COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 92 OF 2021 &
IA NO. 1046 OF 2020

Dated: 12th August, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson

In the matter of:

Srikalahasti Pipes Limited
Rachagunneri-51764 1,
Srikalahasti Mandal, Chittoor
District, Andhra Pradesh, India ….Appellant

Versus

1. **Andhra Pradesh State Power Distribution Company Limited**
   No.19-13-65/A,
   Srinivasapuram,
   Tiruchanoor Road,
   Tirupati – 517 503
   Chittoor Dist A.P. INDIA

2. **Andhra Pradesh Electricity Regulatory Commission**
   4th Floor, Singareni Bhavan, Red Hills,
   Lakdl-K a-Pul, Hyderabad – 500004 …..Respondents

Counsel on record for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Sanjay Jhanwar
Mr. Prakul Khurana
Mr. Ankit Sareen
Mr. Rajat Sharma

Counsel on record for the Respondent(s): Mr. Ardhendumauli Kumar Prasad
Mr. Ushasri Gavarraju
Mr. Ashish Madan **for R-1**

Mr. Sridhar Potaraju
Mr. Shiwani Tushir
Mr. Aayush Shankar **for R-2**

JUDGMENT ON REFERENCE

1. This is Referred from Court – II, since the Hon'ble Members of the Bench differed in their opinion in terms of order dated 27.04.2021.

2. Minimal facts, which are not in dispute, pertaining to the background under which the present Reference is made are as under:

3. The Appellant, apparently, an incorporated company is engaged in the business of manufacturing and supply of Ductile iron pipes. To run the manufacturing unit, it requires supply of electricity. It has supply of power through two electricity connections, one is having capacity of 132 KVA and is HT-III-A Industry General connection with a contracted demand of 13 MVA, and the other connection pertains to HT-III-C Energy Intensive Industry connection for its Ferro Alloys plant with contracted demand of 17 MVA.

4. The appeal came to be filed aggrieved by the impugned order of the Commission pertaining to retail sale of electricity during FY 2020-21 dated

10.02.2020 approving ARR and FPT for FY 2020-21. The challenge to the impugned order is on two counts:

i) Wrong/miscalculation of cross subsidy charge

ii) Blanket ban imposed upon Ferro Alloys industries being an Energy Intensive industry for procuring power from open access.

5. The Appellant approached this Tribunal questioning the impugned order in respect of above two counts contending that it is not just the Appellant but several other industries like PV Ingots, Cell manufacturing units, Polly Silicon industry and Aluminum industries though are intensive industries, imposition/ban is restricted/limited only to Ferro Alloys industries from purchasing power through open access, therefore, according to Appellant it is nothing but creating unreasonable differentiation within a Class.

6. Contention of the Appellant is that very aim and objective of Electricity Act of 2003 was to ensure efficiency, therefore, competition was brought in. The legislation recognized the important role played by the Regulatory Commissions in the challenges that would arise by creating competition in power market. Accordingly, the legislation felt one of the important tools of introducing competition would be open access in the electricity industry, whereby it creates choice/option to buyers and

suppliers of electricity. Since objective in fact finds place in the Statement of Objects, therefore, according to the Appellant, the definition of 'Open Access' under Section 2 (47) of the Act defines open access as non-discriminatory provision. In other words, there should not be any discrimination in providing open access to the consumers. Therefore, Appellant contended that imposing ban on Ferro Alloy Industry alone is nothing but curtailing the right of non- discriminatory open access for whatever reason it may be.

7. The Appellant has also placed reliance on Section 42 of the Act which deals with duties of distribution licensees with reference to open access. Sub-Section 2 along with first proviso, which was introduced in 2003, later came to be amended with effect from 15.06.2007 and so also fifth proviso to Sub- Section 2 of Section 42 of the Act was relied upon. Appellant's contention before the Division Bench was that a conjoint reading of Section 42 (2) along with first and fifth provisos explicitly expresses that as a category all consumers enjoying more than 1 MW are to be treated as open access consumers, who do not require any permission or approval from the commission to exercise their right of open access. Hence, the Appellant's stand is, in spite of such clear provision, the Appellant, who is enjoying connection of 17 MVA cannot be

restricted/limited from purchasing power for its Ferro Alloy industry through open access.

8. For the reasons stated above, they contended before the Division Bench that the Respondent Commission totally ignored and failed to appreciate the non-discriminatory open access to the power grid, which was introduced by virtue of 2003 Act introducing competition in the electricity market, so that their competency and efficiency would increase. They further contended that the stand of the Respondent that the tariff levied on Ferro Alloys being one of the Energy Intensive industry is much lower when compared to other industries cannot be appreciated, since similar other industries, as stated above, such as PV Ingots, Cell manufacturing units, Polly Silicon industry and Aluminum industries do not have such restriction, however they enjoy same tariff for that year, hence, it cannot be said that Ferro Alloys industry is the only industry, which is enjoying the benefit of lower tariff. Hence, there is no rationale according to Appellant in the impugned order why ban/restriction to purchase power from open access was imposed only on Ferro Alloys industry and not on other similarly placed industries, which have the same tariff like the Appellant. Further, it is discriminatory and also prejudicial to the interest of one of the similarly placed industry, hence argument of Respondent, as stated above, is not justified.

9. So far as other contention of the Respondent that Ferro Alloys industry has been getting the benefit of extra incentives on tariff, and therefore, there is justification to treat the Ferro Alloys industry differently also cannot be appreciated, since the so-called benefits in the form of incentive was enjoyed by Ferro Alloys industries in the previous years, but no such incentive/benefit is being offered in the year which was under consideration before the Bench.

10. Then coming to the case of the Appellant, the Appellant contends that it commissioned its Ferro Alloys plant only in January 2020 and the said year being the first year such incentives were provided to the Appellant. It is further contended that when such incentives were offered in the earlier years to Ferro Alloys industries, there was no blanket restriction on the Ferro Alloys industry to purchase power only from the DISCOM operating in that area. However, even if some incentives were to be offered, the same cannot take away the statutory right allowed to the Appellant, since it would amount to acting against the very spirit of Section 42 of the Act.

11. As against this, the Respondent contend that Section 42 of the Act does not confer any absolute right to the Appellant so far as open access. The Commission is obligated/mandated to consider all relevant factors in terms of Section 42 while granting open access. Therefore, the words

used in the Section i.e., 'operational constraints' and 'cross subsidies' would go to show that the Commission has an obligation to keep in mind all relevant factors on case to case basis. The words used by the legislature in framing a statute has to be given effect to and there cannot be any deviation from the simple and straight forward reading of the same. Therefore, according to Respondents, the fifth proviso only mandates that the Commission must notify Regulations within a period of five years from the commencement of 2003 Act for providing open access to consumers, who require electricity supply exceeding 1 MW. Hence, the said proviso cannot be read in isolation and it has to be read harmoniously with the enacting part of the statute.

12. The controversy is with regard to different opinions expressed by the Members of the Bench with reference to Section 42, open access, whether it is an absolute right or whether it is a right which could be subjected to conditions/restrictions. The Appellant has placed a comparative chart column-wise, the views of Hon'ble Judicial Member and Hon'ble Technical Member in the order dated 27.04.2021.

Comparative chart of the views of the Hon'ble Judicial member and the Hon'ble Technical member in the order dated 27.04.2021 in Appeal No.92/2021.

Hon'ble Judicial member	Hon'ble Technical member
The right to open access though a reform brought in by the Electricity Act, 2003, the same is not an absolute right. The words "*non-discriminatory*" appearing in the definition of *open access* given in	The State Commission **shall** introduce open access in such phases and subject to certain conditions…."

Section 2(47) do not connote that such right is to be enforced unexceptionally. The conditions that may be put in position for availing such right would have to be adhered to, subject to compliance with such conditions, there can be no discrimination. **(Para 10, Page 37)** It would be incorrect to say that a conjoint reading of Section 42(2) and fifth proviso confers an absolute right of open access. **(Para 22, Page 45)** The statute itself clarifies the mandate that the State Commission '*shall*' have due <u>regard to all relevant factors including such cross-subsidies, and other operational constraints in allowing open access</u>. The effect of the fifth proviso to section 42(2) is only to specify the timeline (five years) within which regulatory framework for open access to all consumers that require supply of electricity exceeding one megawatt is to be put in position.	The first proviso provides that such open access **shall** be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission. The fifth proviso provides the State Commission **shall**, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, **provide such open access to all consumers** who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt. **(Para 80, Page 22-23)** Section 42 (3) provides that where any person, whose premises are situated within the area of supply of a distribution licensee, (not a local authority engaged in distribution of electricity) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, <u>such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.</u> **<u>(Para 81, Page 23-24)</u>** Further Section 42(8) provides that the provisions of sub-sections (5), (6) and (7) shall be without prejudice to **right which the consumer may have** apart from the rights conferred upon him by those sub-sections. From the readings of Section 42 it is obvious that the State Commission **shall** provide the open access in a phased manner subject to specified conditions as per the Regulation notified by the State Commission. the eligibility criteria mentioned in the Open Access regulation talks about adequacy of transmission system and it nowhere

	prescribes any other condition baring any of the industries from availing open access, let alone ferro alloys. **(Para 83-84, Page 24-25)** The State Commission has interpreted the provisions of open access as given in Section 42 of the Electricity Act, 2003 that the open access will be subject to payment of cross subsidy and also other relevant factors. It emerges from the submission of the Discom that the other relevant factor is the fact that if open access is allowed then Discom will not be able to recover fixed charges. The question which arises for our consideration is that whether the State Commission can take a decision in the interest of Discom at the cost of the consumer? Obviously, the answer is 'No'. **(Para 92, Page 29**)
It is not correct to say that Commission has taken commercial decision on behalf the Consumer. It is not fair to assert that only what is beneficial can be enforced leaving the consumer to leave the supplier high and dry in aspects that concern the legitimate financial interests of the Commission. **(Para 11, Page 38)**	The argument that the Commission has exercised its power as a regulator to ban open access to the Appellant is in view of the fact that if the open access is allowed then Discoms will not be able to recover their fixed charges which also means that the State Commission has banned the open access to the Appellant to help the Discoms to recover their fixed charges cannot be accepted. The Commission cannot take a decision in the interest of Discoms at the Cost of consumer. **(Para 92, Page 28-29)** The Appellant as consumer is free to exercise the right to select the supplier of power, be it Discom or through open access. The selection exercise is a commercial decision which the consumer would make after considering all aspects in his favour. In this case the Appellant has submitted that the permission for open access is required to procure power at time from the market when it is available at tariff lower than the tariff being charged by Discom. This is matter of his choice and as a consumer he has this right to

	select the supplier. And thus, decision of the State Commission to force the consumer to procure power only from the distribution licensee is therefore against the very spirit of the Electricity Act, 2003. **(Para 88-89, Page 29-30)** Even as per the eligibility criteria of the open access, same is dependent upon adequacy of the transmission/ distribution system and it nowhere talks about any other condition. **(Para 84, Page 25-26)**
Section 61 and 62 guide the process of determination of tariff which enumerates various relevant factors i.e. supply of electricity must be organized on commercial principles, there is efficiency and economical use of resources, consumer's interest is safeguarded, and cost of electricity is recovered in a reasonable manner and it being permitted, gives right to the Commission to differentiate basis consumer's load factor, power factor, voltage, total consumption of electricity during any specified period, the nature of supply and the purpose for which supply is required. Thus, the statute clearly permits and provides that the regulatory commission can differentiate in the matter of tariff based on various factors. As provided under section 42(2) of the Electricity Act. ("……having due regard to all relevant factors including such cross subsidies and other operational constraints") is of wide amplitude and the word 'including' proves it be illustrative stipulating some of the relevant considerations. A harmonious interpretation has to be adopted for *fifth proviso* to Section 42(2) which cannot be read in isolation. The *relevant factors* to be taken into consideration include the overall scheme and other provisions of the Electricity Act, particularly Sections 61 and 62, it being incorrect to project *open access* as	These provisions of Section 62 are in the context of determination of tariff i.e. regarding preference to any consumer and therefore should not be construed in any other manner in any other context. (**Para 82, Page 30)**

a standalone right that overrides all other provisions of the statute. (**Para 25-26, Page 48-50**)	
In view of the facts, Commission is justified to treat ferro-alloys industry as a separate class within the larger group known as the energy intensive industry. The State Commission is under a statutory mandate to keep in mind the multi-year tariffs. Commission had been directing from FY 2004-05 to FY 2012-13 the Ferro-Alloy Industry to draw entire power requirement from Discom, such orders were not challenged. In FY 2013-14 this condition was deleted due to inability of Discom to meet continuous supply. From FY 2009-10 to FY 2015-16, some conditions relating to deemed consumption were imposed. However, these minimum energy off-take and deemed consumption conditions were done away with from FY 2016-17. Keeping these factors in mind, open access was denied to Ferro Alloys Industry in the order of FY 2019-20 also. The Open access is allowed subject to payment of CSS. Average Cost of Supply (Rs. 6.47 per unit) for Ferro Alloys Industry is more than the Tariff applicable (Rs.4.95 per unit) for the said category of consumers. In terms of the tariff determined by APERC, having regard to the nature of consumption by the said Industries, only fixed Energy Charges i.e. Rs. 4.95 per unit are payable there being no addition of demand charges and provides that CSS payable is 'Nill'. If ferro Alloys is allowed to source power through open access, Discoms would have no opportunity to recover fixed charges. Thus, the Ferro Alloy industry as a class is separate from the other Energy Intensive Industries. (**Para 29-30, Page 51-53**)	The State Commission has differentiated between the energy intensive industries and the Ferro Alloy industry for the purpose of application of open access. The State Commission by the Impugned Order has banned open access for Ferro Alloy Industries out of the category of energy intensive industries. Therefore, the discrimination in allowing open access to consumers by the State Commission is against the Electricity Act, 2003. **(Para 87, Page 31)** The provision of the open access have been made primarily with a view to inculcate competition in the power sector by providing open access the consumer is being given a choice to procure power from a source other than the distribution licensee. The decision of the State Commission to force the consumer to procure power only from the distribution licensee is therefore against the very spirit of the Electricity Act, 2003 and is therefore illegal and bad in law. **(Para 91, Page 31)**

13. Though in the appeal before the Division Bench, the following two issues were raised, the first issue was not sought to be adjudicated upon, since the very same issue is pending adjudication before the Hon'ble Supreme Court. Therefore, the Bench dealt with only second issue regarding the ban on open access imposed in terms of impugned order on Ferro Alloys industries.

14. To understand the respective contentions raised by the Appellant as well as the Respondent, it would be relevant to refer to relevant provisions of the Act. The first and foremost provision would be the definition of 'Open Access', which is defined under Sub-Section 47 of Section 2 of the Act, which reads as under:

> *"'open access' means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission"*

15. The definition of open access starts with the word 'non-discriminatory'. This open access, which is required for the use of transmission lines or distribution system for supply of electricity was defined as non-discriminatory. Then, Section 42(2) of the Act refers to

duties of distribution licensees, vis-a-vis open access, which reads as under:

> ***"42. (Duties of distribution licensee and open access)***
>
> *(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:*

16. When 2003 Act was brought into force, the first proviso read as under:

First proviso to section 42 (2) of the Electricity Act, 2003 (before amendment) was as follows:

> *"Provided that such open access **may** be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission".*

17. Subsequently, it was amended with effect from 15.06.2007. The amended proviso reads as under:

> *"Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission."*

18. Fifth proviso of Sub-Sections 2 of Section 42 reads as under:

> *"Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations,* ***provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt."***

19. By reading the above provisions, it is clear that the amendment had done away with the option of giving open access prior to elimination of cross subsidy. Therefore, it became mandatory to grant open access by the Commission only on payment of surcharge/wheeling charges. A conjoint reading of all these provisions i.e., Sub-Sections of Section 42 along with amended first and fifth provisos, it is crystal clear that as a category, all consumers, who fall within the range of having supply of more than 1 MW, have to be granted open access on demand or on request. In other words, it means that there should not be any further condition i.e., such open access should not be subjected to the process of approval by the Commission, so that the consumer would exercise its right of open access, that is to say, there is no obligation subjecting the matter for the scrutiny and approval by the Commission to grant open access. ***"Whether the present Appellant would fall within the range of required quantity of electricity to enjoy open access"***. Obviously, the Appellant is having

connection of 17 MVA, therefore, it falls within the required range indicated in the above provisions. However, Sub-Section 2 of Section 42 allows the right of open access to be enjoyed on payment of cross subsidy surcharge or other operational constraints. Apparently, the Appellant is not claiming any exemption from paying cross subsidy. So also Respondent has not denied open access on account of operational constraints.

20. Electricity Act of 2003 envisages determination of tariff and levy of cross subsidy surcharge whenever power was procured through open access. It goes without saying that the Appellant is required to pay cross subsidy charges as per the calculations made by the concerned authority, which is never the grievance of the Appellant.

21. According to Appellant, the Respondent Commission disallowed open access to the Appellant on the ground that the calculation of cross subsidy surcharge came to nil for Energy Intensive industries, hence, the commission opined that there has to be a restriction to extend open access to Ferro Alloy industries.

22. It is surprised to know that the Respondent Commission though opined that several other industries fell in the category of Energy Intensive industry as a whole, the so-called compulsion/restriction/ban concerned was imposed only on Ferro Alloy industries. By such imposition only to

Ferro Alloy industry, it is carving out a separate category from Energy Intensive industry as a whole. Unless there is rationale behind doing so, which is acceptable not only on facts but also in accordance with law, the said action of the Respondent Commission cannot be appreciated.

23. Let us now examine whether any special reasons were assigned to carve out Ferro Alloys industry as a separate entity from General Group of Intensive industry-HT. It is seen that open access to the power grid is being an essential element of importance introduced in the electricity market to create efficiency and competition, it should be non-discriminatory. It is the stand of the Appellant that a consumer in terms of statute has liberty to take decision in its commercial wisdom as a prudent business person, naturally the consumer would choose to opt the seller of electricity, which sells electricity at a competitive rate, within the frame work of the statute.

24. We note that the Respondent Commission seems to have exercised its power as a regulator that, if open access is allowed, then DISCOM will not be able to recover their fixed charges, therefore it would affect the financial interest of the DISCOMS. The Appellant contends that this opinion of the State Commission is nothing but an exercise to help the DISCOMs to recover their fixed charges. Such a ban is nothing but a decision taken at the cost of consumer and only in the interest of the

DISCOM. According to the Respondent DISCOM and the Commission, there is no ban, as understood in the legal sense, upon Ferro Alloys industries from procuring power through open access. Only for the relevant financial year the request of the Appellant was considered and rejected. For this, they contend that during the comprehensive exercise undertaken for fixation of tariff, the Commission having regard to all relevant factors, i.e., having regard to the very fact that tariff determination being a complex process, several decisions on various aspects are to be considered keeping in mind all relevant factors. Since Ferro Alloys are not paying any minimum energy off-take and deemed consumption charges, and further they enjoyed incentives given by Government to Ferro Alloy industries over a number of financial years, therefore, according to Respondent Commission the argument of the Appellant that there is no safeguarding of interest of the consumer is totally incorrect and they further contends that in the larger public interest of all stake holders which also include the generating company, the transmission company and distribution company, tariff determination has to be done under various topical heads after hearing all the stake holders concerned. All 'relevant factors', according to them, in Section 42(2) include those contained in section 61 and 62. The Commission, according to the Respondents, kept in its mind several factors while declining open access to the Appellant.

They are non-imposition of 85% load factor on Ferro Alloys industries by allowing a lower load factor of 52 to 60%.

25. It is argued that the tariff rates fixed for Ferro Alloys industries was much lower than the actual cost of service extended by the DISCOM. Several incentives were given by the Government to Ferro Alloys industries over several financial years. Ferro Alloys industry was not paying any minimum energy take-off and deemed consumption charges. ***"Whether these would constitute relevant factors as envisaged under Section 42(2) of the Act?"*** The financial year, we are concerned with, apparently, did not extend advantage of incentives which were earlier granted by the Government concerned. While determining the tariff under Section 62, the State Commission must ensure that generation, transmission and distribution are conducted on commercial principles so as to encourage competition and ultimately safeguard the interest of the consumers at large. We notice that Section 62 refer to the provisions which extend certain preference to certain consumers. Whether such preference envisaged under Section 62 could be imported into Section 42(2) vis-a-vis open access. While determining the tariff under Section 62, it is permissible for the Respondent Commission to exercise its power to determine different tariff to different consumers on the basis of load factor, power factor, voltage and total consumption of electricity during any

specified period including the nature of supply and the purpose for which the power supply is required. If different tariffs have been stipulated for different category of consumers, as stipulated under Section 62(3), the same exercise cannot be permitted to be exercised while granting open access. It is opined that based on the category under which a particular consumer falls, tariff could be varied from category to category depending upon the factors stated above. But, it does not contemplate that similar factors could be taken into consideration for restricting availment of electricity though open access. The Respondent Commission seems to have imposed the so-called ban/restriction on the ground of incentive or concessional tariff said to have been extended to the Ferro Alloy Industries.

26. Apparently, the Appellant started its manufacturing unit when there was no benefit of any intensive to Ferro Alloy industry during the financial year in question. That apart, out of Energy Intensive industry group only, Ferro Alloy industry is carved out separately. But there is no rationale why other energy intensive industries were allowed to have open access and why only Ferro Alloys industries are left out. All Energy Intensive industries are to be treated at par with no additional benefit of any nature. Definitely it amounts to discrimination, if the restriction is only to the Ferro Alloys industries and not to other Energy Intensive industries.

27. It is to be remembered that the objective behind making a provision of open access, primarily was with a definite motive and intention to develop competition in the power sector by providing open access, so that the consumer of power gets an option to choose from which source he could procure power other than the distribution licensee within whose area the consumer is situated. It is difficult to accept the contention that Respondent Commission was justified in making a decision which carves out Ferro Alloys industry alone from the category of Energy Intensive industries. The selection of the source from where the power has to be procured definitely is a commercial decision which has to be exercised with commercial prudence. The consumer is entitled to consider all factors, which tend to fall in his favour and then decide to procure power at time from the market when it is favourable tariff to the consumer. This means, it is the option of the consumer rather it is the right of the consumer to select the supplier of power. If this right is interfered with by the State Commission, it would mean that the consumer is forced to procure power only from the distribution licensee, which would definitely defeat the very purpose and objective why open access was introduced.

28. The State Commission, for that matter any Commission, constituted under the Electricity Act is a Regulator to regulate the tariff determination. It is a neutral body. It has to take decisions in the larger public interest.

By granting open access, the consumer who choses open access, definitely has to pay the cross-subsidy surcharge and wheeling charges, which is not in dispute. The dispute is the restriction imposed on the Appellant to purchase power through open access. This decision of the Commission seems to be only to see that DISCOMs are not deprived of receiving higher tariff payable by Energy Intensive industry. It is noticed that the eligibility criteria contemplated for obtaining open access, only refers to adequacy of transmission system and none of the provisions pertaining to open access either in the Act or the Regulations indicate that there could be prescription of any condition like restricting the Ferro Alloy Industries from purchasing power through open access. As long as the consumer, who obtains open access is ready to take cross subsidy burden, there should not be any obstruction or restriction or limitation to enjoy the benefit of open access. The relevant factor seems to be that if the Ferro Alloys industries are allowed to have open access, then DISCOM in question will not be able to recover fixed charges. This definitely cannot be the relevant factor and cannot be at the cost of consumer under the guise of taking into consideration relevant factor, which is not applied evenly to all Energy Intensive industries. The State Commission seems to have acted only keeping in its mind the interest of DISCOM at the cost of the consumer by obstructing the right of the consumer to enjoy the open access, which is non-discriminatory under the

Act. Over and above this, it is surprising to note that even if some concessions or incentives were extended to Ferro Alloys industries in the past, it cannot become a ground or relevant factor to stop the Ferro Alloys industries to exercise the option of procuring power through open access subsequently. It is nothing but discrimination. Allowing open access to some industries and disallowing such benefit to other similarly placed industries definitely amounts to discrimination, which is against the spirit of Electricity Act of 2003. Therefore, the open access in terms of Section 42 read with the definition of 'open access' under Section 2(47) explicitly goes to show that there cannot be any compulsion or restriction which comes in the way of right to have open access. Hence, we opine that there cannot be a compulsion on the Appellant not to procure power through open access. It would only compel the Appellant to purchase power from the DISCOM concerned, which is against the very philosophy of the 2003 Act. Accordingly, the Reference is answered.

29. Pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

30. Pronounced in the Virtual Court through video conferencing on this the **12th day of August, 2021**.

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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