd respondent, it may be concluded that:

- A. no charge other than those specified under the CERC [Open Access in Inter-State Transmission] Regulation, 2008 could be levied upon the 2nd respondent.
- B. Backup supply charges are not applicable to situation where generator having open access under CERC [open access] regulations draws power from the grid. Such power must be accounted for as per charges prescribed for UI mechanism.
- C. Even under KERC regulations, proving 'failure of contracted supply' is a sine quo non for applying BPS charges. The concept of BPS cannot be applied to the situation at hand where there is no '**failure of contracted supply**' as the answering respondent does not have any contract with distribution company.
- D. SLDC does not have any authority to collect charges from an entity engaged in inter-state transmission of electricity.

All other averments contained in the appeal which are contrary to the contentions of the answering Respondent are denied.

7. We have heard learned counsel appearing for the Appellant and the learned Counsel appearing for the Respondent at considerable length of time and gone through their written submissions carefully and after thorough critical evaluation of the relevant material available on records, the issues that arise for our consideration are as follows:-

Issue No.1: Whether back up supply charges can be levied on a generator engaged in open access transaction under the CERC (Open Access in Inter-State Transmission) Regulations, 2008?

Issue No.2: Whether State Load Despatch Centre has authority under law to issue impugned invoices levying backup supply charges.

Our Consideration & Analysis:-

Issue No.1:-

8. Learned counsel for the Appellant submitted that the backup supply charges are nothing but charges for consumption of the electricity by the Generating Companies connected to the State Grid as and when they deviate from the schedule and draw electricity from the grid. Learned counsel further submitted that this is nothing but supply of power / distribution of power to the consumer (here, the generating company) from the State grid which obviously cannot be regulated by the Central Commission. Therefore, the Backup Supply Charges are to be levied as per the Regulations and Orders of the Karnataka Commission. Learned counsel vehemently submitted that under the Open Access Regulations framed by the Karnataka Commission deals with customers seeking open access for intra-state transmission and also for

transactions for inter-state transmission wherein the intra-state network is used as incidental to inter-state transactions. In this regard, Regulations 1 (iii) of the Karnataka Open Access Regulations, inter-alia, provide as under:

"(iii) These Regulations shall apply to the open access customers for use of intra-state transmission system/s and/or distribution system/s of licensee/s in the State, including such system/s, which are incidental to inter-state transmission of electricity."

The said regulations were amended on 31.05.2006 which among others provided that in case of outages of the generator, the drawal of power needs to be charged as per the temporary tariff of the relevant consumer tariff category for such drawal of electricity. In this regard, Regulation 11 (viii) of the Karnataka Open Access Regulations, inter-alia, provides as under –

"Charges for arranging backup supply from the grid shall be payable by the open access customer in the event of failure of contracted supply. In case of outages of generators supply to a consumer on open access, standby arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category as specified by the Commission."

- 8.1** Learned counsel was quick to point out that these charges are to be collected by the Appellant and then disbursed to the concerned distribution licensees in accordance with the Regulation 18 of the Karnataka Open Access Regulations. Learned counsel contended that the Central Commission has no power either under the Electricity Act, 2003 or any other law to interpret or set aside the levies / charges decided by any State Commission merely due to the fact that the Central Commission is on a higher pedestal as compared to the Karnataka

Commission. In fact, the jurisdictions to be exercised by the Central Commission and any other State Commission are distinct and no one Commission can usurp or otherwise interpret the Statutory Regulations framed by another Commission. Learned counsel for the Appellant submitted that the Central Commission erred in conferring upon itself the power to interpret the Karnataka Open Access Regulations under CERC Regulations. It is the contention of the Appellant's counsel that the impugned order is erroneous to the extent it fails to consider that the Appellant and the Respondent Generating Companies are bound by statutory regulations framed by KERC which apply to the use of the system of the transmission/distribution licensee in the State. In fact, the charges levied on the Respondent Generating Companies and similarly placed consumers over the years is accounted for revenue requirements of the distribution licensees and forms part of the Annual Revenue Requirements and adjusted in the retail supply tariff. The Appellant is not engaged in the supply of electricity or otherwise not entitled to retain any amount to charges for supply of electricity and instead, such charges are accounted to the distribution licensees.

- 8.2** Learned counsel for the Appellant advancing his arguments further contended that the Central Commission has erred in passing inconsistent orders and ignoring its earlier order dated 03.07.2014 in the case of *Janki Corporation Limited v. SLDC, Karnataka &Anr.*, Petition No. 293/MP/2013. The Central Commission in the said order has held in no uncertain terms that when the generator draws power from the State Grid for any purpose, it is liable to pay the charges for the power consumed in accordance with the regulations of the Karnataka Commission. Learned counsel also clarified that there is no double charging of back-up supply charges by the Appellant and the distribution

licensee. Learned counsel further submitted that this Tribunal in various cases has settled the position that when the Regulations are framed by the State Commission, it is the State Commission alone which can interpret the Regulations. To substantiate his submissions, learned counsel placed reliance on the judgment of this Tribunal in the case of Uttar Gujarat Vij Company Ltd v. Gujarat State Electricity Regulatory Commission &Ors. In Appeal No. 181 of 2010. The relevant extract of the judgement is reproduced below:-

*“13. Now these are the categories made by the Commission in the tariff order dated 31st March, 2007. In the tariff order it has not been expressly mentioned as to under which category the Respondent No. 1 which is a HT consumer running a number of educational institutions not governed by the Government would fall. **Before answering the question whether the Commission’s impugned order is justifiable on merit or not it is necessary to say who is the competent authority under the statute to clarify, explain, interpret or if need be amend the tariff order. A consumer grievance redressal forum or for that matter an Ombudsman cannot possibly give an interpretation or clarification of what a quasi-judicial or quasi-legislative authority intended to mean by framing a tariff order particularly when they do not have the appellate or revision jurisdiction over the Commission. In fact, private educational institutions running on commercial basis or otherwise do not find mention in express words in either of the three categories. There is word ‘etc.’ that can act as esjusedem generis to include a private educational institution, if according to the Commission the categorization of HTP-II(A) would include all such private educational institutions and that the said HTP-II(A) category is intended to cover the institutions and entities which are run from commercial view point or that these entities and institutions as mentioned in HTP-II(A) serve a common purpose. There is no word ‘etc.’ either in HTP-I or HTP-II(B). **To our mind, the power of clarification or interpretation or amendment of the order of the Commission lies with the Commission who is the author of the order and it is only in accordance with the tariff determination order that an agreement between a distribution licensee and a consumer follows. Therefore, if a particular entity is of the opinion that it has been wrongly categorized or that there has been wrong application of the tariff order because of misunderstanding or*****

misinterpretation then it is the Commission that has to clarify the confusion and make the position clear.

To further support his arguments, learned counsel also placed reliance on another judgment of this Tribunal in case of Malana Power Company Ltd v. HPSEB Limited, Petition No. 449/MP/2014 dated 10/03/2017, which clearly held that where the dispute is on the applicability of the State Commission's orders, it is only the State Commission that can decide the issue. In this regard, other judgment relied upon by the learned counsel for the Appellant is this Tribunal's judgment dated 07.04.2016 in SLDC, Gujarat & Anr v GERC & Anr. – in Appeal No.70 of 2015. Learned counsel accordingly emphasized that backup supply charges can be levied by the Appellant under KERC Regulations alone.

8.3 ***Per contra***, learned counsel for the Respondents contended that the Respondents have been conferred open access under the CERC Regulation, 2008 for which SLDC has provided NOC. Learned counsel further submitted that in fact the very authority of SLDC to levy backup supply charges through impugned invoices is under question as the entities which have been granted open access under CERC Regulations are not required to pay any additional charge other than those specified under Regulation 20 (6). Learned counsel quick to point out that as per the Appellant, backup supply charges are levied for drawl of power from the Respondent Generators in the event the distribution company/generating company which has to supply, fails to supply the contracted power. However, in the instant case, the respondents do not have any contract with any distribution company and, therefore, there is no question of supplying backup power to the respondents. Thus, the very applicability of backup supply charges i.e. failure of contracted supply is not subscribed in the facts of this case. Learned counsel

contended that the Regulation nowhere speaks of its applicability to a generating company who is arguably withdrawing power from the State Grid for the startup purposes. In view of these facts, it transpires that the SLDC has completely misconstrued the purport of regulation 11(viii) by seeking to apply it to present situation. Learned counsel vehemently submitted that the very purpose of Regulation 20 (6) of the CERC [open Access] Regulations, 2008 is to ensure that there is uniformity in charges applied to the short term open access customers which get frustrated if a short term open access customer, granted open access under CERC regulations is saddled with additional charges which otherwise are not contemplated. To fortify his arguments, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in ***Reliance Infrastructure Limited v. State of Maharashtra and Ors*** [2019 SCC Online 49].

- 8.4 Regarding the Central Commission's order dated **03.07.2014 in Janki Corp. Limited**, learned counsel for the Respondents contended that the decision in Janki corp. was passed before the impugned order and it has taken consistent view in all other decisions. Learned counsel submitted that the decision in Janki must be ignored as the operative portion of the decision is Janki corp. is ex facie an apparent error. In paragraph 14 of the decision in Janki corp CERC relies upon its earlier decisions namely Falcon Tyres and Sadashiva sugars. Learned counsel admitted that at paragraph 12 and 15(d) of the Janki's decision, due to apparent typographical error, instead of 'Central Commission' the expression 'State Commission' has been used. Learned counsel emphasised that the impugned order in the instant case was passed after the decision in Janki was delivered and the Appellant did not take same decision as a ground before CERC nor was it brought to notice of the CERC.

Moreover, the Appellant has argued that the decision in Janaki was brought to the notice of CERC in **Dalmia Cements (Bharat) Limited [224/MP/2016. decided on 24-03-2017]** which was decided after decision in Janki's matter. Summing up his submissions, learned counsel for the Respondents highlighted that the backup supply charges are not applicable to the generators who have been granted open access for inter-state transactions under the CERC Regulations.

Our Findings:-

- 8.5** We have carefully considered the submissions of learned counsel for the Appellant as well as learned counsel for the Respondents and also taken note of various judgments relied upon by the learned counsel. It is not in dispute that the Respondent generators were granted open access under the CERC Open Access Regulations for Inter-state transactions of power. As required under the Central Regulations, the generators were also given No Objection Certificate from the State Load Despatch Centre of Karnataka. It is the contentions of the learned counsel for the Appellant that when these generating companies which are connected with the State Grid draw electricity from the State Grid, they are liable for paying the backup supply charges under the KERC Regulations, 2004. Learned counsel for the Appellant has vehemently submitted that whatever charges under the KERC Regulations for consumption of electricity from the State Grid are applicable, the Central Commission has no power either under the Act or any other law to interpret or set aside such levies / charges decided by the statutory regulations of the State Commission. It is, however, the contention of the learned counsel for the Respondents that once generators are provided with Open Access under CERC Regulations, 2008, no charges other than those specified under these Regulations shall be payable by

any person granted short term open access under these Regulations namely the Regulations 20 (6). The Regulation 11 (viii) of KERC Open Access Regulations, 2004 (as amended) provides as under:-

“Charges for arranging back up supply from the grid shall be payable by the open access customer in the event of failure of contracted supply. In case of outages of generators supplying to a consumer on open access, standby arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category as specified by the Commission.

8.6 While we note that there does not appear any material controversy in the Open Access Regulations of CERC and KERC, the entire dispute has arisen out of the interpretation of backup power supply charges vis.-a.-vis. supply charges and muchless due to inconsistent orders passed by CERC in the case of Janki Corporation Limited & other generating companies. It is noticed that in fact CERC have taken inconsistent view in its other orders while comparing with its decision in Janki case. For ready reference, we thought fit to refer the Para 12 & Para 15(d) of the Janki decision as under:-

“12. The petitioner’s next grievance relates to billing of the Backup Supply Charges and fixed charges. The petitioner has contended that no such charges are payable under the Open Access Regulations. We are of the view that in case the petitioner is drawing power from the State Grid for any propose it cannot repudiate its liability to pay the charges for the power consumed. However, the charges have to be billed and collected in accordance with the regulations or orders of the State Commission. If there are no regulations or orders of the State Commission requiring back-up supply charges and fixed charges, the petitioner cannot be saddled with such charges. In terms of Regulations 20 (6) of CERC Open Access Regulations, no charges other than those

prescribed under Regulations 20 (5) is payable by an intra-State entity availing inter-State open access, in absence of any rate specified by the State Commission.

13.

14.

15. (d) *The backup supply charges and fixed charges shall be governed by the Regulations of KERC only.*

...(Emphasis supplied)

8.7 We find no force in the submissions of learned counsel for Respondents that at Para 12 & 15 (d) of the Janki decision, due to apparent typographical error, instead of ‘Central Commission’, the expression “State Commission” has been used. We opine that such submissions advanced by learned counsel for the Respondents is unsustainable in law on the ground that the decision in Janki case rendered by larger bench relies upon, earlier decisions at Paragraph 14 and has to read in light of the earlier decisions of the CERC in Sadashiva Sugars and Falcon Tyres. We thus hold that the generating companies provided with Open Access for inter-state transactions under CERC Regulations are not liable to pay any additional charges as per Regulations 20(6), however, any power consumed from the State Grid through the local distribution licensee is chargeable as per the KERC Regulations by considering temporary tariff under relevant category of consumers. However, these supply charges cannot be equated with backup supply charges as being contemplated by the Appellant,

8.8 In light of these facts and circumstances of the case in hand, we are of the considered opinion that the inconsistencies appearing in various referred orders of CERC in different petitions, as stated supra, need to be corrected through a corrigendum along with clear cut directions that

charges for the electricity consumed by the generating companies from the State Grid for any purpose would need to be paid by them as per KERC Regulations.

Issue No.2:-

9. Learned counsel for the Appellant submitted that the Central Commission failed to appreciate that the Appellant is neither engaged in supply of electricity nor otherwise entitled to retain any amount on account of charges for supply of electricity. In fact, the consumption of electricity by the Respondent generating companies from the State Grid is accounted to the distribution licensees and the charges collected in lieu of the same are remitted to the distribution licensee of the area. All such charges and revenues to the distribution licensees are regulated by the Karnataka Commission and, therefore, the questioning of the Respondents for the authority of the Appellant to issue invoices for supply charges is erroneous and uncalled for. In this regard, Regulations 18 of the Karnataka Open Access Regulations, inter-alia, provide as under –

"Collection and Disbursement of charges

The charges may be collected either by the distribution licensee, the transmission licensee or the STU, depending on whose facilities are used for availing open access. In all cases the amounts collected from a particular consumer should be given to the distribution licensee in whose area the consumer is located. In case of two licensees supplying in the same area the licensee from whom the consumer was availing supply shall be paid the amounts collected.

Provided further that transmission charges shall be payable to the concerned transmission licensee."

Learned counsel for the Appellant further submitted that the Appellant is an entity constituted under the Act and functions under the overall supervision of the State Transmission Utility (KPTCL herein). All the power transaction inside the State or Inter-state transaction using the intra-state transmission system are constantly monitored by the Appellant. Besides, the issue of NOC and clearance under Regulation 8 of the CERC Open Access Regulations are also dealt by SLDC. As a matter of fact, the Appellant has issued only invoices for the power consumed by the Respondents from the State Grid on behalf of State Distribution Licensees and as explained above, no any charge on account of such supply is retained by it and all charges get remitted to the concerned distribution licensee of the area. Learned counsel quick to point out that such action of the Appellant on behalf of distribution licenses cannot be presumed as the supply or trading of electricity by the Appellant when no any charge on such account is retained / used by it. SLDC has been established under Section 31 of the Act which falls under the heading 'intra-state transmission' and Section 32 stipulates the functions of SLDC as under

“Section 31. (Constitution of State Load Despatch Centres): ---

*(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre **for the purposes of exercising the powers and discharging the functions under this Part.***

(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:

Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity.

Section 32. (Functions of State Load Despatch Centres): ---

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

(2) *The State Load Despatch Centre shall –*

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

(b) *monitor grid operations;*

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

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

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

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

9.1 To substantiate his submissions, learned counsel placed reliance on the judgment of this Tribunal dated 07.04.2016 in Appeal No.70 of 2015 in the case of **SLDC, Gujarat & Anr v GERC & Anr.** to contend that the ratio of above judgment squarely applies to the present case except that in Gujarat case, it was an embedded consumer and in the present case, it is an embedded generator. Learned counsel for the Appellant further contended that this Tribunal in a catena of judgments has held that where a generator is directly connected to Power Grid network, the State Commission has

no jurisdiction since Power Grid is regulated by the Central Commission and resting on the same principle where a generator is connected to the State network, the Central Commission will not have jurisdiction as the licensee is regulated by the State Commission. Learned counsel summed up that in view of the above, there is no rationale in the allegations of the Respondent generating companies on the role and jurisdiction of the Appellant in this regard.

9.2 *Per contra*, learned counsel for the Respondents alleged that invoices for the supply charges have been specifically issued by SLDC and not by any STU which is clear from the plain reading of the invoices. He further submitted that under the Act or Regulations, there is no express provision conferring power on SLDC to issue invoices. Learned counsel for the Respondents contended that SLDC has been established under the ACT for the purpose of exercising such powers and discharging such functions under this part and accordingly it cannot assume upon itself any function or role beyond what has been envisaged under this part. It is undisputed that NOC from SLDC is required under the CERC [open access] Regulations for issue of open access or taking up inter-state transmission of power. However, it does not confer upon SLDC to levy and charge with open access customer under the same Regulations. Learned counsel vehemently submitted that while looking at KERC [open access] Regulations, 2004, (as amended), it is clear that the authorities entitled to collect charges are distribution company, transmission licensee or STU. Advancing his submissions further, learned counsel for the Respondents submitted that SLDC does not have any authority to collect charges from any entity engaged in Inter-state transmission of electricity.

Our Findings:-

9.3 After thoughtful consideration of the rival contentions of the learned counsel for the Appellant and learned counsel for the Respondent companies and also took note of various judgments relied upon by the learned counsel and various provisions of the Electricity Act, 2003. It is not in dispute that wherever the proposed bilateral transaction has a state utility or an intra-state entity as a buyer or seller concurrence of SLDC shall be obtained in advance and submitted along with application to the nodal agency. Further, under the proviso of Section 31 (2) of the Act, it is clearly envisaged as under:-

“Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity.”

As per Section 32 (3), the SLDC is empowered to levy and collect such fee and charges from the generating companies and licensees engaged in Intra-state transmission of electricity as may be specified by the State Commission. Regulation 18 of KERC Regulations, 2006 provide that the charges may be collected either by the distribution licensee, the transmission licensee or the STU depending on whose facility are used for availing opening access. In all such cases, the amount so collected from a particular consumer should be given to a distribution licensee in whose area the consumer is located. In view of these facts, there is nothing illegal that if SLDC issues invoices in lieu of power supply charges on behalf of distribution licensees and collects such charges

and in turn remits the amount in the account of local distribution licensee. We are of the opinion that such activities on part of the SLDC/Appellant in no way amounts to the business of electricity supplies or trading. Hence, we are of the considered opinion that the action of the Appellant in issuing the invoices to the Respondent Generating companies for supply of power from the State Grid is not in violation of law or Regulations.

Summary of Our Findings:-

10. After microscopic evaluation of the entire material available on records and after taking into consideration the discussion, reasoning and findings regarding Issue Nos.1 & 2 mentioned above, we are of the considered opinion that as specified under the CERC Open Access Regulations, no charges other than those specified under Regulation 20 (6) shall be payable by any person granted short term open access under these Regulations. However, if any generating company consumes power from the state grid for any purpose, it is liable to pay supply charges as applicable under the KERC Regulations, 2004 (as amended). Accordingly, the orders passed by CERC in various petitions stipulated above (Janki orders and others) would need to be corrected to remove, pointed out inconsistencies and also, to provide clarity on various charges namely backup supply charges and distribution/supply charges. In view of these facts and circumstances of the case, the instant appeals deserve to be partly allowed and the impugned orders passed by the first Respondent/CERC are liable to be set aside so far it relate to the findings in the preceding paragraph above.

ORDER

Having regard to the factual and legal aspects of the matter as stated above, we are of the considered opinion that issues raised in the appeals have merits and hence, these appeals are partly allowed.

The impugned orders passed by first Respondent/Central Electricity Regulatory Commission dated 19.11.2012, 24.12.2012, 20.01.2014 and 29.04.2015 in Petition Nos.1/MP/2012, 124/MP/2012, 82/MP/2013 and 10/MP/2014 respectively are hereby set aside so far it relate to the prayer sought in the instant appeal.

The matter stands remitted back to the first Respondent/CERC with the direction to pass the appropriate order in compliance of the observations made in Paragraph No.10 of this judgment, as stated above, as expeditiously as possible at any rate within a period of six months from the date of appearance of the parties.

The Appellant and Respondents are directed to appear before the Central Commission personally or through their counsel without notice on 16.05.2019 at 11.00 A.M. to collect necessary date of hearing.

In view of the disposal of the Appeal, the relief sought in the IA No. 244 of 2014 and IA No.269 of 2015 do not survive for consideration and accordingly stand disposed of.

No order as to costs.

Pronounced in the Open Court on this 16th day of April, 2019.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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