

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)
APPEAL NO. 262 OF 2019

Dated : 2nd March, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

IN THE MATTER OF :

Indian Captive Power Producers Association
309, Mansarovar Building,
90, Nehru Place,
New Delhi – 110019

...APPELLANT

VERSUS

1. Gujarat Electricity Regulatory Commission,
6th Floor, GIFT ONE,
Road 5C, Zone 5, GIFT City,
Gandhinagar - 382355,
Gujarat, India.
2. Gujarat Electricity Transmission Corporation Ltd.
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara-390007
Gujarat
3. The Chamber of Commerce and Industry of Kutch
C-36, Katira Shopping Centre,
RTO Relocation Site, Bhuj- 370001
4. Shree Renuka Sugars Limited
BC 105, Havelock Road Cap
Belagavi-590001
Karnataka

5. Reliance Industries limited
Vraj, near suvidha shopping complex,
Chimanlalgirdharlal road, Paldi,
Ahmedabad-380007
6. Biomass Power Project Pvt. Ltd.
Village-VavdiGajabjai, Taluka- Sihor
Sanosara Village, Bhavnagar
7. Madhya Gujarat Vij Company Limited (MGVCL)
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara-390 007
Gujarat
8. Dakhsin Gujarat Vij Company Limited (DGVCL)
UrjaSadan Nana Varachha Road,
Kapodara,SURAT-395006,
Gujarat
9. Uttar Gujrat Vij Company Limited (UGVCL)
Visnagar Road,
Mehsana -384001,
Gujarat
10. Paschim Gujarat VijSevaSadan (PGVCL)
Off. Nana Mava Main Road, Laxminagar,
Rajkot – 360004, Gujarat
11. State Load Despatch Centre (SLDC)
132kV Gotri Sub Station Compound,
Near T.B. Hospital, Gotri Road,
Vadodara 390021,
Gujarat
12. Bhadreshwar Vidyut Private Limited
(Formerly known as OPGS Power Gujarat Pvt. Ltd.)
Village Bhadreshwar,
Taluka- Mundra, District Kutch,
Gujarat- 370411

13. Torrent Power Limited- Ahmedabad
Narayanpura Office AEC Cross Road,
Behind AEC Bus Stop, Sola Rd,
Vijay Char Rasta, Naranpura,
Ahmedabad, Gujarat-380013
14. Torrent Power Limited- Surat
Torrent House, Station Road,
Raghunathpura Station Road,
Lal Darwaja, Surat, Gujarat-395003
15. Torrent Power Limited- Dahej
Plot No. Z/21, Phase-1,
SEZ, At Dahej, Tal Vagra,
Dahej, Gujarat 392130
16. MPSEZ Utilities Private Limited
village Dhruv, Tahluk Mundra,
Special Economic Zone phase-1,
Mundra, Gujarat-370421
17. Kandla Port Trust
Deendayal Port Trust
Business Development Cell,
P.O. Box 50, Administrative Building,
Gandhidham, Kutch,
Gujarat, India – 370201
18. Jubilant Infrastructure limited
Jubilant Infrastructure Ltd (SEZ Developer),
Plot No. 05,Vilayat GIDC, Village Vilayat,
Tal. Vagra – Dist. Bharuch – 390012 Gujarat.
19. Aspen Infrastructure Private Limited
Survey No. 26,Village Pipaliya,
Waghodia, Vadodara – 391760
Gujarat

20. Gujarat International Finance Tec-City Power Company Ltd.
(GIFT)
Zonal Facility Centre,Block-12,
Road 1-D, Zone-I, GIFT SEZ,
Gandhinagar, Gujarat- 382355.
21. Gujarat State Electricity Corporation Ltd.(GSECL)
Vidyut Bhavan, Race Course,
Vadodara-390 007,
Gujarat
22. Adani Power Limited
Achalraj, Opp Mayor Bungalow,
Law Garden, Ahmedabad-380006 ,
Gujarat, India.
23. Gujarat Mineral Development Corporation limited
Khanij Bhavan, Mahader Mandir,
132 Feet Ring Road :char Rasta,
Vastrapur, Near University Ground,
Vastrapur, Ahmedabad, Gujarat-380052
24. Bhavnagar Energy Company Limited
3rd Floor, Block Number 8,
Udhyog Bhavan, Sector-11,
Gandhinagar – 382 011,
Gujarat, India.
25. Essar Power Gujarat Limited
Essar House,Opposite Gujarat College,
Ellisbridge, Ahmedabad-380006
Gujarat, India
26. Gujarat Industries Power Company limited
P.O. Petrochemical - 391346
Vadodara, Gujarat – India
27. CLP India Limited
7th Floor, FULCRUM,
Sahar Road, Andheri (East),

Mumbai - 400 099.
India.

28. GSPC Pipavav Power Company limited
GSPC Bhavan, Behind Udyog Bhavan,
Sector - 11, Gandhinagar-382 010,
Gujarat
29. Gujarat State Energy Generation limited
Building Nos. A/78/3-8, Near iGATE Corporation,
GIDC Electronic Estate, Sector - 25,
Gandhinagar Gandhinagar-382016
Gujarat.
30. SUGEN
Torrent Power, Samanvay ,600 ,Tapovan,
Ambawadi, Nehru Nagar,
Niyojan Nagar, Manekbag Society,
Ambawadi, Ahmedabad, Gujarat-380015
31. Gujarat Alkalies and Chemicals Limited
P. O. Petrochemicals – 391-346,
Vadodara,
Taluka-Vagra, Dist. Bharuch,
Gujarat, India
32. Gujarat Flurochemicals Limited
2nd Floor ABS Towers,
Old Padra Road,
Vadodara – 390007
33. Hindalco Industries Limited
Ahura Centre, 1st Floor, B Wing,
Mahakali Caves Road
Andheri (East), Mumbai- 400093
Maharashtra
34. Jindal Saw limited
Jindal Centre,

12 Bhikaiji Cama Place,
New Delhi-110066

35. Krishak Bharati Co-Operative Limited(KRIBHCO)
KRIBHCO Bhawan, A - 10,
Sector-1, Noida - 110096, India
36. Oil and Natural Gas Corporation Limited
5,Nelson Mandela Marg,
Vasant Kunj, New Delhi-110070
37. Philips Carbon Black limited
Palej, Phillips Carbon Black Limited.
N.H.-8, Palej, Dist.-Bharuch,
Gujarat-392220
38. Sal Steel Limited
Survey No 245,Village Bharapar,
Gandhidham Kutch,
Bharapar, Gujarat – 370203
39. Sanghi Industries Ltd
10th Floor, Kataria Arcade,
Off S G Highway, Makarba,
Ahmedabad- 380051,
Gujarat
40. Saurashtra Cement Limited
701-702 'Pelican' 7th Floor,
Gujarat Chamber Of Commerce Compound
Ashram Road, Ahmedabad-380009,
Gujarat
41. Shreeyam power & Steel Industries Limited
Plot No.: 332, New GIDC Industrial Estate,
Vill-Mithirohar,
Gandhidham, Gujarat – 370201
42. Ultra tech Cements limited
"B" Wing, 2nd floor, Ahura Centre

Mahakali Caves Road
Andheri (East), Mumbai-400093
Maharashtra

43. UPL Limited
UPL House, 610 B/2,
Bandra Village, Off Western Express Highway,
Bandra (East), Mumbai 400051
Maharashtra
44. Varrsanalspat Limited
P.O.Box 133, Village Varrsana,
Taluka, Gandhidham(Kutch) 370201,
Gujarat, India
45. Welspun Captive Power Generation Limited
Welspun city, village Versamedi,
Taluka, Anjar,
Gujarat-370110
46. Abellon Clean Energy Limited
Sangeeta Complex,
Near Parimal Railway Crossing,
Ellisbridge, Ahmedabad - 380006,
Gujarat
47. Amreli Power Projects Pvt Ltd
4th Floor, My Home Plaza,
10-5-6/B, Masab Tank,
Hyderabad-500028
48. Bhavnagar Biomass Power projects ltd
25-35/10/2, Mallikarjuna Nagar,
Mumbai Highway, RamachandraPuram,
Hyderabad – 502032
49. GPCL Solar
Block No. 8, Sixth Floor,

Udhyog Bhavan, Sector 11,
Gandhinagar – 382011

50. Backbone Solar Power
209, Akik Tower,
Opposite Rajpath Club,
S.G. Highway, Bodakdev, Ahmedabad,
Gujarat 380015

51. Enerson Solar
A/2, Navratna Apartmant,
CTM, Near Baroda Express Highway,
Ahmedabad, Gujarat-380026

...RESPONDENTS

Counsel for the Appellant (s) : Mr. Sajan Poovayya, Sr.Adv.
Mr. Hemant Singh
Mr. Lakshyajit Singh Bagwal
Mr. Pratibhanu
Mr. Ankit Saini
Mr. Ambuj Dixit
Mr. Nishant Kumar
Mr. Tushar Srivastava
Mr. Ali Moid

Counsel for the Respondent(s) : Mr. Pallav Mongia
Mr. S.R. Pandey
Mr. Abhinav Goyal for R-1

Mr. M.G. Ramachandran, Sr.Adv.
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Arvind Kumar Dubey for R-2

J U D G M E N T

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

1. The present appeal has been filed by Indian Captive Power Producers Association (ICPPA) (**Appellant**) against the daily order dated 01.02.2019 (**"impugned order"**) passed by the Gujarat Electricity Regulatory Commission (**"Respondent Commission"**) in Petition No. 1672 of 2017, preferred by the Appellant. Vide the present appeal, the Appellant is seeking necessary directions for expediting the proceedings in Petition No. 1672 of 2017 preferred by the Appellant. Under the aforesaid Petition, the Appellant is seeking amendment of the provisions of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 (**"GERC OA Regulations, 2011"**) as detailed therein. However, even after a lapse of more than 2 years, the Respondent Commission has failed to hear the Petition on merits, thereby leading to a delay in deciding the said case.

1.1 The Appellant, Indian Captive Power Producers Association, is an association actively taking up issues for safeguarding the interests of Power Producing industries. The members of it come from

various cross sections of industries mainly chemicals, paper, textile, iron-steel, cement, aluminum and many more. The said members also avail open access for the purpose of sourcing their power to the end users or captive users, as the case may be.

1.2 The Respondent No.1, Gujarat Electricity Regulatory Commission (GERC), is the state electricity regulatory commission in the state of Gujarat discharging various functions and duties enshrined under the Act.

1.3 The Respondent No.2, Gujarat Energy Transmission Corporation Limited (GETCO), was set up in May 1999 and is registered under the Companies Act, 1956. GETCO has been established to build, operate and maintain an efficient transmission system in the state of Gujarat.

1.4 The other Respondents are various Distribution licensees, Transmission licensees and Generating Companies in the state of Gujarat, who are necessary stakeholders and come under the purview of GERC Open Access Regulations.

2. **FACTS OF THE CASE:**

The brief facts leading to the institution of the instant appeal are as under:

- 2.1 The Respondent Commission vide its Notification No. 3 of 2011, introduced Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011. The said regulations applied to open access for use of intra-State transmission system and distribution systems in the State of Gujarat, including such system which is used in conjunction with inter-State transmission system. The said regulations were later briefly amended on 04.03.2014 and 12.08.2014. However, since 2014, there has been no further development/amendment in the said open access Regulations prevailing in the State of Gujarat.
- 2.2 Even in the existence of the said Regulations, various captive generators in the state of Gujarat were facing various financial difficulties on account of non-amendment of the Open Access Regulations. In view of this, the Appellant issued a letter dated 02.07.2015 to the Respondent Commission to consider and initiate a comprehensive amendment in the GERC OA regulations, 2011 in order to align it with the existing environment of competitive market in the state of Gujarat.
- 2.3 Further, due to non-response of the aforesaid letter, the Appellant issued another letter dated 19.10.2015, wherein a detailed

representation was given to the Respondent Commission in order to emphasize the urgent need for initiating steps towards the amendments to the GERC OA Regulations, 2011.

2.4 Thereafter, the Appellant submitted another representation in the form of a letter dated 23.02.2016 before the Respondent Commission, in continuation to the aforementioned earlier representations dated 02.07.2015 and 19.10.2015, wherein the Appellant briefly elaborated the core issues which are being faced by power producers in the State of Gujarat and how it is necessary that the existing GERC OA Regulations, 2011 need to be amended to be in line with the existing dynamic market conditions. However, on this occasion also, no response was received from the Respondent Commission.

2.5 In such a scenario, due to continuation of non-response to the aforesaid letters/representations, the Appellant was left with no other option but to file a petition before the Respondent Commission. Accordingly, on 25.07.2017, the Appellant filed a petition for amendment of the GERC OA Regulations, 2011, which was later numbered as Petition No. 1672 of 2017. The said Petition was filed by the Appellant on account of the significant

changes observed in the sector impacting the market on open access related issues over the past few years which are not reflected in the GERC OA Regulations, 2011.

2.6 Vide the above petition, the Appellant sought amendment with regard to the following:

- a) Regulation 19 dealing with Priority for Open Access;
- b) Regulation 13 & 14 dealing with Flexibility in drawal points under LTOA and MTOA;
- c) Regulation 21 dealing with Setting-off of LTOA charges against MTOA and STOA charges;
- d) Regulation 28 dealing with Optimum scheduling of power exchange transactions;
- e) Start-up power to generators;
- f) Calculation of cross subsidy surcharge;
- g) Regulation 22 dealing with the payment of Scheduling charges;
- h) Bank Guarantee to SLDC for deviation charges;
- i) System study for intra state medium-term and long-term open access transactions;
- j) Rebate on demand charges to captive consumers;
- k) Monitoring and Dispute Resolution Committee for Open Access;
- l) Ensuring independence of SLDC;
- m) Mandatory publication of transmission system plan;
- n) Transmission planning and network expansion;

- o) Review of timelines for Open Access;
- p) Wheeling Charges on consumers connected to STU;
- q) Consideration of applications from defaulters;
- r) Regulation 42 dealing with Relinquishment of LTOA.
- s) and Various others

2.7 Pursuant to the filing of the abovementioned petition, the Respondent Commission kept the matter for hearing on 16.09.2017 and the order of the said hearing was passed on 29.09.2017. On the said date of hearing, the Respondent Commission observed that it is necessary to implead all the stakeholders who are affected by the issues which are raised by the Appellant under the Petition, and accordingly directed to implead all the stakeholders as party to the said Petition and further directed the stakeholders to file their respective reply within 3 weeks of receipt of the copy of the petition. In compliance with the aforesaid order, the Appellant served a copy of the petition to all the primary stakeholders who were to be impleaded, and thereafter, filed an affidavit for proof of service in this regard before the Respondent Commission.

2.8 Thereafter, the Appellant vide its letter dated 23.02.2018 apprised the Respondent Commission that in compliance with the order dated 29.09.2017, the Appellant had served the copy of the Petition and due compliance of the said order, duly submitted the affidavit of service of the Petition upon the said stake holders. Accordingly, the Appellant requested that the Respondent Commission may list at the earliest possible date.

2.9 However, on account of no response by the Respondent Commission to the aforesaid letter, the Appellant again on 17.04.2018 issued another letter to the Respondent Commission requesting for urgent hearing of the matter since the Appellant had duly complied with the previous order dated 29.09.2017.

2.10 Even after apprising the concern of the Appellant on two occasions, there was still no response on the part of the Respondent Commission to aforesaid letters dated 23.02.2018 and 17.04.2018. However, the Appellant, again on 05.05.2018 issued a letter to the Respondent Commission wherein the Appellant showed its serious concern over non-response of the Respondent Commission to the letters of the Appellant, thereby leading to inordinate delay in the proceedings of Petition No. 1672

of 2017. Further, the Appellant in the said letter requested for an early hearing in the month of May, 2018 itself.

2.11 Meanwhile, in order to get interim relief under Petition No. 1672 of 2017, and due to the inordinate delay in scheduling the matter for hearing by the Respondent Commission, the Appellant also filed an Interim Application, being I.A. 07 of 2018.

2.12 The entire pleadings in the abovementioned matter was completed and the matter was listed for hearing 09.10.2018. However, Respondent No.2/GETCO sought adjournment in the said matter and requested to list the matter on 20.10.2018. To this, a serious objection was raised by the Appellant and a letter dated 06.10.2018 was issued to the Respondent Commission wherein it was requested not to adjourn the hearing dated 09.10.2018.

2.13 The Respondent Commission adjourned the matter on 09.10.2018. However, an early date of 20.10.2018 was given by the Respondent Commission. Accordingly, Petition No. 1672 of 2017 was listed by the Respondent Commission for hearing on 20.10.2018 vide its daily order dated 15.10.2018. During the proceedings, the counsel for the Appellant apprised the Respondent Commission that the counsel for GETCO had filed a

letter seeking adjournment and the matter may be posted for hearing on 20.10.2018. Accordingly, the Respondent Commission posted the matter for hearing on 20.10.2018. The Respondent Commission further directed that since an I.A. No. 07 of 2018 has been filed under the instant petition, the same shall also be listed on the said date.

2.14 Thereafter, the matter was listed on 20.10.2018 and daily order of the said date of hearing was passed on 5.12.2018. During the proceedings, the counsel for M/s Reliance Industries Limited and M/s Shree Renuka Sugars Limited, who were Respondents in the Petition informed the Respondent Commission that they did not receive a copy of the Petition. In response to this, the counsel for the Appellant clarified that the copy of the petition was provided to the abovementioned parties and affidavit of service was also filed along with courier receipts. Despite the same the Respondent Commission directed Appellant to again provide with the copy of the Petition within 7 days to the above Respondents, and further directed the parties to file their submissions within 15 days from the date of receipt of the said documents. No further date of hearing was intimated by the Respondent Commission on the said date. However, the Appellant in due compliance of the aforesaid

order, again provided with the copies of the Petition to the Respondents in Petition No. 1672 of 2017.

2.15 Pursuant to the aforesaid order, the Appellant issued another letter dated 20.12.2018 to the Respondent Commission. In the said letter, the Appellant apprised the Respondent Commission that the copies of the Petition were served one year back and the proof of it was also submitted before the Respondent Commission, and further stated that the copies of the Petitions were received by the Central office of the above stakeholders, but were not forwarded by them to the office of their respective counsels. The Appellant also stated that the copies of the Petition and IA have been again served upon the stakeholders. Accordingly, the Appellant in the said letter prayed for fast tracking the proceedings before the Respondent Commission.

2.16 Thereafter, the Respondent Commission listed the matter for hearing on 22.01.2019. However, Respondent No. 2/ GETCO again vide its letter dated 19.01.2019 requested for an adjournment. Further, in the said letter, the counsel for GETCO stated that an Appeal has been filed by M/s. OPGS Power Gujarat Pvt. Ltd. before the Hon'ble Supreme Court challenging the open access Regulations, wherein both GETCO and the Respondent

Commission have been directed to file their respective written submissions, and the said matter is listed for hearing before the Hon'ble Supreme Court on 29.01.2019 for final disposal. Accordingly, the counsel for GETCO requested the Respondent Commission to hear the above petition post the outcome of the SLP by the Hon'ble Supreme Court. This was the clear instance to show that GETCO, without any sufficient reasons, tried to defer the matter from the date on which the petition was scheduled to be heard.

2.17 In response to the said letter, the Appellant strongly objected by issuing a letter dated 21.01.2019, and stated that it is the second consecutive occasion when the counsel of GETCO is seeking adjournment. Further, in response to the averment raised by GETCO with regard to the matter pending before the Hon'ble Supreme Court, Appellant stated that any affidavit by the Respondent Commission in the Hon'ble Supreme Court cannot amount to taking away its inherent powers to amend regulations under the Electricity Act, 2003, and accordingly the Respondent Commission ought to hear the above petition and pass final orders.

2.18 Thereafter, the Respondent Commission passed the impugned order dated 01.02.2019 wherein, the matter was adjourned on the ground that M/s. OPGS Power Gujarat Pvt. Ltd. had preferred a Special Leave Petition before the Hon'ble Supreme Court challenging the order passed by the Hon'ble High Court of Gujarat in SCA No. 9138 of 2016 wherein Regulation 21 of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 have been challenged.

2.19 Being aggrieved by the aforementioned actions of the Respondent Commission, the Appellant has now approached this Tribunal through this Appeal.

3. QUESTIONS OF LAW:

The Appellant has raised following questions of law:-

3.1 Whether the Respondent Commission was correct in linking the outcome of the petition, with the outcome of the Special Leave Petition pending before the Hon'ble Supreme Court?

3.2 Whether the legislative power to amend or frame Regulations be curtailed on account of pendency of a separate proceeding relating to the challenge of the said regulations?

- 3.3 Whether the Respondent Commission failed to appreciate that an amendment of a regulation can be done, even if the existing regulation is legal and valid?
- 3.4 Whether a legislative body can amend a regulation in the light of changed ground realities?
- 3.5 Whether the Respondent Commission has to align its open access regulations with the principles and methodologies adopted by the Central Commission qua charges/ tariff as provided under Section 61(a) of the Electricity Act, 2003?
4. **Mr. Sajan Poovayya, learned Senior Counsel appearing for the Appellant has filed the Witten Submissions for our consideration as under:-**
- 4.1 Under the aforesaid Petition, the Appellant is seeking amendment in various provisions of the Principle Regulations (Terms and Conditions of Open Access) Regulations-2011 issued by Respondent Commission, on account of the fact that significant changes in the open access regime have been brought out by the Central Commission, as well as other State Commissions to adhere to the Market requirements. The Electricity Act, 2003 (hereinafter referred to as "Act"), was introduced as a

reformatory legislation. Further, the open access regime was for the first time introduced under the said Act. The Section 66 of the Electricity Act, 2003 casts a mandate upon the Commissions to take steps towards development of market. The open access plays a vital role in promoting competition and in market development. Further, open access is a dynamic regime which has to be improvised and developed keeping in mind the existing market conditions.

4.2 As per Section 61(a) of the Act, the principles adopted by the Central Commission are a reference/ guiding factor for the State Commissions. Pertinently, while the Central Commission as well as other State Commissions have reformed/ modified their open access regulations with changing times, starting from the year 2010, however, the Respondent Commission has not made any significant change to its open access regulations, since the year 2011 except some minor changes regarding Short Term Open Access and its tariff calculation methodology through amendment 1 and amendment 2 in the year 2014.

4.3 On account of the above, the Appellant preferred the aforesaid petition, whereby it sought for approximately 21 amendments of various provisions of the GERC Open Access Regulations, 2011.

4.4. Vide the abovementioned petition, being Petition No. 1672 of 2017, the Appellant herein has sought for amendment of the existing Open Access Regulations in regard to the following:

- a) Regulation 19 dealing with Priority for Open Access;
- b) Regulation 13 & 14 dealing with Flexibility in drawal points under LTOA and MTOA;
- c) Regulation 21 dealing with Setting-off of LTOA charges against MTOA and STOA charges;
- d) Regulation 28 dealing with Optimum scheduling of power exchange transactions;
- e) Start-up power to generators;
- f) Calculation of cross subsidy surcharge;
- g) Regulation 22 dealing with the payment of Scheduling charges;
- h) Bank Guarantee to SLDC for deviation charges;
- i) System study for intra state medium-term and long-term open access transactions;
- j) Rebate on demand charges to captive consumers;
- k) Monitoring and Dispute Resolution Committee for Open Access;
- l) Ensuring independence of SLDC;
- m) Mandatory publication of transmission system plan;
- n) Transmission planning and network expansion;
- o) Review of timelines for Open Access;

- p) Wheeling Charges on consumers connected to STU;
- q) Consideration of applications from defaulters;
- r) Regulation 42 dealing with Relinquishment of LTOA.
- s) and Various others

4.5 However, the Respondent Commission has kept the above petition filed by the Appellant, as pending for a period of almost more than 2 years. The Learned Senior Counsel further submitted that in the impugned order, the Respondent Commission has taken a view that the above petition may be listed only after the disposal of Special Leave Petition, being S.LP. (C) No. 3032 of 2017 now Civil Appeal 5705 of 2019, filed by a separate entity independently, namely, M/s. OPGS Power Gujarat Private Limited, before the Hon'ble Supreme Court.

4.6 The above SLP, which was filed by one of the captive generators in the state of Gujarat, has only challenged the vires of one of the GERC Open Access Regulations i.e. Regulation 21, which is silent on amendment for setting off LTOA charges against MTOA and STOA charges. Apart from the said Regulation, no other provision of the Open Access Regulation are pending adjudication in any judicial forum, other than the Respondent Commission.

4.7 The stand of the Commission is not at all justified, firstly, on account of pendency of the issue of one regulation before the Hon'ble Supreme Court, the same cannot at all act as an impediment for the Respondent Commission to not proceed with the various other amendments sought by the Appellant. Secondly, the pendency of the aforementioned SLP before the Hon'ble Supreme Court qua Regulation 21, does not at all mean that the Respondent Commission cannot make an amendment to the said regulation, prospectively. In fact, the challenge before the Hon'ble Supreme Court is qua the vires of Regulation 21, and even if the Hon'ble Supreme Court upholds the said Regulation, the same does not mean that the Respondent Commission cannot amend the same Regulation on a prospective basis, if the need arises.

Therefore, the argument of pendency of the aforesaid issue of Regulation 21 cannot at all have a bearing on the ability of the Respondent Commission to consider amendment of the said Regulations. In view of the above, the Respondent Commission was completely erroneous in linking a decision on the petition seeking amendment of the GERC OA Regulations with the aforementioned SLP pending before the Hon'ble Supreme Court. Further, there exists no basis for the Commission to adjourn the

petition sine- die, as the Respondent Commission can take an independent view with respect to the subject matter which is before it.

4.8 Due to the dynamic nature of open access, majority of the State Commissions, as well as the Central Commission, have brought out amendments to their respective Open Access Regulations.

4.9 As per Regulation 21, 66, 71 and 74 of the GERC OA Regulations, and as per Regulations 65, 68, 71 and 72 of the 2016 MYT Regulations, the rate of open access charges payable by open access consumers is determined by apportioning the Annual Revenue Requirement (“**ARR**”) of Respondent No. 2 over its LTOA and MTOA consumers in proportion to the transmission capacity or open access used by them. The annual revenue requirement is the aggregate of a fixed return on equity allowed to Respondent No. 2, and various capital costs and operational expenditure incurred by it, after subtracting inter alia its income from other businesses and STOA charges received by Respondent No. 2, from its STOA consumers across its transmission system. In other words, the open access consumers are burdened with imposition of dual penalty/ charges by the Respondent No. 2.

4.10 Accordingly, the learned Senior Counsel prayed that the present appeal ought to be allowed and directions should be issued to the Respondent Commission to expedite the proceedings, and dispose of the petition on merits.

5. Learned Counsel, Shri Pallav Mongia, appearing for the Respondent No. 1 has filed the Witten Submissions for our consideration as under:-

5.1 The GERC has passed the order dated 1.2.2019 in Petition No. 1672 of 2017 and IA No. 7 of 2018 as under:

'4. We note that the aforesaid Petition is filed by the Petitioner in July, 2017, however, the same is not finalized due to time sought by the parties from time to time on different grounds.

5. We also note that M/s. OPGS Power Gujarat Private Ltd. who is one of the Respondents herein- Respondent No 24- had challenged Regulation 21 of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 by filing SCA No. 9138 of 2016 before the Hon'ble High Court of Gujarat. The Hon'ble High Court of Gujarat gave its judgment dated 07.10.2016 rejecting the prayer of the Petitioner therein i.e., M/s OPGS Power Gujarat Pvt. Ltd. Being aggrieved by the aforesaid judgment, the said Petitioner filed SLP No. 3032 of 2017 before the Hon'ble Supreme Court and the matter is listed for hearing on 29th January, 2019. The Respondent GETCO has requested to adjourn the matter on the aforesaid ground also. We therefore, decide to grant adjournment.

6. We also note that the Commission during the last hearing had directed the Petitioner to provide a copy of Petition and IA along with relevant documents to the Respondents who had not received the same and also directed the parties to file their submissions on IA, if any, and liberty was also granted to the Petitioner to make their submissions on the filings made by the Respondents. We once again direct the Respondents to file their submissions, if any, on IA with a copy to the Petitioner within 7 days from the date of

this order and the Petitioner is at liberty to file its reply within 7 days from the receipt of the submission from the Respondents.

7. We Order Accordingly.'

5.2 The Appellant has sought following reliefs in respect of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011: (a) set aside the order dated 01.02.2019 passed by GERC, (b) direction for expediting the proceedings in Petition No. 1672/2017 and IA No. 7/2018, and (c) directions to the GERC not to levy MTOA and/or STOA charges in addition to LTA charges without providing for a set-off for the same transaction as it would amount to double charging from the LTA users, till disposal of the Petition No. 1672/2017 pending before the GERC.

5.3 The Appellant in IA No. 07/2018 before the GERC sought a stay of the operation of Regulation 21 of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 ("**said regulations**"). Further, Appellant, inter alia, sought the amendment of Regulation 21 which is with respect to setting off Long Term Open Access charges against Medium Term Open Access and Short Term Open Access. This

categorically shows the commonality of issues and the reliefs sought before GERC and Hon'ble Supreme Court.

5.4 The Hon'ble High Court of Gujarat has already upheld the constitutional validity of Regulation 21 of the said Regulations. Furthermore, Regulation 13, 14 and 19 have also been the subject matter of the order of the Hon'ble Gujarat High Court. In addition to Regulation 21, the challenge made by the Appellant is also with respect to Regulations 13 and 14 of the said Regulations dealing with the flexibility being given in drawal points under the LTOA and MTOA is also related to the setting off the LTOA charges against MTOA and STOA charges sought to be incorporated in Regulation 21 by the Appellant. The Hon'ble High Court of Gujarat has also considered the distinct features of each of the Regulations, Long Term, Short Term or Medium Term requiring the point of injection and point of delivery to be identified and the reasons as to why the Intra State Open Access Regulations in this regard is valid and correct. Since the transmission charges are separately payable for LTOA as compared to MTOA or STOA based on the identification of the point of injection and point of drawal for each of such Open Access, there cannot be any flexibility being given in the drawal points under the LTOA and MTOA in Regulation 13 or Regulation

14 or Regulation 15 dealing with the procedure for grant of Long Term Access, Medium Term Access and Short Term Access.

5.5 M/s OPGS Power Gujarat Private Limited, Respondent No. 24 (one of the members of the Appellant association) has filed a Special Leave Petition being SLP (Civil) No. 3032 of 2019 against the order of Gujarat High Court dated 7.10.2019. The said SLP has now been registered as Civil Appeal No. 5705 of 2019 and is impending adjudication before the Hon'ble Supreme Court.

5.6 The GERC had filed its reply in the above matter both before the Hon'ble High Court of Gujarat and has also filed an affidavit before the Hon'ble Supreme Court stating its position and defending the said regulations. GERC has placed on record its views on the Open Access Regulations and provisions on which, inter alia, issues are raised by the Appellant in the Petition No. 1627 of 2017. Therefore, GERC cannot be compelled to make amendments to the said regulations which will be contrary to the stand taken by it before the Supreme Court. The Supreme Court has laid down numerous times that Government authorities should not take contradictory stand before different fora.

5.7 Further, all the issues relating to the validity of the said regulations squarely fall within the ambit of the appeal which is sub-judice

before the Hon'ble Supreme Court and GERC is seized of the matter.

5.8 The judicial discipline would require that in a hierarchical system it is imperative that conflicting exercise of jurisdiction should strictly be avoided. Therefore, GERC during the pendency of challenge relating to the constitutional validity of the said regulations before the Hon'ble Supreme Court cannot make amendments to the said regulations/ or pass orders which would affect the adjudication of the matter before the Hon'ble Supreme Court.

5.9 In ***Chhavi Mehrotra v. Director General, Health Services, (1995 Supp (3) SCC)***, the Hon'be Supreme Court has held as follows:

"1.The petitioner, Miss Chhavi Mehrotra, has moved this writ petition before this Court under Article 32 of the Constitution of India for directions for consideration of her admission to the MBBS course against the 15% all-India quota of 1992. This writ petition along with other similar petitions came for consideration and certain comprehensive directions were issued in matters for admission of students in the waiting list to various colleges in the country. In obedience to the orders of this Court a notification dated 28-5-1993 was issued by the Director General of Health Services calling upon the candidates to signify their willingness to be considered for admission under the scheme evolved by the court. Despite the whole matter being seized of by the court, the petitioner moved — and what is disturbing us is that the learned Judge of the High Court entertained — an independent Writ Petition No. 1508(M/S) of 1993 before the Lucknow Bench of the High Court and obtained certain directions which would not only be consistent with the consequences of the implementation of this Court's order but would also interfere and detract from it. Learned counsel would say that it was a direct interference with

the proceedings before this Court. It is a clear case where the High Court ought not to have exercised jurisdiction under Article 226 where the matter was clearly seized of by this Court in a petition under Article 32. The petitioner was eo nomine a party to the proceedings before this Court. It is an unhappy situation that the learned Judge of the High Court permitted himself to issue certain directions which, if implemented, would detract from the plenitude of the orders of this Court. The learned Single Judge's perception of justice of the matter might have been different and the abstinence that the observance of judicial propriety, counsels might be unsatisfactory; but judicial discipline would require that in a hierarchical system it is imperative that such conflicting exercise of jurisdiction should strictly be avoided. We restrain ourselves from saying anything more."

5.10 Furthermore, Hon'ble Madras High Court in **Meenakshi Academy of Higher Education & Research (Deemed University) v. University Grants Commission (2010) SCC On Line Mad 4906**, following the above stated ratio of the Hon'ble Supreme Court in *Chhavi Mehrohtra v. Director General Health Services*, while dealing with a writ petition challenging provisions of the UGC (institutions deemed to be universities) Regulations, 2010 held that once the Supreme Court has taken cognizance of the matter pertaining to the validity of UGC (institutions deemed to be universities) Regulations, 2010, the hands of the High Court are tied to deal with the matter any further on merits. The only course open to the petitioner is to make an appropriate application before the Supreme Court seeking for a direction for inspection. Accordingly, the Madras High Court disposed of the writ petition as

the substance of the matter and the reliefs sought were identical and were already lying before the Supreme Court.

5.11 The GERC being a state commission is independent in implementation of its powers vis-à-vis the CERC being the central commission. CERC admittedly regulates inter-state matters and GERC on the other hand has its own distinct powers under the Electricity Act, 2003 to regulate intra-state open access to electricity, and therefore GERC cannot be compelled to make regulations in consonance with CERC regulations. It is also submitted that this Hon'ble APTEL has previously settled the question raised by the appellant with respect to double charging.

5.12 Before the Supreme Court, the Petitioner's (*M/s. OPGS Power Gujarat Private Ltd*) challenge is not restricted to regulations 13 14 and 21 of the said regulations. In fact, the petitioner have in effect challenged the methodologies set out in the said regulations, which in sequitur is a challenge to the whole regulation. This becomes clear from the (iii) substantial question of law of the Special Leave Petition, which is reproduced herein below:

“iii. Whether the Ld. Gujarat Electricity Regulatory Commission (“GERC”) can be permitted to arbitrarily continue to apply outdated and unjust principles and methodologies for levy of transmission charges in total disregard of the principles and

methodologies specified by the Ld. Central Electricity Regulatory Commission and National Tariff Policy?”

5.13 The Hon'ble Supreme Court has held in various cases that Courts should not undertake futile exercises. GERC has filed its reply before the Supreme Court wherein it has defended the said regulations in its present form and therefore entertaining pleas for amendment of the said regulations would be a futile exercise.

5.14 Further, before the Supreme Court *M/s. OPGS Power Gujarat Private Ltd* in its interim relief had sought similar relief as made by the Appellant in the instant case of restraining GETCO from levying transmission charges, directly or through any other party, for short term open access and medium term open access, which was refused by the Hon'ble Supreme Court. This is an indirect way of seeking the same relief. Furthermore, in light of *Meenakshi (Supra)* the Appellant could have impleaded itself before the Supreme Court but have chosen not to.

5.15 Without prejudice, it submitted that if the APTEL were to hold that GERC must hear the Appellant then in light of the matter pending before the Supreme Court, GERC should not be compelled to entertain submissions with respect to Regulations 13, 14, and 21

of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011.

5.16 For the reasons mentioned herein above, and on account of judicial propriety and judicial discipline, it is respectfully submitted that there is no error on the part of the GERC in not dealing with Petition No. 1672 of 2017 during the pendency of the proceedings before the Hon'ble Supreme Court. GERC hereby opposes the prayers of the Appellant and defends its order dated 01.02.2019.

6. Learned Senior Counsel, Shri M.G. Ramachandran, appearing for the Respondent No. 2 has filed the Witten Submissions for our consideration as under:-

6.1 The Appellant is seeking a mandate for legislation by the State Commission which is not permissible. There cannot be any direction to legislate in a particular manner or even that there should be a legislation or amendment to the legislation. It is well settled principle that no court can issue a mandate to a legislature to enact a particular law. The learned senior Counsel to substantiate his submissions has placed reliance upon the judgment of the Hon'ble Supreme Court in ***State of U.P. and Ors. vs. Anil Kumar Sharma and Ors (2015) 5 SCC 716.***

- 6.2 The functioning of the Regulatory Commission in regard to regulations is legislative function and there cannot be any mandate to the State Commission to amend the Regulations or frame new regulations nor can any time period be specified for the State Commission for any amendments or legislation.
- 6.3 The primary aspect of the above petition in regard to Regulation 21 and Regulations 13, 14 and 19 which are related to Regulation 21 have been the subject matter of a decision made by the Hon'ble High Court of Gujarat in SCA No. 9138 of 2016 vide Order dated 07.10.2016. In the said Order the Hon'ble High Court of Gujarat has dealt extensively with the scope of Regulation 21 of the aforesaid regulations and rejected the similar claim made by one of the Captive Power Plant Owner namely, M/s OPGS Power Gujarat Private Limited (Respondent No. 12).
- 6.4 A perusal of the above order dated 07.10.2016 would show that the challenge made by the above Captive Generating Company in the said petition (No.1672 of 2017) relate to the scope of Regulation 21 of the aforesaid regulations. The judgement and Order has also taken note of the following Regulations, namely:

- a) Regulation 10 providing the criteria for granting Long Term Access or Medium-Term Access or Short Term Open Access;
- b) Regulation 13 dealing with the procedure for grant of Long-Term Access;
- c) Regulation 14 dealing with the procedure for Medium Term Open Access;
- d) Regulation 15 dealing with the procedure for Short Term Access;
- e) Regulation 19 dealing with the allotment of priority;
- f) Regulation 21 challenged before the Hon'ble High Court of Gujarat in regard to the transmission charges;
- g) Regulation 42 dealing with under-utilisation or non-utilisation of Open Access Capacity in Intra State Transmission System.

6.5 It would thus appear that the above order deals with the validity of the Regulations 21 notified by the State Commission for the Intra State Transmission in the context of the Regulations notified by the Central Electricity Regulatory Commission for the Inter State Transmission System in regard to the determination of transmission charges applicable.

6.6 M/s OPGS Power Gujarat Private Limited, a captive generator has filed a Special Leave Petition being SLP (Civil) No. 3032 of 2019 challenging the Order dated 07.10.2016 of the Hon'ble High Court of Gujarat. The said Special Leave Petition registered now as Civil Appeal No 5705 of 2019 is pending before the Hon'ble Supreme Court. In the Special Leave Petition, questions of law has been raised related to the Regulations.

6.7 In the circumstances mentioned above, the aspects related to Regulation 21 and other Regulations related to or connected with Regulation 21 or otherwise being considered before the Hon'ble Supreme Court, and raised in the petition No. 1672 of 2017 pending before the State Commission may not be directed to be gone into at this stage by the State Commission pending the Civil Appeal No 5705 of 2019 before the Hon'ble Supreme Court particularly in the context of the decision with detailed analysis having been made by the Division Bench of Hon'ble High Court of Gujarat in the Order dated 07.10.2016. The specific stand taken by the respective parties including the State Commission in the said proceedings after consideration of which the judgement dated 7.10.2016 was passed. The Regulations 13 and 14, for which the Appellant has sought for amendment in its petition

before the Respondent Commission, are linked with Regulation 21. Therefore, since Regulation 21 is sub-judice before the Hon'ble Supreme Court, no amendment can be sought with respect to Regulations 13 and 14 as well.

6.8 Therefore, in view of the foregoing submissions, there is no error apparent in the impugned order passed by the Respondent Commission.

7. **We have heard the learned senior counsel appearing for the Appellant, the Respondent Commission and the Respondent No. 2 at a considerable length of time. Accordingly, based on the arguments/ submissions of the parties, the only limited issue for consideration before this Tribunal is that:-**

“whether the Respondent Commission could sine-die adjourn the proceedings in the petition of the Appellant, on account of pendency of one of the Regulations of the GERC OA Regulations, being challenged before the Hon'ble Supreme Court”.

8. **Our consideration and findings :-**

8.1 To decide upon the issue, we need to first refer to the Amendments sought for by the Appellant in its Petition before the Respondent Commission, which are indicated in the submissions of the Appellant at Para 4.4 above. A perusal of the above shows that there are various provisions of the GERC OA Regulations,

2011 which the Appellant has sought for amendment by the Respondent Commission. However, it is relevant to note, as intimated to this Tribunal by the parties, that out of the above provisions of the Regulations, one of the Regulations, being Regulation 21, is under challenge before the Hon'ble Supreme Court, in Civil Appeal No. 3032 of 2019 by a power producer namely, M/s OPG Power Gujarat Ltd, who is one of the captive generators in the state of Gujarat. The said company has filed the above civil appeal challenging the vires of the above Regulation. The Counsel appearing for both, the Respondent Commission and the Respondent No. 2, have contended that based upon the above Civil Appeal pending before the Hon'ble Supreme Court, the Commission cannot go into the petition filed by the Appellant seeking amendment of various Regulations.

8.2 In fact, we cannot agree to the above view of the Respondents. A petition seeking amendment of a regulation does not mean that the existing regulation is erroneous, or there is some error. Even if the aforesaid Civil Appeal is rejected by the Hon'ble Supreme Court, the Commission can always choose to amend its regulations, by exercising its legislative powers available under Section 181 of the Act, prospectively.

8.3 Therefore, we are of the view that there exists no reason for the Respondent Commission to *sine-die* adjourn the petition of the Appellant. The Commission has to dispose of the said petition, in accordance with law, instead of lingering the proceedings unwarranted. We have already observed above that the proceedings before the Hon'ble Supreme Court cannot come in the way of exercising of independent legislative functions by the Respondent Commission.

8.4 Further, the Appellant has also brought to our notice that the Central Commission, as well as various State Commissions such as Rajasthan, Punjab, West Bengal, Andhra Pradesh, Bihar, Delhi U.P., Maharashtra etc. have brought in amendments to their Open Access Regulations, in order to align them with the dynamic nature of the Open Access Market.

8.5 It would thus be evident that the Central Commission, as well as the various State Commissions are in fact, carrying out amendments in their respective Open Access Regulations, for the purpose of market development as provided under Section 66 of the Act, as well as for introducing reforms. The Respondent Commission cannot keep a closed eye to the regulatory

developments brought out by the CERC, and other State Commissions, for the purpose of creating conducive environment for development of the power market. Further, it may also be pointed out that open access charges are part of overall tariff stream of the Transmission and Distribution Licensees, and accordingly the principles of Section 61 of the Act, including adherence to commercial principles as envisaged under Section 61 (b), have to be complied with, and for the said purpose, Commissions are required to carry out regular amendments.

- 8.6 As a matter of fact, that Respondent Commission is not bound by the Regulations / amendment brought out by the Central Commission and other State Regulatory Commissions but the principles and methodologies of the Central Commission carry a strong persuasive value in terms of Section 61 of the Electricity Act. In the present Appeal, the Appellant is only contending that the Respondent Commission should consider the principles and methodologies adopted by the Central Commission and bring out requisite amendments in its Open Access Regulations, 2011 applying its own prudence and keeping in mind Section 66 of the Act which requires the Appropriate Commission to endeavour to promote the development of a market (including trading) in power.

8.7 It is relevant to mention that the plea for amendment of Regulations is quite different from the challenge to a Regulation. A Regulation can be amended at any time by invoking the legislation jurisdiction. Accordingly, any decision of the Hon'ble High Court, Hon'ble Supreme court with respect to challenge to an existing Regulation (Regulation 21) may be taken by observing that there is no arbitrariness or illegality in the said regulations. We have been informed by the counsel of the Appellant that the Gujarat Electricity Regulatory Commission carried out last amendment in its Open Access Regulations way back in the year 2014. Accordingly, we are of the view that the Respondent Commission in view of the above developments, should expeditiously dispose of the petition of the Appellant.

8.8 Further, with respect to the reliance placed by the Respondent No. 1 & 2 on the decisions of the Hon'ble Supreme Court in ***State of U.P. and Ors. vs. Anil Kumar Sharma and Ors (2015) 5 SCC 716*** and other judgments, mentioned supra, wherein it was held that no court can issue a mandate to a legislature to enact a particular law, we are of the view that the said judgment is not applicable to the present case as it is not for issuing any directions

to the Respondent Commission to amend its Regulations, or enact a particular law.

8.9 Section 181 of the Act provides a procedure to be followed by a State Commission for amendment or enactment of Regulations, which also includes prior publication under Section 181 (3). The same enables all stakeholders, which will include the Appellant, and the Respondent No. 2 to make their detailed submissions during public consultation process. It thus emerges that the procedure for amendments would consume considerable time and as such, it necessitates to initiate at its earliest.

8.10 The Appellant and the Respondent No. 2 are well within their rights to raise all their arguments before the Respondent Commission. **However, at this stage, we refrain from making any observation on the merits of the Petition filed by Appellant before the Respondent Commission.**

ORDER

For the forgoing reasons, as stated supra, we find merits in Appeal No. 262 of 2019, and accordingly, it is allowed. The impugned order dated 01.02.2019 passed by Gujarat Electricity Regulatory Commission in Petition No. 1672 of 2017 is hereby set aside, in

accordance with our findings and directions set out in Para 8.1 to 8.10 above.

We direct the Respondent Commission to expeditiously conduct hearings in Petition No. 1672 of 2017, and pass appropriate orders as expeditiously as possible but not later than three months from the date of passing of this judgment.

No order as to costs.

Pronounced in the Open Court on this 2nd day of March, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

PR