

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

**APPEAL NO. 231 OF 2015 &
APPEAL NO. 251 OF 2015**

Dated: 28th July, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

APPEAL NO. 231 OF 2015

In the matter of:-

**Uttar Pradesh Power Corporation Ltd
Shakti Bhawan, 14, Ashok Marg,
Lucknow, Uttar Pradesh**

.... Appellant

Versus

- 1. Uttar Pradesh Electricity Regulatory
Commission
II Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Khand,
Lucknow – 226010** **.... Respondent No.1**
- 2. Uttar Pradesh State Load Despatch
Centre
Shakti Bhawan, 14, Ashok Marg
Lucknow, Uttar Pradesh** **.... Respondent No.2**
- 3. Uttar Pradesh Power Transmission
Company Limited
Shakti Bhawan, 14, Ashok Marg
Lucknow, Uttar Pradesh** **.... Respondent No.3**
- 4. Noida Power Company Limited,
Commercial Complex, H Block,
Alpha II Sector, Greater Noida,
Uttar Pradesh** **.... Respondent No.4**

**Shakti Bhawan, 14, Ashok Marg
Lucknow, Uttar Pradesh**

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Counsel for the Appellant: Mr. Rahul Srivastava

Counsel for the Respondent: Mr. C K Rai
Mr. Paramhans for R-1

Mr. M. G. Ramachandran
Mr. Vishal Gupta
Mr. Kumar Mihir for R-2

Mr. Amit Kapur
Mr. Vishal Anand
Ms. Pallavi Mohan
Mr. Sambit Panja for R-3

Mr. Rakesh Bajpai for R-4

JUDGMENT

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The Appeal No. 231 of 2015 is being filed by Uttar Pradesh Power Corporation Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the legality, validity and propriety of Order dated 21/07/2015 (Review Order) passed in Petition No. 934 of 2014 and Petition No. 976 of 2014 and Original Order dated 10/09/2014 passed in Petition No. 934 of 2014 (“**Impugned Orders**”) by the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as the '**State Commission**').
2. The Appeal No. 251 of 2015 is being filed by State Load Despatch Centre, Uttar Pradesh under Section 111 of the Electricity Act, 2003 challenging the same Orders passed by the State Commission as in the Appeal No. 231 of 2015.

3. Since the issues contested in Appeal No. 251 of 2015 are squarely covered in the Appeal No. 231 of 2015 and the Appellant herein is Respondent in Appeal No. 231 of 2015, hence the Appeal No. 231 of 2015 is being taken up for our consideration.
4. The Appellant, Uttar Pradesh Power Corporation Limited ("**UPPCL**") is operating as a Bulk Supply Licensee for electricity in the state of Uttar Pradesh.
5. The Respondent No 1 is the Electricity Regulatory Commission for the State of Uttar Pradesh exercising jurisdiction and discharging functions in terms of the Electricity Act 2003. The Respondent No 2 is Uttar Pradesh State Load Dispatch Centre ("**UPSLDC**"). The Respondent No 3, the Uttar Pradesh Power Transmission Company Limited ("**UPPTCL**") is a notified State Transmission Utility under section 39 of the Electricity Act 2003. The Respondent No 4, the Noida Power Company Limited ("**NPCL**") is a Distribution Licensee undertaking the distribution and retail supply of electricity in Greater Noida area in Uttar Pradesh.
6. Aggrieved by the Impugned Orders dated 21/7/2015 (Review Order) and 10/9/2014 (Original Order) passed by the State Commission, the Appellant has preferred the present appeal on following grounds:
 - i. The State Commission while passing the Impugned Orders has failed to take into consideration the fact that in case of inter-State Short Term Open Access ("STOA") the jurisdiction is vested with Central Electricity Regulatory Commission ("CERC") under Section 79 (1)(c) of the Electricity Act, 2003 ("Electricity Act") read with Regulations 8 and 26 of Central

Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 ("CERC inter-State STOA Regulations"). The State Commission in exercise of its jurisdiction has directed UPSLDC to :

- a) Provide its No Objection Certificate ("NOC") to NPCL for inter-State STOA on firm basis for not less than 237 MW (Review Order);
- b) Grant inter-State STOA to NPCL on firm basis upto three months (Original Order dated 10/09/2014); and
- c) in case of shortage of Total Transfer Capability ("TTC") proportionately divide the TTC of UPPTCL between inter-State LTOA availed by the Appellant and inter State STOA availed by NPCL (Order dated 10/09/2014).

7. Facts of the present Appeal:

- a) On 7/6/2005, the State Commission published UPERC Open Access Regulations 2004, which was last amended on 18/6/2009.
- b) On 25/1/2008, the CERC published CERC Inter-State STOA Regulations governing Inter-State STOA which have been amended from time to time.
- c) On 20/7/2011, a transmission service agreement was executed between Power Grid Corporation of India Limited ("PGCIL"), the Appellant and UPPTCL for the purposes of availing and providing Inter-State transmission services.
- d) On 30/1/2014, NPCL entered into a Power Purchase Agreement with M/s. Shree Cement Limited ("Shree Cement") for procurement of 70 MW power on round the clock basis. In

terms of Clause 1 of the said PPA, the power was to be sourced from Shree Cement's power plant located in Beawar, Rajasthan.

- e) On 7/2/2014, Shree Cement on behalf of NPCL sought NOC from UPSLDC in terms of Regulation 8 of the CERC Inter-State STOA Regulations for availing Inter-State Open Access to transmit 35 MW power at 132 KV Surajpur Sub-station.
- f) On 7/2/2014, NPCL wrote a letter to UPPTCL with a request to issue directions to UPSLDC to provide its NOC for availing Inter-State Open Access. Similar letters were sent by NPCL on 8/2/2014 and 10/2/2014.
- g) On 12/2/2014, NPCL filed Petition No.934 of 2014 before the State Commission under Section 86(1)(c) & (f), 35 and 36 of the Electricity Act, 2003 alleging that UPSLDC was arbitrarily holding back its NOC. The NPCL prayed that the Respondents be directed to facilitate Open Access as per the application submitted/to be submitted for transmission of power to NPCL.
- h) On 14/2/2014, the State Commission passed an interim order. The following is the operative part of the said interim order.

“The commission on hearing the submission of all the parties, issues the following interim directions:

- 1. SLDC will continue the arrangement of granting its consent for the Open Access on Day Ahead basis to M/s. NPCL till further orders of the Commission.*
- 2. NPCL is directed to submit Long Term, Medium Term and Short Term power requirement and methodology to meet them to the Commission within fifteen days.”*

- i) The Appellant was a party during all the proceedings before the State Commission and at no point of time; the Appellant raised the point regarding the State Commission's jurisdiction till the conclusion of proceedings when the State Commission reserved its judgment.
- j) On 10/9/2014, the State Commission directed the UPSLDC to grant STOA on firm basis upto three months to NPCL. The State Commission further directed that in case of shortage of TTC it should be proportionately divided among the DISCOMS including NPCL.
- k) On 23/9/2014, UPSLDC filed an application before the State Commission seeking vacation of the Order dated 10/9/2014. Being aggrieved by the allegedly erroneous Order dated 10/9/2014, the Appellant filed a review petition being Review Petition No. 976 of 2014. The Appellant contended that Order dated 10/9/2014 suffered from error apparent on the face of the record because the State Commission had no jurisdiction to regulate/adjudicate issues pertaining to Inter-State Open Access and the jurisdiction to deal with such issues lies with CERC.
- l) On 21/7/2015, the State Commission disposed of the review petition holding, inter alia, that it had jurisdiction to issue the Order dated 10/9/2014.
- m) Being aggrieved by the said Orders i.e. Original Order dated 10/9/2014 and Review Order dated 21/7/2015, the Appellant has preferred the present Appeal. As per Appellant, in issuing the Impugned Orders, the State Commission has acted without jurisdiction and contrary to applicable legal and regulatory framework and directed UPSLDC to:

- i. Grant inter-State STOA to NPCL on firm basis upto three months (Order dated 10.09.2014) ;
 - ii. In case of shortage in the TTC, proportionately divide the available TTC amongst Discoms and NPCL (Order dated 10.09.2014);
 - iii. Issue NOC to NPCL for inter-State STOA on firm basis for not less than 237 MW (Review Order) ; and
 - iv. Limit the priority of Long Term Open Access ("LTOA") over STOA to other customers other than existing distribution licensee, generating power plant and captive power plant. (Order dated 10/09/2014).
- n) An Interim Application being IA No.379/15 in this Appeal was filed by the Appellant praying that the Impugned Orders dated 21/7/2015 and 10/9/2014 be stayed or in the alternative an ad-interim/interim injunction be granted restraining Respondent No.2 i.e. UPSLDC from curtailing the Appellant's LTOA / MTOA for granting Short Term Open Access to Respondent No.4 i.e. NPCL. The interim application of Appellant for stay of Impugned Orders was dismissed by this Tribunal vide Order dated 5/11/2015.

8. **QUESTIONS OF LAW**

As per Appellant following questions of law arise in the present appeal during the course of hearing:

- A. Whether Uttar Pradesh Electricity Regulatory Commission (State Commission) has jurisdiction to entertain issues pertaining to Inter-State Open Access covered under**

Section 79 (1) (c) of the Electricity Act read with Regulation 26 of the CERC Inter-State STOA Regulations?

B. Whether State Commission by passing the Impugned Orders has wrongly treated short term open access customer at par with long term open access customer irrespective of the fact that either UPERC Open Access Regulations,2004 or CERC inter-state STOA Regulations, 2008 are applicable?

9. We have heard at length Mr Amit Kapur, the learned counsel for the Appellant and Mr M G Ramachandran, learned counsel for Respondent No - 4, Mr C K Rai, learned counsel for Respondent No -1, Mr Rahul Srivastava learned counsel for Respondent No -2 and Mr Rakesh Bajpai, learned counsel for Respondent No-3 and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is as hereunder;

Issue regarding lack of jurisdiction of State Commission

10. Following submissions were made before us by the Appellant on this issue for our consideration:-
- a) It is an established law that jurisdiction can only be conferred by way of a statute. The Impugned Orders passed by the State Commission are without jurisdiction and contrary to applicable legal and regulatory framework. The State Commission in the Impugned Orders has directed UPSLDC to:
- i. Grant inter-State STOA to NPCL on firm basis upto three months (Order dated 10.09.2014) ,

- ii. In case of shortage in the Total Transfer Capability , proportionately divide the available TTC amongst Discoms and NPCL (Order dated 10.09.2014),
 - iii. Issue NOC to NPCL for inter-State STOA on firm basis for not less than 237 MW (Review Order) and
 - iv. Limit the priority of Long Term Open Access over STOA to other customers other than existing distribution licensee, generating power plant and captive power plant. (Order dated 10.09.2014).
- b) The State Commission lacked inherent jurisdiction to pass such orders as the dispute pertains to grant of Inter-State Open Access which as per Section 79(1)(c) of the Electricity Act, can only be adjudicated by the CERC and not by State Electricity Regulatory Commissions (SERCs).The allocation of jurisdiction amongst CERC and State Commissions is in terms of Sections 79(1)(c) read with 86(1)(c); 2(36) read with 35; 28(3)(d) read with 32(2)(d) of the Electricity Act. As per Section 86(1)(c) of the Electricity Act, the State Commission has to facilitate Intra-State transmission and wheeling of electricity.
- c) The Short Term Open Access Transactions are granted by Regional Load Dispatch Centre ('RLDC'), which in turn falls within the ambit of CERC. Short term open access over Inter State Transmission System ("ISTS") is granted in terms of the CERC STOA Regulations 2008. The requirement of SLDC's concurrence/NOC arises under Regulation 8 of CERC inter-State STOA Regulations. Further Regulation 26 of CERC inter-State STOA Regulations specifically provides that all disputes arising under the said regulations shall be decided by CERC based on an application made by the person aggrieved.

- d) Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004, as amended in 2009 ("UPERC Open Access Regulations") are inapplicable in the present case since the same deals with intra-State Open Access (and not inter-State Open Access). Even Regulation 13 of the UPERC Open Access Regulations read with Schedule B, Clauses 1.1, 14.7 and 14.18 thereto also accept jurisdiction of CERC over such matters. The paragraph 14.18 states that an application involving Inter-State transaction including power exchange transaction shall be governed by the regulations issued by the CERC.
- e) The provisions of the Electricity Act, 2003 clearly provide that any intervening transmission line in an interstate open access transaction will be governed by regulations framed by Central Commission. Also, Central Commission will be the appropriate Commission to adjudicate any dispute in relation to inter-state open access. This is also evident from the reasoning given by the CERC as per the statement of reasons dated 01.07.2009 while amending Regulation 26 of the CERC STOA Regulations:-

"Substitution of regulation 26

108. Regulation 26 of the 2008 regulations provided that unless a dispute involved the State Load Despatch Centre and the intra-State entities of the concerned State and was within the jurisdiction of the State Commission, all disputes arising under these regulations be decided by the Commission based on an application made by the person aggrieved. In the draft amendment regulations regulation 26 was proposed as under:

"Redressal Mechanism 26.

All disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.

109. It was suggested by RRVPNL that the disputes involving SLDC and the intra State entities of a State were within the jurisdiction of the State Commission and therefore, may be resolved by respective State Commission, who should be otherwise guided by the Commission's regulations. It proposed that Regulation 26 may not be amended. It was suggested by WBERC, WBSETCL and WBSEDCL that the proposed regulation was inconsistent with the Act as the dispute arising on account of usage of intra-State transmission network under inter-State transmission should be redressed by the State Commissions only since those will be guided by clause (2) of sub-section 32 of Act. Moreover, as per sections 39 and 40 of Act for intra-State transmission or STU related activity the regulatory jurisdiction specifically lies with the State Commission.

110. We have considered the comments made. We are aware of the jurisdiction vested in the Commission in terms of the Act. Accordingly, **the disputes relating to inter-State transmission of electricity will be adjudicated by the Commission, in accordance with the jurisdiction vested under the law.** Accordingly, the amendment has been notified”.

- f) In terms of Regulations 2.3.3 and 2.7.3 of the Indian Electricity Grid Code, 2010 notified by Central Commission it is evident that:
- i. In case of inter-state STOA, RLDC shall be the nodal agency and the procedure and modalities shall be in accordance with CERC inter-State STOA Regulations.
 - ii. In case of inter-state STOA, SLDC shall accord concurrence or no objection or prior standing clearance in accordance with the CERC inter- State STOA Regulations.

- g) An inter-state open access transaction has to be seen as a whole transaction. The transaction from power to be supplied from Shree Cements Ltd. and power procured by NPCL is one transaction which cannot be broken up into two separate and distinct transaction, i.e., from Shree Cements Ltd. to State Periphery as one inter-state transaction and from state Periphery to NPCL as intra-state transaction. Although Pali Sub-station forms part of the intra-state transmission system, for the purpose of Inter-state open access transaction, the same will form part of the Interstate transmission system and Central Commission will have jurisdiction to decide any dispute over short term inter-state open access under Sections 2 (36) (ii), 35 and 36 of the Electricity Act, 2003 read with Regulation 26 of the CERC Inter-state STOA Regulations, 2008.
- h) This Tribunal in its Judgment dated 07.10.2015 in Appeal No. 89 of 2014 M/s Vandana Vidhyut Ltd. Raipur vs. Chhattisgarh SERC has held that State Commission is not legally competent to adjudicate upon a matter just on the ground that both the parties are situated within the territorial jurisdiction of the State Commission, when CERC Regulations are applicable, as under:

" 7.19) The CERC (open access in inter-State Transmission) Regulations 2008 were notified on 25.01.2008 stating in Regulation 1(2) thereof that these Regulations shall apply to the applications made for grant of open access for energy transmission schedules commencing on or after 01.04.2008 for use of the transmission lines or associated facilities with such lines on the inter-State transmission system. The Central Commission 2008 Regulations define the Commission as CERC and grid code as the grid code specified by the Central Commission under clause (h) of sub-section (1) of section 79 of

the Electricity Act, 2003. The Central Commission 2008 Regulations further define "intra-State entity" as a person whose metering and energy accounting is done by SLDC or by any other authorized State utility. These Regulations further define "open access customer" as a person who has availed or intends to avail open access under these Regulations and includes short term open access customer as defined in any other Regulation, specified by Central Commission or a generating company including captive power plant or a licensee permitted by the State Commission to receive supply of electricity from a person other than a distribution licensee of his area of supply or a State Government entity authorized to sell or purchase electricity.

7.20) Regulation 20(4) of the CERC (open access in inter-State transmission) Regulation 2008 clearly provides that "Any mismatch between the scheduled and the actual drawal at drawal points and scheduled and the actual injection at injection points for the intra-State entities shall be determined by the concerned State Load Despatch Centre and covered in the intra-State UI accounting scheme.

7.21) We want to first peruse Regulation 26 of the CERC (open access in inter State transmission) Regulations, 2008 and as amended by CERC (open access in inter-State transmission) (amendment) Regulations 2009. Regulation 26 dealing with "redressal mechanism" of CERC (open access in inter-State transmission) Regulation 2008 says "Unless the dispute involves the State Load Despatch Centre and the intra-State entities of the concerned State and falls within the jurisdiction of the State Commission, all disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.

7.22) The Regulation 26 of CERC (open access in inter-State transmission) Regulations 2008 has been amended by CERC (open access in inter-State transmission Amendment) Regulations 2009 as under:

"All disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved."

7.23) Thus from the above it is clear that the Regulation 26 of the Central Commission's (open access in inter-State transmission) Regulations 2008 has been amended by the Central Commission's (Amendment) Regulations 2009 clearly specifying that all disputes arising under these regulations shall be decided by Central Commission based on an application made by the aggrieved person.

8) We have carefully and cautiously studied the Central as well as State Commissions various regulations on the point in controversy before us and collated them. We find that in the case in hand it is the Central Commission which is legally competent to take action under Section 142 of the Electricity Act, 2003 against the appellants for the violation of Regulation 7(2) of CERC (UI charges and related matters) Regulations 2009 if any violation thereof is established. The learned State Commission is not legally competent to adjudicate upon the matter just on the ground that both the parties are situated within the territorial jurisdiction of the State of Chhattisgarh. No State Commission can be bestowed with the jurisdiction just on the ground that both the parties are situated within the territorial jurisdiction of the concerned State Commission. Even the State Commission cannot be held entitled to hold jurisdiction just on the ground that the short term inter-State open access consumers like the appellants are governed by the State Grid because such short term open access consumers first use the intra-State transmission system, for which they pay the relevant charges to the concerned STU or State Grid utility. In the case in hand, the appellants are CPPs/IPPs undertaking short term inter-State open access transmission of electricity generated by them to be exported to other States of the country beyond the State of Chhattisgarh, hence, they are liable to be governed by the relevant regulations of the Central Commission.

9) In view of the above discussions, we are of the firm view and hold that the learned Central Electricity Regulatory Commission is legally competent and has jurisdiction to take action under section 142 of the Electricity Act, 2003 against the appellants for violation (if any) of Regulation 7(2) of the CERC (UI charges and related matters) Regulations 2009. We further hold that the learned State Commission does not have any jurisdiction to take action under Section 142 of the Electricity Act, 2003 for the said violation of regulation 7(2) of the CERC (UI charges and related

matters) Regulations 2009. All the findings recorded in the impugned order, being against law and absurd, are liable to be set aside and appeal is liable to be allowed. Consequently, the sole issue related to the jurisdiction is decided in favour of the appellants and against the respondents”.

- i) Presently M/s NPCL is procuring power to meet the requirement in its area of operation from outside the State under short term agreements. Since the power is being wheeled from outside the State it falls under the ambit of Inter-State Open Access and accordingly is governed by the regulation for Open Access framed by CERC. Matters related to Inter-State Open Access do not fall within the jurisdiction of State Commission.

11. On the issue of jurisdiction of State Commission raised in the Appeal, following submissions were made before us by the Respondent No 4 , NPCL for our consideration :-

Submissions as per Respondent No 4:

- a) The Open Access which the Respondent No. 4 sought for was on the Inter State Transmission of PGCIL i.e. 400 KV D/C Line between Dadri and Ballabgarh connecting to the Pali Substation of UPPTCL. The terms and conditions on which such Open Access was to be allowed is to be decided by the Central Transmission Utility (CTU) in accordance with the CERC (Open Access in Inter State Transmission) Regulations, 2008 notified by the Central Commission, amended from time to time. The grant of Open Access by the CTU on the above line requires the consent to be given to Respondent No. 4 by the STU/SLDC for the Intra State Transmission i.e. within the State of Uttar Pradesh. In other words, the STU and the State

Load Dispatch Centre (SLDC) have to communicate their consent to PGCIL for procurement and scheduling of power by Respondent No. 4 through 400 KV Pali Substation, Greater Noida.

- b) Pali Substation belongs to UPPTCL, an Intra State Transmission Utility, which has been designated as the State Transmission Utility (STU) under Section 39 of the Electricity Act. The functions of the State Transmission Utility is to undertake the transmission of electricity through Intra State Transmission System and to provide non-discriminatory Open Access on its transmission system (Section 39 (2) (a) and (d)).

The Pali Substation serves partly for the conveyance of power to the City of Greater Noida, the licensed area of Respondent No. 4 and for conveyance of power to the city of Noida, the licensed area of Pashchimanchal Vidyut Vitaran Nigam Limited (PWNL), a State Discom in the State of Uttar Pradesh.

- c) Hence the matter under consideration relates to the use of the Pali Sub Station of UPPTCL for conveyance of power injected in the said Sub Station from the Ballabgarh - Dadri Line of PGCIL for onward conveyance to the Sub Station of NPCL at RC Green and Gharbara and also through Surajpur Substation of UPPTCL i.e. use of the Intra State transmission system from the Interconnection Point at Pali Substation and onwards and not transmission of power till Pali Substation.
- d) In the above circumstances, Respondent No. 4 approached UPPTCL and UPSLDC for grant of Short Term Open Access on firm basis for up to three months for procuring power through the Pali Substation of UPPTCL. As UPPTCL did not take any

steps to grant such Open Access, Respondent No. 4 filed a Petition being No. 934 of 2014 before the State Commission under Section 86 (1) (c) and (f), Sections 35 and 36 of the Electricity Act, 2003 and also under the applicable Open Access Regulations for necessary directions.

- e) The Appellant is mixing up the issue of the Open Access on the STU network with Open Access on the Interstate transmission system. The Interstate transmission system is to be regulated by the Central Electricity Regulatory Commission. The STU system being an intrastate system is to be regulated by the State Commission. The present dispute only pertains to the veracity of the actions of UPSLDC in not issuing the NOC for grant of open access to NPCL which is squarely within the jurisdiction of the State Commission.
- f) The transmission system of STU i.e. UPPTCL cannot be termed as 'Inter State Transmission System' within the meaning of section 2 (36) of the Electricity Act. Such a system may be used in conjunction with the Inter State Transmission System such as Ballabgarh - Dadri Line of Powergrid for import of power within the State of Uttar Pradesh.

12. On the issue of jurisdiction of State Commission raised in the Appeal, following submissions were made before us by the Respondent No 2, UPSLDC for our consideration :-

Submissions as per Respondent No 2:

- a) The power is being imported from outside the state which is interstate open access transaction and governed by CERC regulations and for this power to reach to the point of drawal , it is immaterial which intra state network is being used. Therefore

the plea raised by the NPCL does not hold good regarding the use of UPPTCL/STU network for importing of interstate power hence findings recorded by the State Commission in the Impugned Order dated 21.07.2015 to decide the dispute in respect of intra state transmission network use for interstate power is beyond the jurisdiction of the State Commission for deciding in interstate open access transactions.

- b) Neither according to the CERC regulation nor according to the State Commission regulation, the State Commission was having any jurisdiction in dispute in question which is purely a dispute relating to Short Term Open Access for import of Interstate power.
- c) While passing the Impugned Orders, the State Commission has not clarified whether STOA has to be provided for interstate or intrastate power transaction because State Commission has only directed that long term transmission charges be payable for all the power irrespective whether the power is interstate or intrastate. That as the Respondent no. 2, M/s NPCL was seeking STOA for import of interstate power and the dispute related to transmission of the interstate power is only within the jurisdiction of the CERC and Northern Region Load Despatch Centre (“**NRLDC**”) will grant the STOA, hence order dated 10.09.2014 passed by the State Commission was contrary and inconsistent to the CERC (open access for inter-state transmission) regulation 2008.

13. After examining careful perusal of the above submissions by the rival parties on the issue related to jurisdiction of State Commission, the following observations emerge for deciding this Appeal; on the issue raised by Appellant in the Question

No 1 i.e. Whether Uttar Pradesh Electricity Regulatory Commission (“State Commission”) has the jurisdiction to entertain issues pertaining to inter-State Open Access covered under Section 79 (1) (c) of the Electricity Act read with Regulation 26 of the CERC inter-State STOA Regulations;

a) For deciding the issues in the matter it is important to discuss whether the transaction under consideration falls under Inter State transaction or Intra State Transaction. The Appellant has made reliance on the provisions of CERC inter State STOA regulations regarding dispute resolution. These regulations are applicable for grant of short-term open access for use of the transmission lines or associated facilities with such lines on the **inter- State transmission system.**

b) Sub-clause 36 of Section 2 of the Electricity Act provides for a clear definition of Inter State Transmission System which inter alia stipulates:-

“36. Inter-State Transmission System” includes –

- a. *any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State*
- b. *the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;*
- c. *the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility.”*

c) One of the functions of the Central Commission under Section 79 as specified under Sub Section (1) (c) is “to regulate the inter-State transmission of electricity”. As per Regulation 26 of the CERC Inter State STOA Regulations 2008, the redressal mechanism for disputes was specified as -

“Redressal Mechanism

26. Unless the dispute involves the State Load Despatch Centre and the intra-State entities of the concerned State and falls within the jurisdiction of the State Commission, all disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.”

However the said regulations have been amended on 29.5.2009 and as per amended regulations the redressal mechanism has been defined as :-

Redressal Mechanism

26. All disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved.

Hence the earlier condition of involvement of SLDC and Intra State entities has been modified with issuance of amendments to the regulations and jurisdiction in all cases of disputes arising in case of use of Inter State Transmission System for Open Access has been vested with the Central Commission.

- d) The Respondent No 4 , NPCL had filed Petition no. 934 of 2014, u/s 86 (1) (c) & (f), 35 & 36 of Electricity Act, 2003 and in the matter of Open Access for conveyance of upto 45MW power being procured from alternate sources at UPPTCL’s 132 KV Surajpur Substation for Noida Power Company Ltd.
- e) NPCL had entered into Power Purchase Agreement on 30.01.2014 with Shree Cement for supply of power from the plant of Shree Cement in the State of Rajasthan. As per PPA the power was to be delivered at Northern regional periphery.

- f) Drawl point of buyer i.e. NPCL is at Pali Sub Station in the State of Uttar Pradesh. The drawl point of NPCL does fall in an Intra State System of Uttar Pradesh and NPCL is an embedded customer of the Appellant.
- g) In the Power Purchase Agreement, the reference is made to the Injection Point of the Northern periphery which means in the State of Rajasthan where the generating station of Shree Cement is situated and not to the Delivery Point in the State of Uttar Pradesh. The Regional periphery mentioned in the Power Purchase Agreement is specifically with reference to the Injection Point which has been referred to as the Regional periphery of the Seller i.e. NR Exit.
- h) The electricity procured by NPCL through the lines of PGCIL need to pass through the Pali Substation of UPPTCL. In view of the same, the No Objection Certificate or the Consent of SLDC and UPPTCL was required for conveyance of power through Pali Substation on Short Term Basis. Since UPSLDC and UPPTCL were not allowing such Open Access, Respondent No. 4 had approached the State Commission for necessary Orders.
- i) On examining the relevant provisions contained in the PPA executed between NPCL and Shree Cement for supply of electricity under STOA, it is clearly stipulated that Shree Cement's scope is included upto the northern regional periphery by conveyance of electricity from their station through CTU network and the NPCL has to take the input by using the network provided by the STU in the State of Uttar Pradesh through Pali Sub-Station which gets into the Intra State Transmission Network. Looking at various provisions contained

in the Indian Electricity Grid Code, UPSLDC's permission in the form of NOC is essential for such an arrangement.

- j) There is no dispute on the point of injection at northern region periphery from Shree Cement's plant situated in Rajasthan which falls within the Inter State Transmission System. However, subsequent conveyance of electricity from the northern region periphery to NPCL is using the Transmission network owned and developed by STU i.e. UPPTCL.
- k) UPPTCL is an Intra State Transmission Utility within the meaning of Section 39 of the Electricity Act, 2003. Section 39 reads as under:

"39. State Transmission Utility and functions.

- 1) *The State Government may notify the Board or a Government company as the State Transmission Utility:*

Provided that the State Transmission Utility shall not engage in the business of trading in electricity:

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

- 2) *The functions of the State Transmission Utility shall be -*
 - a) *to undertake transmission of electricity through intra-State transmission system;*
 - b) *to discharge all functions of planning and coordination relating to intra-state transmission system with -*
 - i. *Central Transmission Utility;*
 - ii. *State Governments;*
 - iii. *generating companies;*
 - iv. *Regional Power Committees;*

- v. Authority;
 - vi. licensees;
 - vii. any other person notified by the State Government in this behalf;
- c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;
- d) to provide non-discriminatory open access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy.

Provided further that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated.

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission.

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use”.

As per Section 39 of the Electricity Act, 2003, it is a duty of UPPTCL to ensure development of efficient, coordinated and economical system of Intra State Transmission Lines for smooth flow of electricity from generating stations to the load centres and to provide non-discriminatory open access to its transmission system for use by any licensee and as per

Section 32, SLDC is responsible for optimum scheduling and dispatch of electricity within the State in accordance with the contracts entered into with the licensees or the generating companies in the State. The Inter State Transmission System of PGCIL terminates at the Pali Substation and thereafter the entire transmission system involved in the present case is Intra State Transmission Network. On examining the provisions of Sections 32 and 33 of the Electricity Act, 2003 pertaining to the functions of the State Load Despatch Centre and compliance of its directions, this subsequent conveyance of electricity from the northern region periphery to NPCL falls within the provisions of these sections.

- I) Admittedly, NPCL has been a distribution licensee in the Greater Noida Area since 1993 and has been using the transmission system of Erstwhile UPSEB till its reorganisation in the year 2000 and thereafter succeeded initially by UPPCL and thereafter by UPPTCL. NPCL has been an existing distribution licensee within the meaning of the Open Access Regulations when it came into force on 7.6. 2005. Regulation 6 of the Open Access Regulations specifically dealt with the rights of the Existing Distribution Licensees. It provides that-
“the distribution licensees having access to Intra State Transmission System and the distribution system in the State on the date of coming into force of these regulations under an existing agreement or arrangement shall be entitled to continue to avail open access to such transmission and distribution system on the same terms and conditions, for the term of the existing agreement or arrangement on payment of transmission charges and wheeling charges as may be determined by the

Commission.” This is a special provision dealing with the rights and privileges of the distribution licensees which had access to the transmission and distribution system as on the date of the coming into force of the Open Access Regulations, 2004 on 7.6.2005. Regulation 9 of the Open Access Regulations, 2004 dealt with allotment of priority and in that the existing distribution licensee was placed in higher priority than the other distribution licensees, namely those who are given Distribution licenses from 7.6.2005. The highest priority to the existing Distribution licensees was on account of Regulation 6. In the amendments made to Open Access Regulations, 2004 on 18.6.2009 while Regulation 9 was amended the State Commission did not make any amendment to Regulation 6. This would mean that the provisions for existing distribution licensees under Regulation 9 remained unaltered even after the amendment to Regulation 9. In the context of the above, Regulation 6 need to be considered as a special provision for the distribution licensees who were enjoying certain privileges when the Open Access Regulations, 2004 came into force. If the intention was to take away such privileges to the existing distribution licensees amendment would have been made to Regulation 6 also when Regulation 7 and certain other provisions were amended effective 18.6.2009.

The Bulk Power Transmission Agreement dated 27.3.2014 (BPTA) was entered into by NPCL with UPPTCL. This BPTA provides for NPCL that the Access is on a Long Term basis. More importantly Annexure B to the BPTA describes the Transmission system of UPPTCL which includes the above

mentioned transmission sub station and lines through which NPCL draws the power and these systems have been described in the Recitals as Intra state transmission network of UPPTCL and in clause 2 has transmission system owned operated and maintained by UPPTCL within the territory of the state. The dispute resolution in clause 9 of the BPTA is by the State Commission.

- m) Pali substation, 132 KV Line from Pali substation to Surajpur substation and the Surajpur substation are all owned, operated and maintained by UPPTCL, excluding certain bays in the Pali substation which NPCL claims to have monetarily contributed for establishment for NPCL'S own use. These transmission systems, namely, two substations and 132 KV Line are being considered as an Intra State Transmission System under the Electricity Act, 2003 and are utilised for conveyance of power including for Uttar Pradesh Power Corporation Limited (UPPCL). UPPTCL is filing the tariff petitions from time to time for these transmission systems before the State Commission. The tariff for these systems are determined by the State Commission as a part of periodical/ annual exercise. UPPCL, NPCL and others are paying the tariff so determined by the State Commission in regard to the use of these transmission systems of UPPTCL for conveyance of power.

In these circumstances, the transmission systems mentioned herein above have been regarded as an Intra State Transmission System and not as an Inter State Transmission System. It is not the case that when the power from outside the

state flows through the transmission system of UPPTCL, it is regarded as flow of power in the interstate transmission system and to be regulated by the Central Commission and not by the State Commission. The flow of power through these transmission systems for NPCL cannot be regarded to be and treated as an Inter State Transmission System. The aspects of the systems including its capacity are all to be treated as a part of the Intra State Transmission System.

- n) The counsel for the State Commission has sought to rely on the decision of the Tribunal in the case of State Load Dispatch Centre v/s. Gujarat Electricity Regulatory Commission in Appeal No 70 of 2015 decided on 7.4.2016. In that case it was an issue whether the State Commission of Gujarat had the jurisdiction in regard to transmission system if Gujarat Energy Transmission Corporation Limited open access sought for power exchange transaction which is treated as collective and inter state transaction. The present Appeal is squarely covered by the Tribunal's Order in Appeal No. 70 of 2015 dated 07.04.2016 wherein it was 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 IntraState 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.”

If the above position has been held in regard to an embedded customer in the State of Gujarat for a collective power exchange transaction, the same would apply to an existing distribution licensee using the state transmission network as in the present case.

The decision in Vandana Vidyut Limited v/s. Chattisgarh State Electricity Regulatory Commission decided by the Tribunal on 7.10.2015 in Appeal No 89 of 2014 is in the context of UI charges on a transaction of inter state purchases and is distinguishable. It was not a case of use of state network after the power purchased on inter state seller has reached the State periphery.

One other contention of the Appellants is that Northern periphery used in the Inter State Transaction would mean the boundaries of Uttar Pradesh where the northern region ends and not Greater Noida Pali sub station where the Powergrid delivers the quantum of electricity transmitted from Rajasthan. This is an incorrect understanding of the term. The Northern periphery is used to indicate within the northern region namely transmission within the northern region. The interconnection point of the power grid line with the State network in northern region is within the northern region.

The decision in the Electricity Department, Government of Goa Vs. Maharashtra Electricity Regulatory Commission dated 17.12.2007 in Appeal No.150 of 2007 relied on by the Appellants is also distinguishable. In the said case, the issue considered was of the line used by the Central Sector Generating Stations for transfer of power from the Western Region pool quantum from outside Goa through the intervening transmission line of MSETCL along with the transmission line of Powergrid. This intervening transmission line of MSETCL was

treated as incidental to the Inter State Transmission of Electricity. In the present case, the line of UPPTCL is not an intervening line but a line from Pali Substation to Surajpur Substation.

The case of Allian Duhangan Hydro Power Limited v Everest Power Private Limited 2013 ELR (APTEL) 0170 is again distinguishable. The issue in the said case was in regard to the transmission line from Allian Duhagan in Himachal Pradesh to Nalagarh Substation of Powergrid in Punjab laid down by the generating company. This line is emanating from one State to another State and intended to evacuate power through this line. The transfer of power in this line within the State of Himachal Pradesh was also considered as incidental to the Inter State Transmission System and, therefore, within the regulatory jurisdiction of the Central Commission.

The case of Uttar Pradesh Power Corporation Limited v Central Electricity Regulatory Commission 2008 ELR (APTEL) 0809 involved transfer of power generated from the two power stations situated in Uttar Pradesh to the State of Madhya Pradesh by use of the transmission line. In that context, it was held that it was an Inter State Transmission of Electricity.

In Central Power Distribution Company Limited v Central Electricity Regulatory Commission (2007) 8 SCC 197 the issue involved was again in regard to UI Charges and Grid Control, Scheduling and Dispatch etc and not with reference to a particular line being Intra State Line or Inter State Line.

In *Bhushan Limited v WBSEB 2007 (APTEL) 600*, the issue considered was not whether a particular line is an Inter State Line or an Intra State Line. The issue considered was whether the State Commission can notify Regulation in regard to wheeling of electricity on Inter State Transmission Line.

In *Indian Aluminium Company Limited v WBERC 2007 (APTEL) 791* the issue considered was whether a State Commission can direct an Open Access Customer to cease drawing of power from the distribution licensee and the appointment of State Load Dispatch Centre as the Nodal Agency to regulate the Inter State Transmission of Electricity. There is no dispute even in the present case. The Nodal Agency is the NRLDC as there is an import of power from Rajasthan to Uttar Pradesh. However, the issue whether the transmission network of UPPCL within the State of Uttar Pradesh should be treated as an Inter State Transmission or an Intra State Transmission System.

The various judgements cited above by the Appellants in regard to the support of their argument that the present case falls within the jurisdiction of the Central Commission do not have any merits for reasons mentioned above. In our considered opinion, in the present Appeal, the jurisdiction is of the State Commission.

- o) If the interpretation by the Appellants are accepted, it would mean that every line in Uttar Pradesh State belonging to

UPPTCL would become an Inter State Line on account of the fact that all such lines are integrated and there is substantial import of power into Uttar Pradesh by UPPCL also from sources outside Uttar Pradesh. There is no evidence shown as to how UPPCL's imports from the generating sources and trading licensees located outside the State of Uttar Pradesh are being treated when it flows through the lines of UPPTCL, namely, whether it is treated as an Inter State Transmission. Obviously, such usage is treated as Intra State Transmission for which the tariff terms and conditions are determined by the State Commission of Uttar Pradesh.

- p) For the reasons mentioned herein above, the State Commission has the necessary jurisdiction to entertain the petition filed by NPCL arising out of the refusal on the part of UPSLDC to give NOC for import of power to pass through the section from Pali Substation to Surajpur Substation and for delivery to NPCL as well as for the power to pass through Pali Substation to the lines leading RC Green Substation etc.
- q) The State Commission in the Impugned Order dated 21.7.2015 on the issue of jurisdiction of the State Commission has held as under:

“The Commission finds that as per Section 39 of the Electricity Act, 2003, it was a duty of UPPTCL to ensure development of efficient, coordinated and economical system of Intra State Transmission Lines for smooth flow of electricity from generating stations to the load centres and to provide non-discriminatory open access to its transmission system for use by any licensee and as per Section 32 SLDC shall be responsible for optimum scheduling and dispatch of electricity

within the State in accordance with the contracts entered into with the licensees or the generating companies in the State.

*So far as the question of jurisdiction of the Commission over the Inter State Open Access Transactions is concerned, the Commission is clear that the Short Term Open Access Transactions are granted by RLDC and which in turn falls within the ambit of CERC. **The issue of grant of NOC by the SLDC for use of Intra State Transmission System to RLDC for Open Access Transactions is well within the jurisdiction of the State Commission.***

The Commission was very well in exercising its jurisdiction to issue the order dated 10.9.2014 in this matter.”

- r) As per the procedure for Short-Term Open Access identified under Schedule-B of the UPERC Open Access Regulations, the procedure made shall be in addition to and not in derogation to open access regulations or any procedure made thereunder by the Central Electricity Regulatory Commission for use of inter-State transmission system. The current matter under consideration is consisting of two transactions one where Inter State Open Access was sought for supply of power from Shree Cements Rajasthan Plant to Pali Sub Station and the other where Intra State Open Access is required for using UPPTCL transmission system. After considering all the relevant provisions of Electricity Act and the provisions of Regulations of Central Commission and the State Commission, we are of the considered view that the UPERC Open access regulations shall be applicable for applying for open access for use of intra-state transmission system and / or the distribution systems of licensees within the State, including, when such system is used in conjunction with inter-state transmission system. Hence any

dispute arising due to non-issuance of NOC by UPSLDC/UPPTCL for use of Intra State Transmission System for open access transactions has to be brought before the State Commission which in this case is UPERC. Hence on this issue of jurisdiction we hold that in the present case the UPERC's jurisdiction is attracted.

- s) The issue is decided accordingly.

Regarding incorrect treatment of Short term open access vis-a-vis long term open access

14. On this issue raised in the present Appeal, following submissions were made before us by the Appellant for our consideration:

- a) Irrespective of the fact that as to whether the CERC Regulations are applicable or UPERC Regulations are applicable, the preference is to be given to Long Term Open Access customer and not to short term open access customers. The short term open access transaction is to be allowed only if there is surplus capacity available in the system. Accordingly, the Impugned Order passed by State Commission to treat short term open access at par with long term open access is contrary to both Central Commission as well as State Commission's Regulations.
- b) In CERC inter-State STOA Regulations, there is no concept of granting STOA on firm basis. STOA (inter-State) as matter of settled principle is granted temporarily for maximum one month at one time subject to availability of surplus capacity. Under

Regulations 2 (n-a), 3 and 15 of the CERC STOA Regulations 2008, inter-state short term open access can be granted for:-

- i. Maximum one month duration;
 - ii. Surplus capacity available after use by LTOA(s) and medium-term open access ("MTOA") customer(s) by virtue of:
 - a) Inherent design margin;
 - b) Margins available due to variation in power flows, and
 - c) Margins available due to in-built spare transmission capacity created to cater future load growth or generation addition.;
 - iii. In the inter-state short term transaction if any state utility or an intrastate entity is involved as a buyer or seller, concurrence of SLDC shall be obtained in advance and submitted along with the application to the nodal agency; and
 - iv. In case of curtailment or cancellation of transactions, the short term transaction shall be cancelled or curtailed first, followed by medium term and thereafter long term transactions.
- c) In terms of Regulation 4 of the UPERC Open Access Regulations, 2004 short term open access is allowed only if there is any surplus capacity available, as under:-

"4. Criteria for allowing open access. The Criteria for allowing open access shall be the availability of surplus capacity in the system to be determined by the Nodal Agency as below:

- (i)..... .*
- (ii) Short term open access shall be allowed if the request for such access can be accommodated based on following;*
 - (a) Inherent design margins;*

- (b) Margins available due to variation in power flows;*
- (c) Margins available due to inbuilt spare capacity in transmission and distribution system created to meet future generation and load requirement."*

From the above it can be seen that the Regulation 4 (ii) of UPERC Open Access Regulations, 2004 is para materia with Regulation 3 of the CERC STOA Regulations 2008.

- d) In terms of Regulations of the Indian Electricity Grid Code, 2010 short term customer shall be curtailed first followed by medium term customer which shall be followed by long term customer. The State Commission in the Impugned Orders has wrongly relied upon un-amended Regulation 9 of the UPERC Open Access Regulations, 2004.
- e) The Regulation 9 of the UPERC Open Access Regulations, 2004, was amended by State Commission on 18.06.2009. As per amended Regulation 9 Long-term open access customers shall have the priority over the short-term open access customers. Allotment priority within short-term open access customers shall be as per clause 3.2 of Schedule-B to the amended Regulations which specifies that the priorities for allowing short-term access shall be decided by SLDC in descending order i.e. from higher priority to lower priority group as follows:
 - i. Existing distribution licensee
 - ii. Existing generating company
 - iii. Existing captive power plant
 - iv. Other distribution licensee.

- v. Other generating company.
- vi. Other captive power plant.
- vii. Any consumer permitted by the Regulations.

Where “Existing” means that existing prior to the date of publication of UPERC (Terms and Conditions for Open Access) Regulations, 2004 in Official Gazette on 7th June’2005.

- f) The stand taken by Respondent No 4, NPCL is that it has made financial contribution towards one 315 MVA transformer, one third cost of a 500 MVA transformer and cost towards two Bays at 220 KV busbar of Pali Substation of UPPTCL. Hence, having made such financial contribution, NPCL have accrued an entitlement of superior rights in regard to the use of the Pali Substation of UPPTCL for the purpose of claiming access to the tune of 237 MW. This position is not correct since:-
 - i. The utilization of Asset will be governed by relevant Regulations framed by either Central Commission or UP State Commission.
 - ii. The contributions towards creation of facilities do not entitle NPCL to have a preferential treatment over Long Term Open Access customers while seeking Short Term Open Access.
- g) The State Commission while passing the Impugned Orders failed to appreciate that UPPTCL transmission system has availability constraints for wheeling power coming from outside Uttar Pradesh. Thus, there is no surplus availability for granting, inter-state STOA to NPCL for scheduling 237 MW power from outside Uttar Pradesh.

- h) The long term and medium term Power Procurement to the Appellant will be curtailed to provide STOA power to NPCL. In fact Curtailing transmission of power to the Appellant will cause irreparable loss and injury to the Appellant and consumers of Appellant's distribution companies ("Discoms").
- i) The communication from UPPTCL and UP SLDC before State Commission only recommends that a capacity of 237 MW can be made available to NPCL only if NPCL executes a long term Power Purchase Agreement and consequently seeks long term open access. Even after directions issued by State Commission in the Impugned Order dated 10.09.2014, till date NPCL has not executed any long term PPA. As such in the absence of any long term PPA, the short term open access can be allowed only if any surplus capacity is available in the system. Appellant is also procuring power through inter-State STOA, which alike NPCL is granted to the Appellant on day ahead basis only.
- j) NPCL has failed to place on record any BPTA executed with Central Transmission Utility. NPCL has executed BPTA with UPPTCL on 27.03.2014. The said BPTA was not in existence at the time when the PPA in dispute was executed between NPCL and Shree Cements Ltd. The BPTA treats NPCL as Long Term Customer since, at the relevant time, NPCL had a long term PPA with Essar Power Ltd. and accordingly, NPCL was a Long Term Customer in line with the definition of "Open Access Customer" in the UPERC Open Access Regulations, 2004. The said long term between NPCL and Essar Power is now stands terminated. Accordingly, the BPTA cannot be said to be in existence. Even otherwise, an Agreement cannot

override express terms of Electricity Act, 2003 and the Regulations framed hereunder.

15. On this issue following submissions were made before us by the Respondent No 4, NPCL for our consideration:

- a) In UPERC (Open Access) Regulations, 2004 there is no discrimination between the existing distribution licensees in terms of Open Access whether Short Term or Long Term. The priority of Long Term Open Access over Short Term Open Access is for other customers other than existing distribution licensees, generating power plants and captive power plants. Hence the Respondent No. 4 being an existing distribution licensee has the priority for availing open access, over long term or short term open access customers. In this regard reference is craved to Regulation 9 (Allotment Priority) of Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation 2004, notified by Uttar Pradesh Electricity Regulatory Commission and amended from time to time.
- b) Further as the Respondent No 4 had contributed for the full costs of the transformers, bays, and lines to enable evacuation of 481 MVA at Pali Sub Station, in its capacity as a distribution licensee and for the specific purposes to enable sourcing of power for the consumers in the licensed area. The 220 KV Line from the two Bays from Pali Sub Station to RC Green Substation and Garbara Substation exclusively belongs to NPCL. These lines are radial lines and are not used for any other purpose. In addition, some of feeders emanating from the Surajpur Substation are also contributed by NPCL for its use as

a distribution licensee. NPCL has, therefore, a priority for use of the above assets.

c) Further, NPCL is a Long Term Customer under the Regulations of the State Commission in regard to Pali Substation and other assets connected therewith i.e. from the Injection Point of electricity from Ballabgarh Powergrid Line at Pali Substation. As at present, there is a Bulk Power Transmission Agreement (BPTA) dated 27.3.2014 entered into between UPPTCL and NPCL. This BPTA recognizes -

a. UPPTCL Transmission System is an Intra State Transmission System ;

b. NPCL is a Long Term Customer ,

c. The Pali Substation is a part of the Intra State Transmission System of UPPTCL;

d. The capacity available at the Pali Substation for NPCL on Long Term basis is at present 268 MVA; and

e. In the BPTA, the UPPTCL had also agreed to UPERC, the State Commission as the Authority to adjudicate on any dispute with NPCL .

Hence as per BPTA, there can be no issue regarding Pali Substation being an Intra State Transmission Network, NPCL being a Long Term Customer and the capacity earmarked at the Pali Substation being 268 MVA. NPCL is also paying the Long Term Open Access Charges for the above under the BPTA.

- d) NPCL is a deemed distribution licensee as per the provisions of Electricity Act 2003. NPCL is the only distribution licensee having Long Term Open Access Agreement with UPPTCL in the State. So, highest priority should be given to NPCL and distribution licensee should have priority of Short Term Open Access over the Long Term Open Access consumers. NPCL was ready to pay Long Term Open Access Charges even on Short Term Open Access.
- e) The State Commission only in wake of the submissions made by SLDC that M/s NPCL should be allowed/scheduled only 237 MW power at CTU- STU periphery, amended the Commission's Order dated 10.9.2014 to the extent of directing SLDC to provide NOC on the request of the petitioner NPCL for Short Term Open Access on firm basis for not less than 237 MW.
16. On this issue following submissions were made before us by the Respondent No 2, SLDC for our consideration:
- a) A distribution licensee is authorised to operate and maintain a distribution system for supplying electricity to consumers of its area of supply and its license continues to be in force for 25 years in light of the section 2(17) read with section 14 of the Electricity Act, 2003. Therefore a distribution licensee uses the transmission system for conveyance of electricity (from the point of purchase of power) to its area of supply for the purpose of distribution of electricity to its consumers. In this manner, a distribution licensee (i.e. NPCL) shall use the transmission system for the entire period till its license remains in force and as such he must avail long term open access of the

transmission system as defined under UPERC/CERC Open Access Regulations.

- b) The STU plans and develops intra-State transmission system primarily for use of LTOA customers that lead to investments in construction of lines and substations and thereafter incur expenditure on operation and maintenance of such lines and substations. Such investment and expenditure is recoverable by the STU from these LTOA customers through transmission charges as determined by the State Commission in terms of regulations framed for determination of tariff for transmission licensee under section 62 of the Electricity Act' 2003 .
- c) 'Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Open Access) 2004 was amended in 2009 (First Amendment) thereby amending the allotment priority. Now after amendment to the regulations Long-term open access customers shall have the priority over the short-term open access customers.
- d) Since last about 23 years, NPCL is having the license of the Distribution in its area of the Greater Noida and only for commercial gain, till date not entered any long term agreement with any injecting entity for purchase of Inter- State / Intra-State Power. The NPCL has no long term open access approvals either from STU or CTU for intra state or interstate long term open access. M/s NPCL is trying to run the discom business on short term basis power only to gain the undue profit at the cost of others i.e.-PSUs (CSGS / ISGS / CTU and STU/state owned

- discoms/UPPCL etc), which has inherent chances of non availability of corridor in short term open access some times.
- e) Even the State Commission in the Impugned Orders has observed that NPCL must tie-up for long / medium term power. In spite of such directions of the State Commission, NPCL has not entered so far in long term contracts for purchase of power.
 - f) Though the NPCL has signed the BPTA with the STU in March 2014 for availing of the long term open access power but in absence of Long term open access agreements , the said BPTA is not in operation and effective.
 - g) The State Commission, while passing the order dated 10.09.2014 has ignored the fact that there was no firm transmission margin in the ATC (Available Transfer Capability) available as Inter State Transmission corridors have been reserved/booked by long Term Open Access Customer (State Utility-State Owned Discoms/UPPCL) for implementation of their long & medium term power purchase agreements. According to the CERC Regulation long term customer will get the priority over the short term customer and while granting the concurrence for Short term open access SLDC has to verify the surplus Transmission Capacity.
 - h) As regards the right and ownership dispute of the transformers and 220 KV R.C. Green sub-station between the NPCL and STU, this is pending before the UPERC in petition No 987 of 2014. That it is also relevant to mention here that 220 KV Gharbara substation is not connected with State Grid and connectivity issue of that substation is sub-judice in UPERC in petition no. 1020 of 2015.

- i) As there was no firm transmission margin in the ATC (Available Transfer Capability) available, the application filed by the NPCL for grant of Short Term Open Access for import of interstate power on firm basis was not processed. This was in accordance with the CERC Open Access Regulation 2008 which provides that while processing the application for concurrence or 'no objection' or prior standing clearance, as the case may be, the State Load Despatch Centre shall verify (i) existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the Grid Code in force, and (ii) availability of surplus transmission capacity in the State network.

17. After considering the arguments put forth by the parties, now we will consider the issues under Question No 2 i.e. Whether State Commission by passing the Impugned Orders has wrongly treated short term open access customer at par with long term open access customer irrespective of the fact that either UPERC Open Access Regulations, 2004 or CERC inter-state STOA Regulations, 2008 are applicable?

- a) As per Appellant the issue involves treatment of the Short Term Open Access Customer at par with Long Term Open Access customers by the State Commission while passing the Impugned Orders irrespective of the fact that regulations of Central Commission or State Commission are applicable.
- b) The State Commission while passing the Impugned Orders has made reference to the clause 9 of the UPERC (Terms and Conditions for Open Access) Regulations, 2004 for deciding on allotment priority for open access for different type of customers

and has held that no differentiation has been provided between the existing distribution licenses. The priority of Long Term Open Access Customer over the Short Term Open Access Customer is for the other customers, other than existing distribution licenses, existing generating company and captive power plant.

- c) As per Clause 9 of the UPERC (Terms and Conditions for Open Access) Regulations, 2004 notified on 7th June, 2005 the allotment priority has been identified as :

“Allotment Priority

- 1) The priority for allowing open access to customers shall be decided on the following criteria:
 - a. A existing distribution licensee and existing generating company and captive power plant shall have the highest priority in allotment of open access capacity.
 - b. Distribution licensee shall have priority over other customers;
 - c. Other Long-term open access customers shall have the priority over the short-term open access customers but next to those covered under 9(a) and 9(b);
 - d. An existing long-term open access customer shall have the priority over new open access customer under respective category provided he has applied for its renewal 12 months prior to the expiry of existing term of open access;
 - e. All applications for long-term open access received within a month shall be considered for processing at the end of that month. Subject to clauses (a) to (d) above, the decision for allowing Open Access, both for short-term and long-term, shall be based on the basis of first come first served.

Provided that the applications for long term and short-term open access are filed in the month prior to the period allowed for disposal of such applications under the regulation 11 (5) and 12 (5). However, in case of short-term open access for period specified under regulation 12 (5), all applications received during the month shall be treated at par and processed at the same time.

Provided further that for open access up to a day, application shall be filed 24 hrs in advance and shall be and decided on first cum first served basis.

- (2) In case of short term access, if the capacity sought to be reserved by the customers is more than the available capacity at that point of time, the following procedure would be followed:
 - a) State Load Despatch Centre shall invite snap bids through fax /e-mail;
 - b) The floor price for the bidding shall be the price determined under regulation 15(1) and 9(3);
 - c) The bidders shall quote price in terms of percentage points above the floor price;
 - d) The reservation of capacity will be made in decreasing order of the price quoted;
 - e) In case of equal price, if required, the reservation of capacity shall be made prorata to the capacity sought;
 - f) The customer getting reservation for a capacity less than the capacity sought by him shall pay charges quoted by him and the customers getting capacity reservation equal to the capacity sought by them shall pay charges quoted by the last customer getting reservation of capacity;
- (3) The State Load Despatch Centre shall, within 60 days, formulate a detailed procedure for reservation of capacity to short term customers, including the detailed procedure for bidding.”

Hence, as per UPERC Open Access regulations 2004, the priority of existing distribution licensee has been identified as the highest priority in allotment of open access capacity.

- d) However Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Open Access) 2004 was amended in 2009 (First Amendment) vide notification dated 18.06.2009. The allotment priority under clause 9 was also amended as follows:

"Allotment Priority"

Existing clause (1), (2) and (3) shall be replaced by the following:

"(1) Long-term open access customers shall have the priority over the short-term open access customers.

Provided that applications for long-term access shall be considered for processing as per Schedule-A to these Regulations.

(2) Allotment priority within short-term open access customers shall be as per clause 3.2 of Schedule-B to these Regulations."

Hence as per amended Regulations, the highest priority of existing Distribution licensee on Open Access has been changed and priority of long term open access customers was identified over short term open access customers.

e) As per Regulation 2 (e) of the UPERC Open Access Regulations 2004, "**Open Access Customer**" means a person using or intending to **use the transmission system** and/ or the **distribution system of the licensees** in the state for transmission or wheeling of electricity in the State. This definition has not changed during the first amendment.

f) As per Regulation 8 of the UPERC Open Access Regulations 2004 the Long term and Short term open Access Customers have been defined as below: -

"8. Categorisation of Open Access Customers

Subject to the provisions of Regulations 6 and 7, the open access customers shall be classified into the following categories:

(i) **Long-term customers**

An open access customer availing or intending to avail intra state open access for a period of five years or more shall be the long-term intra state open access customer.

(ii) **Short-term customers**

An open access customer availing or intending to avail intra state open access for a period of one year or less and up to one day shall be the short-term intra state open access customer.”

- g) Allotment priority within short-term open access customers as per clause 3.2 of Schedule B, has been defined as :-

“ALLOTMENT PRIORITY”

3.2.1 The applications for short-term access shall be considered for processing on first come first served for a period permitted under clause 3.3. The priorities for allowing short-term access shall be decided by SLDC in descending order i.e. from higher priority to lower priority group as follows:

- i. Existing distribution licensee
- ii. Existing generating company
- iii. Existing captive power plant
- iv. Other distribution licensee.
- v. Other generating company.
- vi. Other captive power plant.
- vii. Any consumer permitted by the Regulations.

"Existing" means that existing prior to the date of publication of UPERC (Terms and Conditions for Open Access) Regulations, 2004 in Official Gazette on 7th June'2005.”

- h) As per Clause 3.3.1 of the Amended Regulations 2009, an application for grant of open access for the transaction for period three months to one year has to be made through

application for Short Term open Access. Clause 3.3 of the Amended Regulations is as follows:

“3.3 CONFIRMATION OF RESERVATION OF CAPACITY

3.3.1 Transaction for period three months to one year

- (i) An application for grant of open access commencing in any month may be submitted in a cover marked “Application for Short-Term Open Access – period from three months to one year” by 5th day of the preceding month...”
- i) The State Commission in the Impugned Order dated 10.09.2014, has held that NPCL is to pay long term transmission charges to UPPTCL on all the power imported by it through short term open access. The relevant details are as below :
- “The Commission directs SLDC to grant Short Term Open Access on firm basis up to three months. It is necessary to say according to their requirement for drawal at NPCL Distribution periphery for which they have BPTA with UPPTCL. NPCL is directed to pay Long Term Transmission Charges to UPPTCL on all the power imported by it whether by Interstate or Intrastate transmission.
- In Case of Shortage of TTC, it should be proportionately divided among the Discoms including NPCL.
- NPCL is directed to make Long Term PPA for its power requirement within six months.”
- j) Further, the State Commission while passing the Impugned Order dated 21.7.2015 has observed as below:

“The Commission finds that as per clause 9 of the UPERC (Terms and Conditions for Open Access) Regulations, 2004 allotment priority for open access for different type of customers has been provided as below:

Allotment Priority

1. The priority for allowing open access to customers shall be decided on the following criteria:
 - a. An existing distribution licensee and existing generating company and captive power plant shall have the highest priority in allotment of open access capacity.
 - b. Distribution licensee shall have priority over other customers;
 - c. Other Long-term open access customers shall have the priority over the short-term open access customers but next to those covered under 9(a) and 9(b);
 - d. An existing long-term open access customer shall have the priority over new open access customer under respective category provided he has applied for its renewal 12 months prior to the expiry of existing term of open access;
 - e. -----“

That no differentiation has been provided between the existing distribution licenses. The priority of Long Term Open Access Customer over the Short Term Open Access Customer is for the other customers, other than existing distribution licenses, existing generating company and captive power plant.

Moreover the Commission finds that NPCL has paid for one 315 MVA ICT and GNIDA has paid for one third of 500 MVA ICT for supply of power to the consumers to Greater Noida area i.e. out of 1445MVA, 480MVA transformation capacity at Pali sub-station has been paid by NPCL/GNIDA and for 220 KV bay and associated line form Pali to R C Green sub-station has been paid by GNIDA/NPCL and similarly for Surajpur substation.

This shows that this transmission facility has been developed by UPPTCL on deposit by NPCL/GNIDA.

The Commission finds that as per Section 39 of the Electricity Act 2003, it was a duty of UPPTCL to ensure development of efficient, co-ordinated and economical system of Intra State Transmission lines for smooth flow of electricity from generating stations to the load centres and to provide non discriminatory open access to its transmission system for use by any licensee and as per Section 32 SLDC shall be responsible for optimum scheduling and dispatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies in the State.”

It is evident that the State Commission while passing the Impugned Orders has relied upon the provisions of clause 9 of the UPERC (Terms and Conditions for Open Access) Regulations, 2004 notified on 07.06.2005 for deciding on allotment priority for open access for different type of customers. The clause 9 was amended in the year 2009 vide first amendment to the UPERC Terms and conditions of Open Access Regulations notified on 18.06.2009. As per amendment, Long-term open access customers have been given the priority over the short-term open access customers. Long-term access request shall be considered for processing as per Schedule-A to the Amended Regulations 2009. Requirement of Bulk Power Transmission Agreement for use of transmission network has been identified for long-term open access transactions under Schedule-A.

- k) There has been a Bulk Power Transmission Agreement (“BPTA”) executed between NPCL and UPPTCL on 27/3/2014 wherein it has been agreed that NPCL would be treated as

“Long Term Customer” and the capacity available at the Pali Substation for NPCL on Long Term basis was to the extent of 268 MVA with a provision of enhancement. NPCL is also paying the Long Term Open Access Charges for the above under the BPTA. As placed before us by SLDC that the planning and development of intra-State transmission system is being done primarily for use of LTOA customers and cost of necessary investment as well as expenditure on Operation and maintenance of lines and substations is recoverable by STU from LTOA customers. Hence the bilateral arrangement under consideration through PPA between Shree Cement and NPCL falls within the same ambit.

- I) It has been brought to our notice that despite State Commission direction that NPCL must tie-up for long / medium term power, NPCL has not entered so far in long term contracts for purchase of power. We would like to put a remark on this count that the directions of State Commission are to be followed by NPCL in order to provide secure and reliable power supply to the consumers of NPCL.

However, these are aspects on the nature of power purchase. The Commission is well within its right to direct NPCL to arrange for the power purchase on Long Term Basis considering the interest of the consumers in the area of distribution of NPCL. The issue whether the Short Term purchase made by NPCL for meeting the requirements of the consumers, which NPCL claims to be for the benefit of the consumers, as it is able to procure at cheaper price, based on the prevalent circumstances, is independent of this aspect

whether NPCL is using the Intra State Transmission System of UPPTCL on a Long Term basis or Medium Term basis or Short Term basis. Further NPCL is paying to UPPTCL the Long Term usage charges for the use of the transmission system of UPPTCL.

The BPTA provides for the treatment of NPCL as long term customer. In the proceedings, the State Commission directed the State Load Dispatch Centre to file its submissions on the availability of the transmission capacity for considering the Open Access to NPCL. By affidavit dated 15th May 2015, the State Load Dispatch Centre submitted before the State Commission that only 237 MW power should be allowed/scheduled at all voltage levels at the CTU/STU periphery. The said affidavit by the State Load Dispatch Centre was based on a report given to the State Load Dispatch Centre by the Executive Engineer of UPPTCL vide letter dated 14th May 2015. The letter was addressed to the State Load Dispatch Centre analysing the load on the line and stating 'Messrs NPCL should be allowed 237 MW (Max) at all voltage level'. The letter is unambiguous in its representation. The letter is now sought to be explained by UPPTCL appearing as a Respondent in the present proceedings and UPPCL and the State Load Dispatch Centre as Appellants that it was only recommendation and not conclusive. It has been noted that UPSLDC is the appropriate authority to decide on the aspect of the transmission capacity available. The UPSLDC had filed an affidavit before the State Commission based on the above letter. In view of the categorical nature of the letter and the affidavit filed by

UPSLDC, it cannot be denied that the quantum of 237 MW was available to be allowed for the purpose of Open Access. Thus, irrespective of the issues of Long Term, Medium Term and Short Term Open Access, in the present case, there is a clear confirmation of availability of 237 MW. Though it is correct that the total transmission capacity determination cannot be considered in isolation of the transmission line from Pali Substation to Surajpur Substation or the availability of the capacity in Pali Substation alone and the total transmission capacity need to be considered taking into account the incidence of various power flow in the State. In the facts and circumstances of the case, it is clear that the capacity is available for transfer from Pali Substation to Surajpur Substation as well as to inject electricity through the two buses for which NPCL has contributed for the power flow on the lines leading to RC Green - Gharbara Substation.

In view of the above, the use of Intra State Transmission System by NPCL is on a Long Term basis notwithstanding that NPCL has sought for the use of the Inter State Transmission System of Powergrid (CTU) from Rajasthan till the Pali sub station for Short Term procurement from Shree Cement.

- m) In view of the above we do not find any infirmity in the Impugned Orders issued by State Commission, while deciding the priority of Short Term Open Access. Hence this issue is also decided against the Appellant.

ORDER

We are of the considered opinion that there is no merit in the present Appeal and hence the same is hereby dismissed.

The Impugned Orders dated 10.09.2014 and 21.07.2015 passed by the State Commission are hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **28th day of July, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

✓
REPORTABLE/~~NON-REPORTABLE~~
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