

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

Appeal no. 70 of 2015

Dated: 7th April, 2016

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

In the matter of

- 1. State Load Despatch Centre ... Appellant No.1
132 KV, Gotri Substation Compound
Gotri Road, Vadodara – 390 021**
- 2. Paschim Gujarat Vij Company Limited ... Appellant No.2
Laxminagar Main Road
Nana Mava Road
Rajkot – 360 004**

Versus

- 1. Gujarat Electricity Regulatory Commission ...Respondent no. 1
6th Floor, GIFT-1, Road No.5-C
Gift City, Gandhinagar – 332 335**
- 2. Steelcast Limited, ...Respondent no. 2
Ruvapuri Road
Bhavnagar – 364 005**

**Counsel for the Appellant(s): Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri**

**Counsel for the Respondent(s): Mr. C.K. Rai with
Mr. Paramhans
Mr. Arvind Tiwari,
Mr. S.R. Pandey (Reps.) for R-1**

JUDGMENT

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

This present Appeal is being filed under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 20.12.2014 passed by the Gujarat Electricity Regulatory Commission (**hereinafter referred to “State Commission”**) in Petition No. 1421 of 2014 whereby the State Commission has held that the Appellants are bound by the provisions of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulation, 2011 (**“GERC Open Access Regulations”**) with regard to giving the open access.

2. The State Load Despatch Centre, Vadodara (**hereinafter referred to “Appellant No. 1”**), is a company incorporated under the provisions of the Companies Act, 1956 and performing the statutory functions of the State Load Despatch Centre provided under the Electricity Act, 2003 for the State of Gujarat and is also the State Transmission Utility.

3. Paschim Gujarat Vij Company Limited (**hereinafter referred to “Appellant No. 2”**), is a Distribution Company incorporated under the provisions of the Companies Act, 1956 and performing the functions as a Distribution Licensee operating in the Paschim areas in the State of Gujarat.
4. Gujarat Electricity Regulatory Commission, Respondent No. 1 (**hereinafter referred to “State Commission”**) is exercising powers and discharging functions under the provisions of the Electricity Act, 2003.
5. M/s. Steelcast Limited (**hereinafter referred to “Respondent No. 2”**), is a consumer of the Appellant No. 2 having a contract demand of 6,000 KVA and in addition, it has been obtaining Short Term Open Access to purchase power through the power exchange since March, 2013.
6. Facts of Appeal
 - a) The Respondent No. 2 is situated in the area of the Appellant No. 2 and it has a contract demand of 6000 KVA. For the period from 07.03.2013, Respondent No. 2 has been applying for Short Term Open Access for collective transactions for purchase of power through the power exchange.

- b) As per the Appellants, conveyance of power in pursuance to the sale or purchase of electricity through power exchange is an Inter-State transaction.

- c) The Inter-State Short Term Open Access is governed by the provisions of the Central Commission's Open Access Regulation notified in 2008 and any purchase of power through the exchange is termed as a collective transaction.

- d) As stated by the Appellant, all the relevant provisions contained in the Central Commission's Open Access Regulations would apply in the present case which clearly defines the procedures, and governing principles in dealing with transmission constraints, payment of transmission and operating charges, redressal mechanism and deviation settlement mechanism.

- e) As per the Appellants, for grant of Short Term Open Access to facilitate transaction through power exchange, the Central Commission's Regulations need to be considered. Respondent No.2,

engaged in manufacturing of different types of steel casting, had applied for grant of open access through an application dated 23.04.2014. The same was not provided by the Appellants for the reason communicated to the Respondent No.2 as operational constraints in the transmission and distribution network of the Appellant No. 2.

- f) Since, No Objection Certificate (**“NOC”**) for Short Term Open Access was denied to the Respondent No. 2, it filed the Petition No. 1421 of 2014 before the State Commission with the following prayers:-
- i. To direct the respondent to issue No Objection Certificate for Short-Term Open Access with immediate effect.
 - ii. To decide and direct the respondent to pay compensation to the petitioner for losses occurred due to refusal of NOC without any valid reasons,
 - iii. To instruct the nodal agency that in future, the NOC should be granted within time frame to avoid losses to the open access consumer without any reasons.

- g) The Appellant No. 1 generated Deficiency or Defect with Application for Collective Transaction vide its letter dated 25.04.2014 stating consent is required from (i) Concerned Discom and (ii) Transmission Licensee. The Respondent No. 2 was further informed vide letter dated 30.04.2014 that the prior standing clearance is not granted as the Appellant No. 2 has not accorded the consent for the same.
- h) The State Commission while dealing with the subject petition of the Respondent No. 2 has held that denial of Short Term Open Access to the Respondent No. 2 for the month of May, 2014 was illegal and not in accordance with the State Commission's Open Access Regulations.
- i) As per the Appellants, this being a collective transaction through power exchange was required to be dealt in accordance with the Central Commission's prevailing Regulations.
- j) As such the Appellants are aggrieved by the State Commission's Impugned Order dated 20.12.2014 and hence, the Appellants have filed the present Appeal.

7. In view of the above, the main issue in present Appeal which is required to be decided by us is **“Whether the State Commission has jurisdiction to deal with the issues emerging out on denial of Short Term Open Access by the Appellants to the Respondent No. 2 considering the subject transaction as a power conveyance through power exchange?”**

8. We have heard at length Mr. M G Ramachandran, learned counsel for the Appellants and Mr. C.K. Rai, learned counsel for the State Commission and considered the written submissions and the arguments putforth by the rival parties and the following points emerged for our consideration.
 - a) The Appellants stated that the present case dealing with the conveyance of power on short term basis through power exchange is to be termed as Inter-State transaction and the same is to be governed by the provisions of Central Commission’s Open Access Regulations notified in 2008 wherein any purchase of power through the exchange is termed as a collective transaction and it has to

follow the detailed procedure prescribed thereunder. The relevant extracts from the Central Commission's Open Access Regulations is as under:-

“Short Title, Commencement and Application

1. (1) *These regulations may be called the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008.*

(2) *These regulations shall apply to the applications made for grant of short term open access for energy transfer schedules commencing on or after 1.4.2008 for use of the transmission lines or associated facilities with such lines on the inter- State transmission system.*

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(c) *“collective transaction” means a set of transactions discovered in power exchange through anonymous, simultaneous competitive bidding by buyers and sellers;*

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

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

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

(3) (a) For obtaining concurrence or ‘no objection’ or prior standing clearance an application shall be made before the State Load Despatch Centre who shall, acknowledge receipt of the application, either by e-mail or fax, or any other usually recognised mode of communication, within twenty four hours from the time of receipt of the application:

Provided that where the application has been submitted in person, the acknowledgement shall be provided at the time of submission of the application.

(b) 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 the following, namely-

(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.

(c) Where existence of necessary infrastructure and availability of surplus transmission capacity in the State network has been established, the State Load Despatch Centre shall convey its concurrence or ‘no objection’ or prior standing clearance, as the case may be, to the applicant by e-mail or fax, in addition to any other usually recognised mode of communication, within three (3) working days of receipt of the application:

.....

15. Curtailment in case of transmission constraints

(1) The Regional Load Despatch Centre may curtail power flow on any transmission corridor by cancelling or re-scheduling any transaction, if in its opinion cancellation or curtailment of any such transaction is likely to relieve the transmission constraint on the corridor or to improve grid security:

Provided that subject to provisions of the Grid Code, while cancellation or curtailment of any transaction, among short-term, medium-term and long-term transactions, short-term transactions shall be cancelled or curtailed first, followed by medium -term and thereafter long term–transactions:

Provided further that while cancelling or curtailing any short-term transaction, bilateral transactions shall be cancelled or curtailed first followed by collective transactions.

(2) In case of inter-regional bilateral transactions, approved schedule may be revised or cancelled by the Regional Load Despatch Centre, if the Central Government allocates power from a central generating station in one region to a person in the other region and such allocation, in the opinion of the Regional Load Despatch Centre, cannot otherwise be implemented because of congestion in inter-regional link. The intimation about such revision or cancellation shall, as soon as possible, be conveyed to the affected short-term customers.

(3) In case of curtailment of the approved schedule by the Regional Load Despatch Centre, transmission charges shall be payable pro-rata in accordance with the curtailed schedule: Provided that operating charges shall not be revised in case of curtailment.

Payment of transmission charges and operating charges

18. In case of the bilateral transaction, the applicant shall deposit with the nodal agency transmission charges and operating charges within three (3) working days of grant of application and in case of collective transactions, the power exchange shall deposit with the nodal agency these charges by the next working day falling after the day on which its application was processed:

Provided that in case of the collective transactions, the transmission charges for use of State network and operating charges for State Load Despatch Centre shall be settled directly by the power exchange with respective State Load Despatch Centre.

Redressal Mechanism

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

- b) The Appellants stated that the scheme and delineation with respect to Intra-State and Inter-State open access is well defined in the Central Commission’s Open Access Regulations. Collective transaction for power purchase through the exchange is clearly covered under the Central Commission’s Regulations and role of the State Load Despatch Centre in such a case is also defined under the said Regulations. As per the Appellants, the Respondent No. 2 applied for Short Term Open Access for purchase of power through the exchange as a collective transaction and as such, it’s application needs to be processed as per the provisions of the Central Commission’s Open Access Regulations and the transmission system availability and transmission constraints.
- c) The Appellants further stated that due to summer demand, they were required to curtail upstream injection due to Short Term Open Access into the transmission lines in order to maintain the system reliability and the grid security. Had the upstream injection due to Short Term Open Access not being curtailed during the said period,

it would have inevitably resulted in overloading all the transmission system and there would have been no margin to meet system contingencies and might have even led to the partial grid failure on account of frequent black out of the local system. The Appellants further stated that one of the significant objectives leading to the notification of Deviation Settlement Mechanisms Regulations, 2014 (“**DSMR, 2014**”) by the Central Commission under the Electricity Act, 2003 was to avoid grid failure at all costs. The relevant extracts from the Deviation Settlement Mechanism is as under;

*“(h) ‘**Deviation**’ in a time-block for a seller means its total actual injection minus its total scheduled generation and for a buyer means its total actual drawal minus its total scheduled drawal.*

7. Limits on Deviation volume and consequences of crossing limits

(1) The over-drawals / under drawals of electricity by any buyer during a time block shall not exceed 12% of its scheduled drawal or 150 MW, whichever is lower, when grid frequency is “49.70” Hz and above”

Provided that no overdrawal of electricity by any buyer shall be permissible when grid frequency is “below 49.70 Hz”.

Explanation: *The limits specified in this clause shall apply to the sum total of over-drawal by all the intra-State entities in the State including the distribution companies and other intra-State buyers, and shall be applicable at the inter-State boundary of the respective State.*

(2) The under-injection / over-injection of electricity by a seller during a time-block shall not exceed 12% of the scheduled injection of such seller or 150 MW, whichever is lower when frequency is “49.70” Hz and above”

Provided that –

(i) no under injection of electricity by a seller shall be permissible when grid frequency is "below 49.70 Hz" and no over injection of electricity by a seller shall be permissible when grid frequency is "50.10 Hz and above”.

(ii) any infirm injection of power by a generating station prior to COD of a unit during testing and commissioning activities shall be exempted from the volume limit specified above for a period not exceeding 6 months or the extended time allowed by the Commission in accordance with the Connectivity Regulations.

(iii) any drawal of power by a generating station prior to COD of a unit for the startup activities shall be exempted from the volume limit specified above when grid frequency is “49.70” Hz and above”.

(3) In addition to Charges for Deviation as stipulated under Regulation 5 of these regulations, Additional Charge for Deviation shall be applicable for over-drawal as well as under-injection of electricity for each time block in excess of the volume limit specified in Clause (1) and (2) of this regulation when average grid frequency of the time block is “49.70” Hz and above” at the rates specified in the table A & B below in accordance with the methodology specified in clause (7) of this regulation:

TABLE –A

<i>When 12% of Schedule is less than or equal to 150 MW</i>		
<i>(i)</i>	<i>For over drawal of electricity by any buyer in excess of 12% and up to 15% of the schedule in a time block</i>	<i>Equivalent to 20% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>

(ii)	<i>For over drawal of electricity by any buyer in excess of 15 % and up to 20% of the schedule in a time block</i>	<i>Equivalent to 40% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(iii)	<i>For over drawal of electricity by any buyer in excess of 20 % of the schedule in a time block</i>	<i>Equivalent to 100% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(iv)	<i>For under injection of electricity by any seller in excess of 12% and up to 15% of the schedule in a time block</i>	<i>Equivalent to 20% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(v)	<i>For under injection of electricity by any seller in excess of 15 % and up to 20% of the schedule in a time block</i>	<i>Equivalent to 40% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(vi)	<i>For under injection of electricity by any seller in excess of 20 % of the schedule in a time block</i>	<i>Equivalent to 100% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
B	<i>When 12% of Schedule is more than 150 MW</i>	
(i)	<i>For over drawal of electricity by any buyer is above 150 MW and up to 200 MW in a time block</i>	<i>Equivalent to 20% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(ii)	<i>For over drawal of electricity by any buyer is above 200 MW and up to 250 MW in a time block</i>	<i>Equivalent to 40% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(iii)	<i>For over drawal of electricity by any buyer is above 250 MW in a time block</i>	<i>Equivalent to 100% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
iv)	<i>For under injection of electricity by any seller is above 150 MW and up to 200 MW in a time block</i>	<i>Equivalent to 20% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(v)	<i>For under injection of electricity by any seller is above 200 MW and up to 250 MW in a time block</i>	<i>Equivalent to 40% of the Charge for Deviation corresponding to average grid frequency of the time block.</i>
(vi)	<i>For under injection of electricity by any seller is above 250 MW in</i>	<i>Equivalent to 100% of the Charge for Deviation corresponding to</i>

	<i>a time block</i>	<i>average grid frequency of the time block.</i>
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TABLE –B

<i>When 12% of Schedule is less than or equal to 150 MW</i>		
<i>(i)</i>	<i>For under injection of electricity by any seller in excess of 12% and up to 15% of the schedule</i>	<i>Equivalent to 20% of the Cap Rate for Deviations of 303.04 Paise /kWh or the Charge for Deviation corresponding to average grid frequency of the time block, whichever is less.</i>
<i>(ii)</i>	<i>For under injection of electricity by any seller in excess of 15 % and up to 20% of the schedule</i>	<i>Equivalent to 40% of the Cap Rate for Deviations of 303.04 Paise /kWh or the Charge for Deviation corresponding to average grid frequency of the time block, whichever is less.</i>
<i>(iii)</i>	<i>For under injection of electricity by any seller in excess of 20% of the schedule</i>	<i>Equivalent to 100% of the Cap Rate for Deviations of 303.04 Paise/kWh or the Charge for Deviation corresponding to average grid frequency of the time block, whichever is less.</i>
<i>B When 12% of Schedule is more than 150 MW</i>		
<i>(i)</i>	<i>For under injection of electricity by any seller is above 150 MW and up to 200 MW in a time block</i>	<i>Equivalent to 20% of the Cap Rate for Deviations of 303.04 Paise/kWh or the Charge for Deviation corresponding to average grid frequency of the time block, whichever is less.</i>
<i>(ii)</i>	<i>For under injection of electricity by any seller is above 200 MW and up to 250 MW in a time block</i>	<i>Equivalent to 40% of the Cap Rate for Deviations of 303.04 Paise/kWh or the Charge for Deviation corresponding to average grid frequency of the time block, whichever is less.</i>
<i>(iii)</i>	<i>For under injection of electricity by any seller is above 250 MW in a time block</i>	<i>Equivalent to 100% of the Cap Rate for Deviations of 303.04 Paise/kWh or the Charge for Deviation corresponding to average grid frequency of the time block, whichever is less.</i>

- d) The Appellants stated that with such necessary curtailments of the upstream injection have resulted into in improving system integrity and reliability.

- e) Since the Intra-State Transmission lines of the Appellants are integrated with the Inter-State Transmission Network operated and maintained by Central Transmission Utility, the Appellants are bound to implement the directions taken at the Inter-State transmission level in regard to grid operation, security, safety etc. and as such, the Central Commission is entitled to take serious actions against the Appellants for any deviation in the discharge of their functions to maintain grid security and safety. As per Section 28 of the Electricity Act, 2003, the state utilities are bound to implement the directions of the Regional Load Despatch Centres without fail.

- f) The Appellants keeping in view the various regulations of the Central Commission as stated above and the likely transmission scenario for the month of May, 2014 did not grant the No Objection Certificate for allowing open access to the Respondent No. 2 and denied the same which was strictly in view of the operational

constraints in the transmission and distribution network of the Appellant No. 2 on account of significant increase in the electricity requirements of its consumers. Such an action on the part of the Appellants was justified in the interest of the overall grid security, as mandated by the Central Commission's prevailing regulations. As per the Appellants, the State Commission while passing the Impugned Order dated 20.12.2014 has ignored the following aspects;

"i. RLDC/NLDC are curtailing open access as per system requirements under the provisions of the CERC Open Access Regulations;

ii. the power exchanges are splitting the market, based on transmission congestion/constraint and discovering the area prices by isolating the congested areas on a day-to-day basis;

iii. the Indian electricity grid code empowers the load dispatch centre is to modify schedules incase of any bottlenecks or constraints in the evacuation of power to do any outage failure or limitation in the transmission system, associated switchyard and substation owned by any licensee or threat to the grid security;"

- g) The Appellants quoted this Tribunal's judgment dated 08.05.2014 in the Appeal No. 173 of 2013 holding that apart from the availability of system, there may be other issues which needs to be considered while granting or refusing Inter-State open access including the contracts entered into by the generating companies and the State

Load Despatch Centre ought to be mindful of such issues while granting or refusing open access. While denying the Short Term Open Access to the Respondent No.2, the Appellants took into consideration all these aspects.

- h) As regards the State Commission's comment in the Impugned Order dated 20.12.2014 that the Appellants ought not to have filed a common reply, the Appellants stated that since they have to work in coordination and have to jointly manage the grid, they filed a joint reply as the case in hand was dealing with the network congestion and upstream congestion particularly in the Appellant No.2's area.
- i) The Appellants stated that the present case deals with the collective transaction and the Regulation framed by the State Commission do not define the term "collective transaction". In a collective transaction, one to one relationship of buyer and seller of power in transaction are not known and it is not possible to distinguish whether such transaction is on Inter-State basis or Intra-State basis to avoid the jurisdictional issues. Any exchange of power through collective transaction on power exchange is deemed to be Inter-State sale and purchase and hence is regulated by the Central Commission. Accordingly, in the present case, the procurement of

power by the Respondent No. 2 is ought to be regulated by the provisions of the Regulations notified by the Central Commission. The Appellants contended that the State Commission's Open Access Regulations can have no application to the collective transaction through power exchange and the above aspect is clear from the perusal of Regulation 15 and 16 of the State Commission's Regulations, 2011 which deals with the open access involving the Intra-State transmission system and the same reads as under;

“15. Procedure for short-term Open Access

- (1) Involving inter-State transmission system:*** *Notwithstanding anything contained in clauses (2) to (3) herein below, procedure for inter-State short- term Open Access shall be as per Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, or its statutory re-enactments, as amended from time to time:*

Provided that in respect of a consumer connected to a distribution system seeking inter-State short-term open access, the SLDC, before giving its consent to the RLDC as required under the Central Commission's regulations, shall require the consumer to submit the consent of the distribution licensee concerned.

- (2) Involving only intra-State transmission system:*** *Subject to the provisions of clause (1) herein above, intra-State short-term Open Access shall be in accordance with the provisions of sub clause (a) to (f) herein below:*

(a) Open Access in advance

- (i) *Application may be submitted to the Nodal Agency seeking short-term open access upto the fourth month, considering the month in which an application is made being the first month.*
- (ii) *Separate application shall be made for each month and for each transaction in a month.*
- (iii) *The application to the Nodal agency shall be on the prescribed form given in **FORMAT-ST1** containing such details as capacity needed, generation planned or power purchase contracted, point of injection, point of drawal, duration of availing open access, peak load, average load and such other additional information as may be required by the Nodal agency. The application shall be accompanied by a non-refundable application fee in cash or by demand draft in favour of the officer so notified by Nodal agency.*
- (iv) *An application for grant of open access commencing in any month may be submitted in a cover marked “Application for Short-Term Open Access – in advance” upto 15th day of the preceding month.*

For example, application for grant of open access commencing in the month of July shall be received upto 15th day of June.

- (v) *Nodal agency shall acknowledge receipt of the application by indicating time and date on “ACKNOWLEDGEMENT” to the applicant.*
- (vi) *A consumer of distribution licensee intending to avail open access shall also furnish a copy of his application to the distribution licensee of his area of supply.*
- (vii) *Based on the type of transactions Nodal agency shall take a decision on the applications for short-term open access in the manner provided herein below.*
- (viii) *All applications received under sub-sub-clause (iv) above shall be taken up for consideration together and processed as per*

allotment priority criteria specified under Regulation 19 of these regulations.

- (ix) Nodal agency shall check transaction for congestion of any element (line and transformer) of transmission and distribution system involved in transaction.*
- (x) Nodal agency shall convey grant of open access or otherwise in **FORMAT-ST2** along with schedule of payments to the consumer latest by 21st day of such preceding month.*
- (xi) Nodal agency shall assign specific reasons if open access is denied under sub-sub clause (x).”*

.....

“16. Consent by STU, SLDC or Distribution Licensee

- (1) **Inter-State open access** : STU In the case of application for grant of long-term access and medium-term open access and SLDC in the case of grant of short-term open access shall convey its consent or otherwise as per the provisions respectively of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 and Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, or their statutory re-enactments, as amended from time to time. In case of applicant connected to the distribution licensee, the said distribution licensee shall convey its consent or otherwise within 3 days of receipt of the request of the applicant.*
- (2) **Intra-State Open Access** :*
 - (a) In respect of a consumer connected to a distribution system seeking Open access, such consumer shall be required to submit the consent of the distribution licensee concerned. The distribution licensee shall convey its consent to the applicant by e-mail or fax or by any other usually recognised mode of communication, within three (3) working days of receipt of the application.*

- (b) *While processing the application from a generating station seeking consent for open access, the distribution licensee shall verify the following, namely-*
- (i) *Existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the provisions of the State Grid Code in force,*
 - (ii) *Availability of capacity in the distribution network, and.*
 - (ii) *Availability of RTU and communication facility to transmit real-time data to SLDC.*
- (c) *Where existence of necessary infrastructure and availability of capacity in the distribution network has been established, the distribution licensee shall convey its consent to the applicant by e-mail or fax or by any other usually recognised mode of communication, within three (3) working days of receipt of the application.*
- (d) *In case the nodal agency finds that the application for consent is incomplete or defective in any respect, it shall communicate the deficiency or defect to the applicant by e-mail or fax or by any other usually recognised mode of communication, within two (2) working days of receipt of the application:*
- (e) *In case the application has been found to be in order but the distribution licensee refuses to give consent on the grounds of non-existence of necessary infrastructure or unavailability of surplus capacity in the distribution network, such refusal shall be communicated to the applicant by e-mail or fax or by any other usually recognized mode of communication, within the period of three (3) working days from the date of receipt of the application, along with reasons for such refusal:*
- (f) *Where the distribution licensee has not communicated any deficiency or defect in the application within two (2) days from the date of receipt of application, or refusal or consent within the specified period of three (3) working days from the date of receipt of the application consent shall be deemed to have been granted.”*

- j) From the above, it can be seen that the collective transactions are only dealt by the Central Commission's Regulations hence the Appellants contended that the State Commission does not have any jurisdiction in the present case.

- k) As regards the system constraints, the transmission and distribution network and the circumstances leading to curtailment of Short Term Open Access, the Appellants observed that had it not been resorted to curtailment, the grid security would have been at stake and further supported its arguments by stating that even the Deviation Settlement Mechanism Regulations of the Central Commission call for such an action in the given scenario.

- l) The Appellants further stated that the State Commission by the Impugned Order dated 20.12.2014 has assumed its jurisdiction on the basis that the power system in Gujarat has to be operated as per the Intra-State ABT order in terms of the State Commission's Regulations without appreciating that the two authorities cannot be co-existing in jurisdiction and any issue pertaining Inter-State Open Access has to be only dealt with by the Central Commission.

- m) The Appellants further stated that in terms of provisions of the Electricity Act, 2003, the statutory role of the SLDC is to operate the Intra State grid and allow short term open access after satisfying that there will absolutely be no impact on the grid safety and security. It is, therefore, in the interest of the grid safety and security, the Appellants had to deny the Short Term Open Access to the Respondent No. 2.

- n) The Appellants further submitted that the State Commission has not appreciated that open access is not the absolute right and is subject to other provisions of Electricity Act, 2003 while ensuring the non-discriminatory open access to a consumer. Any grant of open access can be done only when there is no operational constraint at that point of time in that specific area.

- o) The Appellants contended that the Short Term Open Access gets the lowest priority and can be accorded only when there is a surplus capacity available after meeting the requirements of Long Term Open Access users and the Medium Term Open Access users and as such, the Short Term Open Access has to be decided on monthly

basis and keeping in view the system contingency and needs of the grid.

- p) The learned counsel for the Respondents cited the following portion of the Appellant No.1's letter dated 30.04.2014 vide which the open access was denied to the Respondent No.2;

"This has reference to your application seeking concurrence/prior standing clearance through interstate collective transaction or trade/purchase of 2.5 MW power by M/s. Steel cast Ltd. through IEX for the period May' 2014. Your application is registered for collective transaction vide registration no. GU/OA-439/2014-15. In accordance with the Clause 16(1) of the Intra State open access regulation 3 of 2011 issued by Hon'ble GERC your above registered application has not been given prior Standing Clearance/NOC for purchase of power through collective transaction as Concerned Discom-PGVCL has not accorded consent....."

The above denial by the Appellant No. 1 on the ground that the Appellant No. 2 has not accorded consent was challenged by the Respondent No. 2 and the State Commission has held that the actions of the Appellants in denying open access to the Respondent No. 2 for the month of May, 2014 was illegal.

- q) The Respondent No. 1 submitted that the open access sought in the present case is an Intra-State transmission system and distribution system and not the Inter-State transmission system and in support of the same, cited Section 2 (36) and 2 (37) of the Electricity Act,

2003 which define Inter-State transmission system and Intra-State transmission system respectively and the relevant extract is reproduced below;

“Section 2 (36) defines;

“inter-State transmission system” includes –“

(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) 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;

(iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.

Section 2(37) defines ‘intra-State transmission system’ as

“intra-State transmission system” means any system for transmission of electricity other than an inter-State transmission system;”

The learned counsel for the Respondent No. 1 stated that the Appellants’ reliance of Section 2(36) (ii) of the Electricity Act, 2003 to consider that the system which is involved in the present case is an Inter-State transmission system is not correct since it speaks of a situation wherein an intervening state is involved and the conveyance of the electricity takes place across territory of that

intervening state as well as conveyance within that state and such conveyance is incidental to such Inter-State transmission of electricity. This is not the situation in the present case. It was further stated that Section 2(36) (i) is also not applicable to the present case as it deals with a situation where conveyance of electricity takes place by means of main transmission line from the territory of one state to another state and the present case is also not related to this provision. Even the present case does not fall within the ambit of Section 2(36) (iii) of the Electricity Act, 2003. The Respondent No. 1 further stated that the Intra-State transmission system as defined in Section 2(37) Electricity Act, 2003 provides that transmission system other than Inter-State transmission system is Intra-State and as such, the Respondent No. 2 would have availed the Intra-State transmission network and it is also liable to pay the transmission and distribution losses as per the State Commission's (Open Access Regulation, 2011). As such the disputes pertaining to the same shall only be decided by the State Commission.

- r) The learned counsel for the Respondent No. 1 further submitted that the right of the embedded consumer of Discom to seek open access is a statutory right in terms of the Electricity Act, 2003 and it cannot

be curtailed on the ground that the Discom has not accorded consent. In support of the same, it has cited Section 42 of the Electricity Act, 2003 which is reproduced below;

“42. (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(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:

.....

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, 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.....”

- s) The Respondents further stated that the Appellants have admitted in its letter dated 30.04.2014 that the State Commission’s (Open Access Regulations, 2011) is the relevant Regulation applicable to

the facts of the present case. The relevant clauses of the State Commission's Regulations are reproduced hereunder;

"2. Scope

These regulations shall apply to open access for use of intra-State transmission system and distribution systems in the State of Gujarat, including when such system is used in conjunction with inter-State transmission system.

.....
.....

16. Consent by STU, SLDC or Distribution Licensee"

The relevant provisions are already brought out above for ready reference.

From the bare reading of the above mentioned provisions of the State Commission's Regulation, 2011, it is clear that in case of open access consumers that is connected to the network of Distribution Licensee, the said Distribution Licensee has to convey its consent or otherwise within the period of 3 working days from the date of receipt of the application along with the reasons for such refusal, if any. If the Distribution Licensee fails to communicate its refusal within the specified period of 3 working days from the date of receipt of the application, then its consent shall be deemed to have been granted.

t) As regards the issue of State Commission's jurisdiction to deal with the present case, the learned counsel for the Respondent No. 1 submitted that the State Commission has exclusive jurisdiction to determine such dispute under Section 86(1)(c) of the Electricity Act, 2003 and the relevant extract is reproduced below;

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(a).....

(c) facilitate intra-State transmission and wheeling of electricity;...”

In addition, the other relevant provisions of the Electricity Act, 2003 which are also to be considered while deciding the issue of jurisdiction are reproduced hereunder;

“Section 30. Transmission within a State- The State Commission shall facilitate and promote transmission, wheeling and inter-connection arrangements within its territorial jurisdiction for the transmission and supply of electricity by economical and efficient utilisation of the electricity.

The aforesaid Section recognize the territorial jurisdiction of the State Commission with regard to facilitate and promote (i) transmission, (ii) wheeling, (iii) inter connection arrangement, (iv) transmission and supply of electricity by economic and efficient utilization of electricity.

“Section 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:

(2) *The functions of the State Transmission Utility shall be -*

(a) *to undertake transmission of electricity through intra-State transmission system;*

.....

(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:*

Section 42. (Duties of distribution licensee and open access): --

- (1) *It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

(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:*

.....

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, 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.....”.

As per the Respondent No. 1, it is abundantly clear from the above that the jurisdiction of the State Commission in case any dispute arises in respect of the open access of transmission network of the state transmission utility as well as distribution network by the embedded consumers of the Discom under Section 39 read with Section 42 of the Electricity Act, 2003, is undisputed and the present case lies within its embedded status.

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

- (i) On perusal of letter dated 30.04.2014 of the Appellant No. 1 to the Respondent No. 2, it has been noted that the Appellants have dealt with the issue in accordance with clause 16(1) of the

Intra-State Open Access Regulations, 2011 of the State Commission issued by the State Commission.

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

(iii) Having regard to the provisions of Section 32 and 33 of the Electricity Act, 2003 pertaining to the functions of the State Load Despatch Centre and compliance of its directions, this case falls within the ambit of Appellant No. 1 and 2. We have further noted that as per the prevailing Regulations of the State Commission, any dispute arising due to non-issuance of NOC by the Appellants has to be brought before the State Commission which in this case is GERC and for the same reason, the GERC's jurisdiction is attracted.

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

(v) After going through the detailed submissions made by the Appellants before the State Commission regarding the transmission constraints, the State Commission observed that the present issue should have been dealt by the Appellant No. 1 since it is the nodal agency and is equipped with the latest technology to monitor and control the power system round the clock basis and the designated agency is continuously aware of

the system loading dynamics and any bottlenecks in the network as such there was no need on the part of the Appellants No. 1 to refer the matter to the Appellant No.2 for consent. On examination of letter dated 30.04.2014 of the Appellant No. 1 which clearly states that the Appellant No. 2 has not accorded consent, it is observed that relevant facts on the system dynamics have not been analyzed or recorded by the Appellant No. 1 which was mandatory for denying the Short Term Open Access permission to the Respondent No. 2 and by just mentioning in the letter that the Appellant No. 2 has not accorded consent, this cannot be considered as justifiable reason for such denial.

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

Open Access are not in accordance with the State Commission's Regulations.

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

(viii) We agree that the open access should be provided subject to operational constraints but the specific reason for such denial ought to be given as per the State Commission's Regulations, 2011.

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

In view of above, we agree with the State Commission's finding that the action on the part of the Appellants in denying Short Term Open

Access to the Respondent No. 2 for the month of May, 2014 was neither right nor in accordance with the prevailing Regulations.

ORDER

We are of the considered opinion that there is no merit in the present Appeal and is hereby dismissed. The Impugned Order dated 20.12.2014 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **7th day of April, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/NON-REPORTABLE
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