

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 83 OF 2018**

**Dated: 15<sup>th</sup> March, 2019**

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER**

**IN THE MATTER OF**

**Ultratech Cement Limited**

(Unit: Gujarat Cement Works),  
Kovaya; Ta: Rajula; Dist: Amreli

..... Appellant(s)

***Versus***

1. The Secretary,  
**The Gujarat Electricity Regulatory Commission**  
6th Floor, GIFT ONE, Road 5C, Zone 5,  
GIFT City, Gandhinagar - 382355,  
Gujarat, India

2. The Chief Engineer,  
**State Load Dispatch Centre**  
Gujarat Energy Transmission Corporation Ltd,  
132 KV Gotri Sub-Station Compound,  
Near T.B. Hospital, Gotri Road,  
Vadodara 390021,  
Gujarat, India

..... Respondents

Counsel for the Appellant ... Mr. R.N. Purohit

Counsel for the Respondent(s)... Mr. Pallav Mongia  
Mr. Mridul Chakravarty  
Ms. Nupur Trivedi for R-1

Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Anushree Bardhan  
Mr. Shubham Arya  
Mr. Anand K. Gamesan  
Ms. Poorva Saigal for R-2

**The Appellant has sought the following reliefs in the instant Appeal:**

- a) Set aside the impugned order dated 08/09/2017 by Ld.GERC in the original Petition No. 1558/2016.
- b) Direct the Respondent 2 – SLDC to refund the payment made against impugned bills along with interest @ 18% per annum.
- c) Pass any other order that this Hon'ble Tribunal may deem necessary in the facts of the case and in the interests of justice

**The Appellant has presented this Appeal for considering the following Question of Law:**

- A. Whether impugned Order is suffering from infirmity as passed overlooking a very clear and unambiguous decision under MOM dated 24.11.2011 of Ld. GERC and CERC Regulations?
- B. Whether Ld. GERC can allow SLDC to raise impugned bills after a period of over 2 years negating its own ruling in MOM dated 24.11.2014 and against CERC Regulations?
- C. Whether the Impugned Order is legally tenable?
- D. Whether Ld. GERC was justified in taking recourse to its order in Petition 1440 / 2015 which had raised different grounds than those raised in petition 1558 / 2016 filed by this Appellant?

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER**

1. Ultratech Cement Limited, (in short, '**the Appellant**') questioning the legality, validity and propriety of the impugned Order dated 08.09.2017 passed in Petition No. 1558 of 2016 on the file of the Gujarat Electricity Regulatory Commission, Gandhinagar (in short, '**first Respondent**')

**GERC**), upholding charges recovered by State Load Despatch Centre, Gujarat Energy Transmission Corporation Ltd, (hereinafter referred to as the “**second Respondent/SLDC**”) for short trade or non-trade or power through open access during the period of No Objection Certificate (NOC) granted by second Respondent has filed the instant Appeal, being No. 83 of 2018, on the file of the Appellate Tribunal for Electricity, New Delhi.

2. The Appellant is a registered company under the Company’s Act - 1956 having its registered office at “B” Wing, Ahuja Centre, 2<sup>nd</sup> Floor, Mahakali Caves Road, Andheri (E), Mumbai # 400 093 having its production facility at Kovaya, and engaged in production of cement. It is an EHV Consumer of Paschim Gujarat Vij Company Limited (PGVCL) who is supplying electrical power/energy to the Appellant at 220 KV having Contract Demand of 17500 KVA and Consumer No. 43107 and connected to transmission network of the State Transmission Utility (STU) viz. GETCO at 220 kv Voltage Level. Petitioner also has a captive power plant (CPP) of 4X23 = 92 MW capacity for supplementing his requirement of power and using Open Access facility as per regulation for sale of his spare/Standby power if and when such surplus power is available.

3. The first Respondent/GERC is a Statutory Authority constituted under the Electricity Regulatory Commission Act, 1998, having jurisdiction in the State of Gujarat. The impugned order was passed by the first Respondent and, therefore, it has been impleaded herein as a party.

4. The second Respondent/SLDC, Gujarat is a system operator for the power system network (Gujarat Grid System) including the Network of GETCO for monitoring and controlling generation and use of power within Gujarat by the consumers.

**BRIEF FACTS OF THE CASE LEADING TO THE PRESENT APPEAL ARE AS UNDER:**

5. The Appellant/Petitioner has filed a Petition under Regulation 45, Power to Remove Difficulties, of GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and for refunding the charges unduly recovered by the State Load Dispatch Centre (SLDC) on account of Short-trades and Non-trades period for use of State Transmission Network in respect of Short Term Open Access user for Collective transactions seeking the following reliefs:

- a) Direct and hold that based on the definition under Regulation 3 (r), "Reserved Capacity", in case of Collective Transactions, no transmission capacity stands reserved till the energy is scheduled and approved a day ahead for the Short-Term Open Access (STOA) users.
- b) Hold and declare that the action of the Respondent SLDC in considering the MW capacity limit indicated under Prior Standing Clearance/NOC for STOA as in case of Collective Transactions for power not Scheduled and Scheduled energy not approved as capacity reserved is unwarranted, arbitrary and not tenable in

terms of regulatory provisions in this regard and hence be set aside.

- c) Hold and declare that the action of the Respondent SLDC in raising the Transmission Charges claims from STOA users for collective transactions is ultra vires, unwarranted, arbitrary and not tenable in terms of regulatory provisions in this regard and hence be set aside and reaffirm that such charges are to be recovered by the exchanges only as directed under the respective regulations.
- d) Direct the concerned SLDC to abide by the provisions under CERC/GERC Regulations/procedures and refrain itself from raising claims and recovering amounts through arbitrary decisions/instructions towards Transmission Charges to deter them from going for Open Access power purchase through collective transactions by insisting on payment of such arbitrary claims.
- e) Direct the SLDC to approach the Commission as per the Regulatory provisions for Removal of Difficulties if any, instead of directing the consumers at least in the Open Access matters based on its arbitrary/convenient interpretations,

- f) Direct the SLDC to stop forcing any such recovery viz. State Transmission Charges for collective transactions which is not duly approved by the Commission through legitimate process for the same and also warn SLDC that such arbitrary actions henceforth shall be treated as breach/disobedience of the Orders of the Commission attracting punishment as per Section 142 of the Electricity Act, 2003,
- g) Direct the SLDC to refund the claim amount recovered so far from the petitioner with interest at the rate the Utilities recover the Delay Payment Charges,
- h) Direct the Respondent viz. SLDC, refund the amount recovered for claims which were not raised within the period of 2 years from the date/dates on which it was considered due for payment by the Petitioner, if at all such additional charges are finally considered as leviable.

6. The said matter had come up for consideration before the first Respondent/GERC and on the basis of the pleadings available on record seven issues framed for consideration of the first Respondent/GERC and after hearing the learned counsel for the Appellant and the Respondents and after appreciation of the documentary evidences available on record assigning the valid and cogent reasons, the petition filed by the petitioner has dismissed as devoid of merits. Not being satisfied by the impugned

Order dated 08.09.2017 passed by the first Respondent/ GERC, the Appellant has filed the present appeal contending that the second Respondent/SLDC, which was all along recovering Transmission charges based on energy actually scheduled, has recovered additional Transmission charges for the same power transactions illegally after a period of 2 years for the periods of Short-trades and Non-trades periods in respect of Short Term Open Access (STOA) charges by arbitrary after thoughts and misleading interpretation of permission granted for Open Access by way of issuing the NOC by second Respondent/SLDC for Sale of power through collective transactions allegedly as capacity reserved.

7. It is the case of the Appellant that, the second Respondent/SLDC has retrospectively recovered the charges on the basis of assumption that the No Objection Certificate given for the capacity limited under the NOC is the capacity reserved for the Appellant/petitioner whereas in fact according to Open Access Regulation Notification 3 of 2011 for Terms and conditions of Intra State Open Access Regulation, capacity is reserved for Long Term Open Access ( LTOA ) and Medium Term Open Access (MTOA), while for the Short Term Open Access (STOA ) for collective transactions in particular, it is considered as permission only for operation if and when the capacity is available after allowing (i) the use of capacity in priority by LTOA first, (ii) MTOA and (iii) by STOA under bilateral

contracts. Thus the question of reserved capacity for STOA in case of collective transactions in particular is far from the fact.

8. Further, it is the case of the Appellant that, the second Respondent SLDC did not furnish any specific reply against the specific issues and references pointed out by the petitioner in his correspondence referring to regulatory reference documents for reservation of capacity and the collective transactions but merely preferred to reiterate irrelevant generalized references based claims only. Appreciating the fact that the second Respondent/SLDC enjoying a monopoly status and dominant position, the Appellant/petitioner has paid the claim amounts with protest. The after thoughts based recovery after a period of a few years for quantum of energy not scheduled or less scheduled than approved/permitted capacity is arbitrary, unwarranted and illegal and, therefore, liable for refunding such recovery amounts with interest.

9. It is clarified by the first Respondent/GERC to the second Respondent/ SLDC vide Minutes of Meeting (MOM) dated 24.11.2011 vide clarification at serial no. 4 of MOM that the transactions of power made by STOA consumer through power exchange is a collective transaction and to be treated as per Interstate Open Access Regulation of Central Electricity Regulatory Commission (CERC) and not as per intra State transactions as per regulation of the first Respondent/(GERC).



Therefore, it is the case of the Appellant that the issues arise for consideration before this Tribunal in the present appeal are as under:

- (i) Whether No Objection Certificate (NOC) / Standing Clearance granted by the second Respondent/SLDC – means reservation of transmission capacity for Short Term Open Access consumers selling power through Power Exchange i.e. Collective Transaction there by being obligated to pay transmission charge for entire quantum of NOC for entire period of NOC irrespective of quantum of energy transmitted or duration of energy transmitted;
- (ii) Without prejudice to Appellant's stand that there is no such reservation of capacity for Short Term Open Access through Collective Transaction through Power Exchange, whether second Respondent/SLDC is estopped from levying such transmission charges – claiming error by them – after a period of over two years.

**10.** The Appellant has contended that the first Respondent/GERC without considering the case made out by the Appellant and contrary to the relevant provisions of the Electricity Act and Regulations and without considering the well settled law laid down by the Hon'ble Apex Court and this Tribunal in host of judgments, has dismissed the petition filed by the Appellant/petitioner. Therefore, the Appellant felt necessitated to present

this Appeal assailing the correctness of the impugned order dated 08.09.2016 passed in Petition No. 1558 of 2016 on the file of the first Respondent/GERC, Gandhinagar.

**Oral and written submissions of the learned counsel, Mr. R.N. Purohit, appearing for the Appellant, are as follows:**

11. The learned counsel for the Appellant has filed his written submission contending that two issues, as stated above, arise for the consideration of this Tribunal in the instant appeal. He submitted that, the first issue of reservation of capacity, following facts need to be considered that,

12. GERC (Terms and Conditions of Intra State Open Access) Regulations, 2011 Sec. 21(2) – Transmission Charges for use of intra-state transmission system specifies Transmission Tariff for Long & Medium Term Open access users for part of a month as:

*Transmission Tariff =  $TTC / (ACs \times 8760)$  (in Rs./MWh),*

*where TTC = Total Transmission Cost determined by the Commission for the transmission system for the relevant year (in Rs.),*

*and ACs = Sum of capacities allocated to all Long-term and Medium-term Open Access customers in MW*

*Regulation 21(2)(ii) further specifies Transmission Tariff for Short Term Customers as  $1/4^{th}$  of transmission charge payable by Long-term / Medium-term Open access customers and Proviso specifies further reduced transmission charges payable by Short Term Open Access customers for use of system for part of a day for different durations e.g. for upto 6 hours in a day, between 6 hours and 12*

*hours in a day and for more than 12 hours in a day upto 24 hours. Above provision of the Regulation allows use of system partially and also Transmission Tariff will apply accordingly.*

**13.** The second Respondent/SLDC had contended in Appeal No. 70 of 2015 decided by this Tribunal on 07.04.2016 that Short Term open Access gets lowest priority and can be accorded only when there is a surplus capacity available after meeting the requirements of Long Term and Medium Term Open access. Therefore, the contention of the Respondent is misplaced that even for Short Term Open Access transmission Charges are applicable on basis of Max. Capacity Reserved. The first Respondent/GERC has derived Transmission Tariff based on ACs i.e. Sum of Capacities Allocated to all Long and Medium Term and Bilateral Short Term Open Access customers. For Short Term Open Access through Collective Transaction, granting Open Access is last priority in the whole chain.

**14.** Further, the counsel for the Appellant contended that, in the NOC/Prior Standing Clearance issued by second Respondent/SLDC vide letter dated 26.06.2013 para 1 states that Sufficient Transmission capacity is available. The letter does not specify/stipulate any reservation of capacity for Appellant. Also "NOC" format: PX-I - Standing Clearance/No Objection Certificate Pt. 6-MAX. MW ceiling allowed for injection (i) Zero with contingency margin and (ii) 24 MW without contingency margin for

day. At Pt. 10 the said NOC defines different rates for different hours of use per day. In the same NOC under Declaration SLDC certifies that (a) We have "No Objection" to seeking and availing Open Access by M/s. Ultra Tech Cement Ltd., Kovaya through Power Exchange up to the 24 MW ceiling. Such terms used by the second Respondent/SLDC e.g. "Max. Ceiling", "Sufficient Transmission capacity", ....availing Open Access through Power Exchange UP TO 24 MW CEILING" leads to the interpretation that there is No Reservation of Capacity for Short Term Open Access through Power Exchange.

**15.** The counsel for the Appellant contended that in the meeting held between the first Respondent/GERC and State Utilities on 24.11.2011, the State Utilities sought clarification from first Respondent/GERC regarding treatment to be given to Short Term Open Access through Power Exchange i.e. Collective Transaction, first Respondent/GERC unambiguously confirmed that for Short Term Open Access thru Collective Transaction, CERC Regulations for Open access shall apply. It is pertinent to note that the said meeting was between the State Commission and State Utilities, where customers who are important Stake Holders in the whole process were never involved. Therefore, the contention of the Respondent's that the meeting was to clear procedures is totally unfounded since detailed procedure already existed as per the relevant Regulation. CERC Regulations for Open Access which were notified in

2008 - much before GERC Open access Regulations notified in 2011 - clearly mandates that State Transmission charges will apply as per State Commission, with a proviso that where the State Commission has not defined the same in Rs./MWh, it will be applicable at the rate of Rs.80/MWh as applicable in CERC Regulation. It is pertinent to note that first Respondent/GERC had not defined Transmission Charges in Rs./MWh, thereby making Transmission Charges of CERC as applicable for Short Term open Access through Collective Transactions. These aspects of the matter has not been looked into nor considered nor appreciated by the first Respondent/GERC in the impugned Order. Therefore, the impugned Order passed by the first Respondent/GERC is liable to be set aside.

**16.** On the second issue regarding Estoppel, the learned counsel for the Appellant has contended that,

- (i) Whether the Appellant made payments of Transmission Charges as demanded by Power Exchange - since for Short Term Open access through Power Exchange, Transmission Charges for Open Access are to be settled with Power Exchange as per Regulations of CERC and GERC - without demur for all Open Access transactions;
- (ii) Whether the Appellant would have acted differently if he was made aware that he shall be required to pay Transmission

Charges for entire NOC quantum and period irrespective of his scheduling the energy based on his requirement;

- (iii) Whether by violating the principle of Equity, Appellant was put in a disadvantageous position after a period of over 2 years, since while the Respondent had the opportunity to recover any amount from Appellant by virtue of his dominant position, the Appellant has no such recourse to recover any amount from his customers.

**17.** The counsel for the Appellant vehemently contended that the Appellant has never defaulted or disputed bills raised by Power Exchange as per procedure laid down in the applicable Regulation. It is a sound business proposition that while selling or buying any product or service, all parameters which have a bearing on the cost of product or service are factored. It is obvious that had Appellant been aware of this huge liability - to arise on a future date after a period of over two years - of over ₹12 million with nil possibility of recovery from his customers, like any sane business entity, he would have acted prudently. i.e. he would have added this part of the cost to the purchasers of his power sold thru' Open Access to Exchange or even not obtained NOC for such periods wherever not financially viable.

**18.** Further, the counsel for the Appellant contended that, if the cost of his product would eventually turn out to be more than amount realized through sale of his product, he would have refrained from any such

transaction. Equity demands that Appellant cannot be put to a disadvantageous position due to error committed by Respondent when the Appellant has no such remedy available. The second Respondent/SLDC for over two years kept on accepting Transmission Charges without any demur. Their raising additional demand puts Appellant into disadvantageous position and causes Appellant irreparable loss for no fault of his. The well settled law laid down by the Hon'ble Supreme Court and various High Courts held that once a position is accepted by a party, he cannot be permitted to change his position if it would put the other party in a disadvantageous position. To substantiate his submissions, he placed reliance on the judgments of the Hon'ble Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors. [1979 ]2SCR641 and another judgment by High Court of Guwahati in the case of Union of India (UOI) vs. Raj Brothers AIR 2000 Gau 132. In the afore stated judgment, the Hon'ble Supreme Court has allowed the appeal filed by the Appellant and set aside the judgment of the High Court, and in its judgment, the High Court of Guwahati has held that, the trial Court was not justified in directing the appellant to refer such new claims raised by the plaintiff respondent for settlement by the arbitrator. The judgment and order passed by the trial Court being vitiated is accordingly set aside. In the result the appeal succeeds which is allowed with costs. Therefore, he submitted that, following the ratio of the judgment of the Hon'ble Apex Court and High Court, as referred above,

the order impugned passed by the first Respondent/GERC is liable to be set aside directing the second Respondent/SLDC to refund the payment made against the impugned bills along with interest @ 18% per annum in the interest of justice and equity.

**Oral and written submissions of the learned counsel for the first Respondent/GERC are as follows:**

19. The learned counsel for the first Respondent/GERC, Mr. Pallav Mongia, submitted that, the present Appeal has been filed by the Appellant questioning the correctness of the impugned Order dated 08.09.2017 passed by the first Respondent/GERC in Petition No. 1558 of 2016, wherein the said petition of the Appellant was dismissed while upholding the recovery of the applicable transmission charges on the basis of the maximum capacity reserved for the Short-Term Open Access ('STOA') granted to the beneficiaries for the period prior to 14.08.2014. Further, the first Respondent/GERC has dealt with issues raised in the petition before it, in detail and the said issues also overlap in the present proceedings before this Tribunal. The first Respondent/GERC most respectfully submits the following relevant issues, which emanated in the original proceedings before it, as also in the present Appeal preferred before this Tribunal, which issues, inter-alia, are as follows:

- (I) Whether the collective transactions, and the transmission charges for the same, are governed by the *GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011*



(hereinafter 'GERC Regulations') or the *CERC (Open Access in Inter-State Transmission) Regulations, 2008* (hereinafter 'CERC Regulations')? This must also be considered in the light of point no. 4 of the Minutes of Meeting (hereinafter 'MoM') of the answering Respondent dated 24.11.2011.

- (II) Whether there is any Reserved Capacity as per the *GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011* for collective transactions and whether there is any difference in the reserved capacity for bilateral transactions and collective transactions? And, whether the Appellant, for collective transactions, is liable to pay the transmission charges for Scheduled Energy instead of Reserved Capacity based on NOC prior to Second Amendment to the GERC Regulations?
- (III) Whether the action of recovery of transmission charges by the Respondent No. 2 for collective transactions on Reserved Capacity basis is unwarranted, illegal and ultra-vires?
- (IV) Whether the claim of the Respondent No. 2 is barred by the period of Limitation as specified under Section 56 of the Electricity Act, 2003? And, whether the Respondent No. 2 is eligible to recover the dues for the period FY 2012-13 and FY

2013- 14 as claimed in the impugned invoices dated 28.01.2015 and 16.04.2015 retrospectively (estoppel)?

20. Regarding issue No. (I), the learned counsel for the first Respondent/GERC submitted that, as per the relevant provision of the CERC Regulations needs to be seen, which read as under:

***“Transmission Charges:***

*16. (1) In case of bilateral transactions, for use of the inter-State transmission system, the transmission charges at the rate specified hereunder shall be payable by the applicant for the energy approved for transmission at the point(s) of injection:*

...

*(2) In case of the collective transaction, for use of the inter-State transmission system, transmission charges at the rate of Rs.30/MWh for energy approved for transmission for each point of injection and for each point of drawal shall be payable.*

*(3) The intra-State entities shall additionally pay transmission charges for use of the State network as determined by the respective State Commission:*

*Provided that in case the State Commission has not determined the transmission charges, the same shall not be a ground for denial of open access and charges for use of respective State network shall be payable for the energy approved at the rate of Rs.30/MWh:*

*Provided further that transmission charges for use of the State network shall be intimated to the Regional Load Despatch Centre concerned for display on its web site:*

*Provided also that transmission charges shall not be revised with retrospective effect.”*

**(Emphasis supplied)**

21. Further, Regulation 16(3) of the CERC Regulations specifically provides that, in the case of intra-state entities and transactions, additional payment of transmission charges for use of the state network shall be determined by the respective State Commission(s). Thus, the aforesaid Regulation recognizes that when the Intra-State Transmission system is utilized, the Open Access customers are required to additionally pay the transmission charges as per the charges determined by the respective State Commission and once this exercise has been fulfilled by a respective State Commission, there is no occasion for application of the proviso to the aforesaid Regulation 16(3). Further, in terms of the above, it is seen beyond dispute that the Appellant is situated in the State of Gujarat and injecting power at injection point for collective transactions, utilizing the Intra-State network from the injection point to inter-connection point of Intra-State and Inter-State transmission network. It is also beyond any lis that the Appellant is liable to pay the transmission charges for utilization of Intra-State network.

That, additionally, reference may also be had to the judgment passed by this Tribunal in the case of *State Load Dispatch Centre and Paschim Gujarat Vij Company Limited Vs. Gujarat Electricity Regulatory Commission and Steel Cast Limited*, wherein at paragraph no. 7 onwards, it has been specifically held that in case of users of Intra-State networks for collective transaction, it would fall within the jurisdiction of the State

Commission within whose jurisdiction the intra-state network falls. Regarding reliance of the Appellant on the Minutes of Meeting of the answering Respondent dated 24.11.2011 is concerned, it is most respectfully submitted that the said reliance is misplaced as nowhere in the said Minutes has it been stated that the first Respondent/GERC's relevant Regulations shall not apply and in fact, when the Intra-State network is also involved or utilized, in such case the GERC Regulations shall apply. Thus, the Appellant is bound to bear the transmission charges as determined by the answering Respondent, as per its Open Access Regulations.

**22.** The counsel for the first Respondent/GERC submitted that, regarding the first part of Issue No. 2, it is respectfully submitted by the first Respondent/GERC that foremost, as per the definition of Reserved Capacity needs to be perused, the said definition can be seen that the definition envisages transfer of energy between drawal and injection point in MW which is not in energy term but the same is in capacity term for Open Access. The definition of Reserved Capacity as per the CERC Regulations is also required to be seen as the same is being relied upon by the Appellant, which read thus:

*(j) "Reserved Transmission Capacity", means the power transfer between the specified point(s) of injection and points of drawal allowed to a short-term customer on the transmission system depending on availability of transmission capacity and the expression "reservation of transmission capacity" shall be construed accordingly*

**23.** The counsel for the first Respondent/GERC contended that the counsel for the Appellant placing reliance on Regulation 16 of the CERC Open Access Regulations and contended that transmission charges are payable for energy scheduled for transmission i.e. on scheduling which is approved and not on Prior Standing Clearance/NOC capacity basis. It is, thus, submitted with regard to the entire gamut of the aforesaid issue and stand of the Appellant that the definition of Reserved Capacity under the captioned CERC Regulations does not provide to mean either scheduled energy or scheduled capacity and whichever way, the array of the Appellant's contention with regard to scheduled capacity would unwantingly mean variance in the scheduled capacity on different dates and shall lead to different reserved capacity for Short Term Open Access which is not the case in NOCs as sought by such customers and shall also lead to a situation wherein Short Term Open Access period may vary considering the scheduled capacity on which the Short Term Open Access is sought by such customer which is against the provisions of the relevant Regulations. Therefore, the contention of the counsel for the Appellant is liable to be rejected.

**24.** The other aspect that needs to be seen by this Tribunal is Regulation 21 (along with its Amendments) of the GERC Regulations which is reproduced as under:

***“21. Transmission Charges***

*Open Access customer using transmission system shall pay the charges as stated hereunder:*

*(1) For use of inter-State transmission system:*

*As specified by the Central Commission from time to time.*

*(2) For use of intra-State transmission system: .....*

*(ii) By Short-Term Open Access Customers:*

*Transmission Charges payable by a Short-Term Open Access customer shall be at a rate one-fourth of the transmission charges applicable to the Long-Term/Medium-Term customer, as described above.*

*Transmission charge payable by Short-term open access customers  
=  $\frac{1}{4}$  × Rate of transmission charge payable by long-term/medium open access customers*

*Provided that the Transmission charges payable by Short-term open access customers for use of the system for part of a day shall be as follows:*

<i>(a)</i>	<i>Upto 6 hours in a day in one block</i>	<i>=</i>	<i>(<math>\frac{1}{4}</math> × short-term open access rate)</i>
<i>(b)</i>	<i>More than 6 hours and upto 12 hours in a day in one block</i>	<i>=</i>	<i>(<math>\frac{1}{2}</math> × short-term open access rate)</i>
<i>(c)</i>	<i>More than 12 hours upto 24 hours in one block</i>	<i>=</i>	<i>Short-term open access rate</i>

*Provided that transmission charges for short-term open access shall be payable on the basis of maximum capacity reserved for such customer.”*

***(Emphasis supplied)***

From the above, it can be seen that the GERC Regulations provide for payment of the transmission charges on the basis of ‘maximum capacity reserved’, recoverable from Open Access customers who are availing the Long-Term, Medium-Term and Short-Term Open Access (*the latter also required to pay the said charges on capacity allocated i.e. MW*

basis, as is the case with the Long-Term, Medium-Term customers) by the STU/Transmission Licensee. Further, on 04.03.2014, the answering Respondent vide a notification no. 1 of 2014 (effective from 01.04.2014) carried out First Amendment in the GERC Regulations particularly Regulation 21 i.e. the transmission charges payable by a Short-Term Open Access customer and they were bought on par with the Long-Term and Medium-Term Open Access customers, however, the basis for these charges i.e. maximum capacity reserved was not amended or changed. The relevant portion of the amendment is as below

*“Regulation 21 (2) (ii) of the Principal Regulations shall be substituted as under:*

*(ii) By Short-Term Open Access Customers:*

*Transmission Charges payable by a Short-Term Open Access customer shall be determined as under:*

*Transmission charges payable by Short-term open access customers*

*=  $24 \times TTC / (ACs \times 8760)$  (In Rs./MW/day)*

*Where;*

*TTC = Total Transmission Cost determined by the Commission for the transmission system for the relevant year (in Rs.) and*

*ACs = Sum of capacities allocated to all long-term and medium-term open access customers in MW.*

*Provided that transmission charges for short-term open access shall be payable on the basis of maximum capacity reserved for such customers.”*

**(Emphasis supplied)**

Therefore, counsel for the first Respondent/GERC submitted that, recovery of transmission charges from Short-Term Open Access customers on the basis of actual scheduled energy in the State of Gujarat has become operational and effective only from 14.08.2014 and such charges are/were payable on the basis of reserved capacity in MW till 13.08.2014, i.e. prior to coming into effect of the aforementioned Second Amendment. Furthermore, it is necessary to clarify and state herein that the definition of the Reserved Capacity as per the Regulations proves that the capacity stated in the Regulations is on MW basis applied for NOC in Short-Term Open Access application and accordingly the same has been granted by the second Respondent/SLDC herein and it is neither on scheduled capacity basis nor on MWh basis and the term maximum reserved capacity cannot be equated with the scheduled capacity or energy actually scheduled. That, it is also vital to note that there has been no revision of the applicable transmission charges by the first Respondent/GERC and the relevant Regulation and its subsequent amendments are distinct and have different meaning in the domain they cover.

**25.** Regarding issue No.3, the counsel for the first Respondent/GERC contended that, foremost, there has been no surrender of unused capacity nor any such information has been conveyed to the second Respondent/SLDC regarding any revision in such capacity that has been



allowed vide the NOC of the second Respondent/SLDC, after the Appellant's transmission capacity is booked under Short-Term Open Access by the second Respondent/SLDC. It has also been put forth by the Appellant before the first Respondent/GERC, as also this Tribunal that on short-traded days the transmission charges are payable limited to traded quantity only, however, it is submitted that this stand of the Appellant is erroneous as the quantum of short-traded quantity of Short-Term Open Access is a commercial transaction carried out at the Exchange level between seller and purchaser for power purchase/sale and once the Short-Term Open Access is granted on the transmission system, the same needs to be utilized by the open access customers to whom such open access is granted and consequently, any shortfall in procurement of power through Energy Exchange due to mismatch of price between seller and procurer of power is not a ground for non-applicability of transmission charges for Short-Term Open Access. Sight cannot be lost of the GERC Regulations and its First Amendment, wherein it has been specifically provided that once the capacity is booked for Short Term Open Access, such consumers are liable to pay transmission charges as per the relevant Regulations prevailing when such Short-Term Open Access transactions took place. As such, the recovery of transmission charges for NOC capacity/Reserved capacity by the Respondent No. 2, as per the answering Respondent is legal and valid strictly in consonance with the relevant provisions of the Electricity Act and Rules.

26. The counsel for the first Respondent/GERC regarding issue No.4, at the outset, submitted that, second Respondent/SLDC has made a claim for recovery of Transmission Charges from the Appellant vide its invoice dated 28.01.2015 for an amount Rs. 63,74,625 for the Financial Year 2013-14 and invoice dated 16.04.2015 for an amount of Rs. 56,70,282 for the Financial Year 2012-13. Further, the Appellant herein has contended that the second Respondent/SLDC is barred from recovering any dues which falls beyond a period of 2 years from the date when such dues first fell due as per Section 56 of the Electricity Act, 2003. It is pertinent to note that as per section 56 of the Electricity Act, 2003, in its entirety, this Tribunal in the case of *Ajmer Vidhyut Vitarant Nigam Limited Vs. RERC* particularly paragraph nos. 32 to 39, a conjoined reading of Section 56 of the Electricity Act, 2003 and the aforesaid judgment of this Tribunal leads to a conclusion that Section 56(2) particularly provides for a barrier from disconnection with regard to default in payment of any pending due(s) that lies beyond a period of 2 years. However, there is no bar in the said section on the licensee/generating Company from recovering any pending due(s) that is beyond the period of 2 years but within the general limitation period of 3 years as provided under the Limitation Act, 1963. Further, to substantiate his submission, the counsel for the first Respondent/GERC placed reliance on the judgment of this Tribunal as referred above. In the case at hand, it is beyond dispute that the invoices dated 28.01.2015 and 16.04.2015 are raised by the Respondent no. 2 on the Appellant within a

period of 3 years period from the date of grant of Open Access to the Appellant.

**27.** Further, the counsel for the first Respondent/GERC contended that with regard to the second part of Issue No. 4, i.e. recovery of transmission charges (dues) retrospectively, it is submitted by the first Respondent/GERC that the basis and mechanism under the prevalent GERC Regulations along with the First Amendment held domain for recovery of transmission charges on reserved capacity basis until 13.08.2014 i.e. prior to coming into effect, the Second Amendment. Further, the Respondent No. 2 has recovered charges from the Appellant on scheduled capacity (energy) basis instead of reserved capacity basis, when the GERC Regulations along with the First Amendment specifically envisaged the latter under an erroneous application of the said Regulation. Thus, it is this error that was rectified by the second Respondent/SLDC and the consequent supplementary invoices dated 28.01.2015 and 16.04.2015 were raised for the under-billed balance amounts. Hence, in these set of facts, the recovery by second Respondent/SLDC cannot be termed as recovery based of retrospective applicability of GERC Regulations. Further, estoppel cannot be pleaded against a statute or law and Regulations are a sub-legislative function conferred on the State Commission(s) having statutory force, this position of law is also settled by a catena of judgments of the Hon'ble Apex Court.

Further, he submitted that, it has to be kept in notice that the charges recoverable under the GERC Regulations were wrongly recovered by the second Respondent/SLDC and there is no restriction to correct the error and recover the correct amount. Furthermore, the recovery of these charges is counted in the ARR of the licensee and given effect in the Long-Term Open Access and Medium-Term Open Access customer charges. The recovery of transmission charges by the second Respondent/SLDC from the Appellant is legal and valid. Therefore, this aspect of the matter has rightly been considered by the first Respondent/GERC and by assigning valid and cogent reasons has passed the order impugned. Hence, interference by this Tribunal does not call for.

**28.** The learned counsel for the first Respondent/GERC vehemently contended that certain issues are raised in the present Appeal before this Tribunal which were never raised in the original proceedings before the first Respondent/GERC. In this regard, it is submitted that, the present proceedings are Appeal proceedings as envisaged under Section 111 of the Electricity Act, 2003 and as such, the first Respondent/GERC had no occasion to deal with such contentions which were never raised before it. As such, no Review proceedings were either initiated before the first Respondent/GERC to bring such new issues to the foray before it. The contention of the counsel for the Appellant regarding new issues raised

herein regarding whether the first Respondent/GERC has overlooked its own Regulation which gives all formats i.e. ST-2, ST-3, ST-4 for transmission charges as in Rs./MWh and not in Rs./MW, it is respectfully submitted that there cannot be any overriding effect of formats over the main Regulations and this position is also a settled law as laid down by the Hon'ble Apex Court in host of cases. Further, it is pertinent to mention herein that GERC Regulations along with its First Amendment, in the most certain way lays down that Short-Term Open Access transmission charges is on the basis of maximum capacity reserved and as per the formats, this capacity allocated is in MW. A reference may be had to the prevalent Regulation 21 in this regard. As such, the contention of the Appellant in the issue under submission is erroneous and misplaced and liable to be rejected at threshold. Regarding contention of the counsel for the Appellant with reference to the issue of conduct of meetings by the first Respondent/GERC, it is submitted and clarified that the same are within the regulatory framework and as per the Conduct of Business Rules, particularly Regulation 14. As per Regulation 14, the Commission is empowered to hold meetings and that has been followed strictly. With regard to the issue of part of day billing, it is submitted and clarified that Short-Term Open Access, under the said Regulation is defined for a period upto 1 month at a time, but not exceeding a period of 6 months in a calendar year thus making it clear that any person seeking Short-Term Open Access may be granted open access for a period of 1 month and

wherever the said grant is for such period, the charges payable shall be calculated on this basis. In the present case, it is imperative to see whether the Appellant had applied for Short-Term Open Access for the entire period of 1 month or otherwise, as provided under the said Regulations. Therefore, he most respectfully submitted that, the Appellant has failed to make out any case passed by the first Respondent/GERC. The first Respondent/GERC, after thorough evaluation of the evidences available on record and critical verification of the relevant materials available, by assigning the valid and cogent reasons has passed the reasonable and proper order. The said order is proper and sound and interference by this Tribunal does not call for and the appeal filed by the Appellant is liable to be dismissed as devoid of merits.

**Oral and written submissions of the learned counsel for the second Respondent/SLDC are as follows:**

29. The learned counsel, Mr. M.G. Ramachandran, appearing for the second Respondent/SLDC contended that, the matter in issue is the Recovery of the applicable transmission charges for the State network (within the State of Gujarat) on the basis of the maximum capacity reserved under the Short Term Open Access granted to the beneficiaries and the applicable regulations are the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and the amendments thereto (hereinafter referred to as '**GERC Open Access Regulations**'). The Appellant has claimed that it is

selling power through Power Exchanges, a collective transaction regulated by the Central Commission and not by the State Commission. As per the Appellant, the open access is governed by only those regulations applicable to Inter State transactions notified by the Central Commission under Section 79 of the Electricity Act, 2003. Though the Power Exchange transactions is an Inter State Transaction involving the use of the Inter State Transmission Network owned, operated and maintained by the CTU/Powergrid/Transmission Licensees of the Central Commission, it also involves the use of the Transmission Network of the State Transmission Utility (STU). Accordingly, the Transmission System involved are both the networks of the CTU/Powergrid/Inter State Transmission Licensees and also the network of the Intra State Transmission Licensee, as well as it may involve the network of the Distribution Licensees in the State. The transmission charges and other related charges for the state transmission network are to be paid as per the Tariff Terms and Conditions decided by the State Commission of Gujarat, in addition to any charges applicable to inter-state transmission network maintained by Power Grid Corporation of India Limited (Central Transmission Utility) or any transmission licensee of the Central Commission. The transmission charges are determined by the State Commission in exercise of its powers under Sections 61, 62, 74 and 86 of the Electricity Act, 2003. The fact that the transmission charges are to be determined by the State Commission is also specifically provided in the

Regulations of the Central Commission. It is submitted that the short term open access was sought by the Appellant for sale of power through Power Exchange. The nature of open access is short term open access and for such open access, there is no distinction under GERC Open Access Regulations between Bilateral or Collective Transactions. Similarly, the CERC Open Access Regulations also in so far as they relate to the State Network do not distinguish the bilateral or collective transactions. The attempt of the Appellant therefore to seek a special dispensation due to collective transaction is misconceived.

**30.** The counsel for the second Respondent/SLDC submitted that, the transmission charges applicable for the short term open access to the State network have been determined as per the GERC Open Access Regulations. The Electricity Act, 2003 in Section 86 provides that the State Commission shall regulate the intra-state entities including the transmission network of the State Transmission Utility (Section 86(1)(c)) and the transmission charges for the State transmission network is determined by the State Commission. The transmission charges for the State network of Gujarat Energy Transmission Corporation is admittedly determined by the State Commission and it is not the contention of the Appellant that the tariff has to be determined by the Central Commission. The Central Commission cannot determine the transmission charges in respect of transmission lines/network of the State Transmission Utility nor



can the Central Commission determine the methodology or otherwise any terms and conditions for such determination of tariff. The Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, which governs the short-term open access in inter-state transmission system, itself provides that the transmission charges payable for use of state network shall be as fixed by the concerned State Commission. As per Regulation 16(3) of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 i.e. The intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) and (2), provided that in case the State Commission has not determined the transmission charges, the charges for use of respective State network shall be payable at the rate of Rs.80/MWh for the electricity transmitted. After amendment i.e. 11.09.2013, section 16(2), the intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) of this regulation, provided that where the State Commission has not determined the transmission charges for use of the state network in ` /MWh. The charges for use of respective State network shall be payable at the rate of ` 80/MWh for the energy approved. Therefore, it is submitted that, the transmission charges for use of the State network are in addition to the charges specified under Regulation

16(1) of the CERC Open Access Regulations for use of inter-state network. Such transmission charges are for the usage of the State network are to be determined by the State Commission. The Appellant has sought to claim in terms of the amended regulations (effective 11.09.2013) that the transmission charges determined even for State network by the State Commissions are to be in MWh. This is contrary to the basic scheme of the Electricity Act, 2003 where-under the State Commission determines the terms and conditions for tariff in relation to transmission network of the intra-state transmission licensees such as GETCO. The Appellant cannot seek to interpret the CERC Regulations in a manner to contradict or overrule the Regulations of the State Commission. As stated above, the State Commission has jurisdiction over transmission charges of state networks and the Central Commission has jurisdiction over transmission charges of inter-state networks. This has also been held by this Tribunal in the case of State Load Despatch Centre, Gujarat itself. The Appellant cannot seek to contend to the contrary. The Central Commission does not mandate under Regulation 16(2) of CERC Regulation that the transmission charges to be determined by the State Commission have to be for energy scheduled. The proviso would only apply if the State Commission has not determined the transmission charges, which is not the present case. In any case the reference to MWh is due to the fact that the short term open access may be sought for a certain number of hours and not necessarily for an entire day. Therefore

the MWh is the capacity multiplied by number of hours for which the Applicant may be granted short term open access. In the present case, the Appellant had sought for and been granted open access for 24 MW for the entire day and therefore the MWh is 24 X 24 (per day). This is also manifest from the fact that the GERC Open Access Regulations also provide for transmission charges incorporating the number of hours for which allocation is made vis-à-vis number of hours in the year (Regulation 21 referred in Written Submissions of the Appellant).

**31.** To substantiate his submission, the counsel for the second Respondent/SLDC contended that this Tribunal in the case of State Load Despatch Centre and Anr v. Gujarat Electricity Regulatory Commission and Anr dated 07.04.2016 in Appeal No. 70 of 2015 which had upheld the jurisdiction of the State Commission in cases of short term open access for collective transactions. In the said Appeal, specific grounds were raised that only the Central Commission Regulations have to be considered for grant of short term open access to facilitate transaction through power exchange. However, the said stand taken has not been accepted by this Tribunal. The stand of Respondent in the said Appeal cannot be relied on when this Tribunal has dismissed the Appeal and held that the jurisdiction even for collective transactions lies with the State Commission. Therefore, the contention of the Appellant seeking to distinguish collective transaction from other transactions is not borne out

by the GERC Open Access Regulations and is contrary to the specific judgment of this Tribunal. Therefore, he submitted that, the first Respondent/GERC has rightly justified in taking the said view and interference by this Tribunal does not call for.

**32.** The counsel for the Appellant has sought to rely on a clarification in a Meeting dated 24.11.2011 between State Commission and State Utilities. It is submitted that the clarification in the meeting was neither an order nor a Regulation and therefore cannot be relied on. In this regard, the State Commission has in the Impugned Order clarified the nature of the above clarification, which read thus:

*“7.10. The Petition has further relied upon clarification issued in the Minutes of Meeting dated 24.11.2011 issued by the Commission which reads as under:*

<i>Sr. No.</i>	<i>Clarification Sought by the Discom</i>	<i>Decision taken in the meeting</i>
<i>4.</i>	<i>Scope of the open access regulations notified by the Commission  The distribution licensee seek clarifications that as to whether regulations are applicable to the consumer who are availing power supply through power exchanges, particularly in regard to the Short Term Open Access.</i>	<i>It was clarified that OA transactions through power exchanges are to be treated as collective transactions and to be dealt according to the inter-state OA regulations of CERC.</i>

*We clarify that the aforesaid clarification was issued by the Commission on the issues sought to be clarified by the distribution licensee and the same is not on the disputes amongst the parties on the aforesaid subject matter issued by the Commission after hearing*

*the parties. Moreover, the said clarification talks about the transactions carried out by Short Term Open Access customers through power exchanges are to be treated as collective transactions. It also states that the same are to be dealt as per the Inter-State Open Access Regulations of CERC. The said clarification does not say that GERC Open Access Regulations, 2011 also consist of provisions for the inter-state transactions as well as intra-state transactions. In case of utilization of only Inter-State network, the CERC Regulations apply exclusively. However, when the Intra-State network is also involved or utilized, in such case the GERC Open Access Regulations apply.*

*Therefore, the reliance of the Petitioner on the clarification dated 24.11.2011 and CERC Open Access Regulations has no relevance and does not support to the contention of the Petitioner and the same is rejected.”*

**33.** In any case, the said Clarification was prior to the above Judgment dated 07.04.2016 of this Tribunal which has clearly laid down the law that even for collective transactions, the GERC Open Access Regulations would apply. Further, the above clarification does not state nor can it state that the transmission charges even for State Network would be determined by the Central Commission and not by the State Commission. The Clarification can also not be considered contrary to the scheme of the electricity Act, 2003 which provides for transmission charges for state network to be determined by the State Commissions. In any event, the CERC Open Access Regulations, dealing with collective transactions, has

also provided that the transmission charges for the State network are as fixed by the respective State Commission only.

The state transmission system is utilized by the open access customer in both cases, whether bilateral or collective and therefore the customer is required to pay the transmission charges and such transmission charges for the state network is to be determined by the State Commission as decided by the Central Commission itself. The rationale behind the same is that there cannot be different charges applicable for use of the State Transmission System for similarly placed customer. There can be no distinction between the transmission charges for a collective transaction and for a bilateral transaction. Thus, there can be no dispute on the fact that the transmission charges for state network are to be as per the Regulations of the State Commission i.e. GERC Open Access Regulations. On this ground also the stand taken by the Appellant cannot be sustainable.

**34.** The counsel for the second Respondent/SLDC contended regarding transmission charges payable as per GERC Open Access Regulations is on maximum capacity reserve. The GERC Open Access Regulations as notified on 01.06.2011 (prior to 01.04.2014) by the State Commission provided as under in respect of transmission charges:

“21....

(ii) *By Short-Term Open Access Customers:*

*Transmission Charges payable by a Short-Term Open Access customer shall be at a rate one-fourth of the transmission charges applicable to the Long-Term / Medium-Term customer, as described above.*

*Transmission charge payable by Short-term open access customers =  $1/4 \times$  Rate of transmission charge payable by long-term / medium-term open access*

*Provided that the Transmission charges payable by Short-term open access customers for use of the system for part of a day shall be as follows:*

(a)	<i>Upto 6 hours in a day in one block</i>	=	<i>(<math>1/4 \times</math> short-term open access rate)</i>
(b)	<i>More than 6 hours and upto 12 hours in a day in one block</i>	=	<i>(<math>1/2 \times</math> short-term open access rate)</i>
(c)	<i>More than 12 hours upto 24 hours in one block</i>	=	<i>short-term open access rate</i>

*Provided that transmission charges for short-term open access shall be payable on the basis of maximum capacity reserved for such customer.”* **(Emphasis Supplied)**

Thus the GERC Open Access Regulations provide for payment of transmission charges on maximum capacity reserved. Accordingly, the above methodology has been adopted for calculation of Short term Open Access charges.

**35.** In regard to the above, the Appellant has sought to rely on the table which provides for open access for part of the day. It is submitted that an applicant as per the above could have applied for open access for part of day – i.e. certain hours as against the entire day or different capacity for

different hours/days. The application itself would specify the above capacity and above hours and the NOC/Open Access would be granted for those specific hours. In such cases where the open access is granted only for part of the day, the capacity is reserved accordingly and the transmission charges are to be paid for such part of the day. However, this would apply only when the open access is granted for part of the day. It does not mean that an Applicant can seek open access for the entire day and then seek to pay for only part of day. It is submitted that in the present, the Appellant had applied for open access for the entire period (not certain hours) and the NOC was also granted for the entire period. The Validity period as per one of the NOCs being NOC dated 28.11.2013 is reproduced hereunder:

*“8. Validity Period : From (01/12/2013) To: (31/12/2013)”*

**36.** The State Commission in the Impugned Order has also noted that in the NOC sought, there was no different capacity for different dates and the STOA was granted for the duration of a month and such capacity is kept reserved for the month.

*“7.13.....it is not the case in the NOCs as sought by the STOA customers as it does not provide different capacity on different dates and approved by the SLDC accordingly. As the STOA is granted for duration of a month by the SLDC, such capacity is reserved for such STOA customer, irrespective of whatever capacity is scheduled by the customer throughout the month.....”*



It is submitted that the above Regulations were amended on 04.03.2014, effective 01.04.2014 wherein the transmission charges payable by the Short term open access customers and made it equivalent to long and medium term open access customers. Even under the Amended Regulations, the transmission charges applicable were on reserved capacity.

*“(ii) By Short-Term Open Access Customers:*

*Transmission Charges payable by a Short-Term Open Access customer shall be determined as under:*

*Transmission charges payable by Short-term open access customers*

$$= 24 \times TTC / (ACs \times 8760) \text{ (In Rs./MW/day)}$$

*Where;*

*TTC = Total Transmission Cost determined by the Commission for the transmission system for the relevant year (in Rs.) and*

*ACs = Sum of capacities allocated to all long-term and medium-term open access customers in MW.*

Provided that transmission charges for short-term open access shall be payable on the basis of maximum capacity reserved for such customers.”

Thereafter, the State Commission notified the Second Amendment vide Notification No. 3 of 2014 dated 12.08.2014 which came into effect on 14.08.2014. The relevant extract of the Second Amendment is as under:

*“Amendment of Regulation 21 of the Principal Regulations:*

*(1) Regulation 21 (2) (ii) of the Principal Regulations shall be substituted as under:*

*“(ii) By Short-Term Open Access Customers:*

*Transmission Charges payable by a Short-Term Open Access customer shall be determined as under:*

*Transmission charges payable by Short-term open access customers*

*=  $TTC / (ACs \times 8760)$  (In Rs./ MWh)*

*Where;*

*TTC = Total Transmission Cost determined by the Commission for the transmission system for the relevant year (in Rs.) and*

*ACs = Sum of capacities allocated to all long-term and medium-term open access customers in MW.*

*Provided that transmission charges for short-term open access shall be payable on the basis of the energy actually scheduled for Short-Term transactions. **(Emphasis Supplied)***

37. The above amendment was made for the first time to recover the transmission charges payable for short-term open access on the energy actually scheduled for Short-Term transactions. However prior to the above Amendment, the transmission charges are to be based on the maximum reserved capacity as provided in the then prevailing Regulations. The second amendment to the GERC Open Access Regulations applies prospectively and not retrospectively. It is well settled principle that subordinate legislation cannot be applied retrospectively. It is, further, contended that the Open Access Regulations and the principles of determination of transmission charges for short term open access provided therein cannot be challenged by the Appellant in the present Appeal. It is a settled principle that the Regulations are binding and the validity of the Regulations cannot be a subject matter of appeal. In this

regard, the Constitutional Bench of the Hon'ble Apex Court in *PTC India Limited v. Central Electricity Regulatory Commission* (2010) 4 SCC 603 as held in paragraphs 40, 59 & 60 respectively. Therefore the contentions raised by the Appellant in regard to determination of transmission charges for short-term open access cannot be considered. The Short Term Open Access consumers are required to pay the transmission charges determined in accordance with the Open Access Regulations.

**38.** Regarding maximum capacity reserved is the capacity for which NOC was granted, the learned counsel for the second Respondent/SLDC submitted that, the Appellant had sought the facility of Short Term Open Access on the state transmission system to sell electricity through the Indian Energy Exchange as a collective transaction. The consent or the No Objection Certificate (NOC) of the SLDC is required for such open access on the state's transmission system and the same has been recognized in the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 also. The SLDC, after considering the surplus capacity available after allotment to the Long and Medium Term Open Access, grants the consent/NOC for a certain capacity in MW to the open access customer. Once granted, such capacity is accounted for and kept reserved for the open access customer. The spare capacity is considered at the time of allocation, but once such allocation is made, this capacity is blocked. The above capacity is not

considered in the available surplus capacity considered while granting open access to the subsequent applicants. It is, thus, wrong on the part of the Appellants to claim that there is no reservation of capacity for short term open access. Merely because the short term open access applicant has lowest priority for grant of open access does not mean that there is no capacity reserved once the short term open access is granted. The same capacity would not be granted to another short term open access applicant. The Consent/NOC granted by SLDC is for a certain capacity, which is the maximum capacity reserved for the short term open access customer. Merely because the No Objection does not use the term 'maximum capacity reserved' does not negate the clear the provisions of the GERC Open Access Regulations. Otherwise, the above capacity for which NOC/Consent is granted would have no relevance. The fact that the short term open access also has capacity reserved is clear from the definition of 'Reserved Capacity' under the GERC Open Access Regulations, which reads as under:

*“3.1 (r) “Reserved Capacity” means the power transfer in MW between the specified point(s) of injection and point(s) of drawal allowed to a short-term customer on the transmission/distribution system depending on availability of transmission/distribution capacity and the expression “reservation of capacity” shall be construed accordingly.”*

**39.** The reserved capacity is defined as the MW allowed to a short term customer depending on availability of transmission capacity. If the

contention of the Appellants is accepted that there is no reservation of capacity for short term open access, then there would have been no definition of the term “reserved capacity” in the GERC Open Access Regulations and the Regulations would not have provided for transmission charges on basis of maximum reserved capacity. There is no need to mention any capacity in the NOC if there was no reservation of capacity and there would be no requirement to check for sufficiency of transmission capacity while granting NOC. The contentions of the Appellants are contrary to the specific Regulations of the State Commission which are to be considered even for collective transactions. The term ‘maximum capacity reserved’ in Regulation 21 has to be given a meaning, which is nothing but the capacity for which No Objection/Consent has been given by the SLDC. This is the ‘maximum’ capacity which can be utilized by the short term open access customer. The maximum capacity reserved cannot be determined on a day to day basis as claimed by the Appellant but is the capacity reserved by the Short Term Open Access Customer for the period of Open Access. This capacity is the capacity for which NOC has been granted by the SLDC. The capacity placed on bid by the Appellants and accepted by Power Exchanges is not the reserved capacity under open access but the capacity sought to be purchased under open access. The capacity in NOC is the maximum capacity allowed to the Appellants for open access. The Appellant has wrongly sought to rely on the terms “Maximum” “Ceiling” and “Up to” to claim that

there was no reservation. Since the GERC Open Access Regulations refer to the 'maximum capacity reserved', the NOC also refers to Maximum/Ceiling/Up to to signify the 'maximum' capacity reserved. This only means that the Appellant is entitled to inject the power of 24 MW but there is no obligation on the Appellant to inject power exactly 24 MW but the Appellant can inject any quantum of power up to 24 MW. This is the reason why the term "up to 24 MW" is used. But since the Appellant is entitled to inject 24 MW, the transmission capacity of 24 MW has been reserved for the Appellant and therefore the Appellant has to pay the transmission charges for 24 MW for the entire day irrespective of whether the Appellant actually transmits power or not. It is reiterated that no further allocation of short term open access would be made for such 24 capacity for the said period.

**40.** To substantiate the above submissions, the counsel for the second Respondent/SLDC placed reliance on the judgment of this Tribunal in the case of Gujarat Energy Transmission Corporation Limited v. Gujarat Electricity Regulatory Commission and Another in Appeal No. 6 of 2015 dated 13.10.2015 while interpreting the GERC Open Access Regulations has already held that the transmission charges are payable on the capacity and the said judgment has been assailed in the Hon'ble Apex Court by way of Civil Appeal No. 14062 of 2015. The said Civil Appeal filed by the aggrieved party has been dismissed by the Hon'ble Apex

Court. Therefore, he submitted that the Appellants had specifically applied for the open access and has been allocated the reserved capacity. In terms of the applicable regulations, the Appellants are required to pay and settle the transmission charges. As per the CERC Open Access Regulations, the transmission charges are payable by intra-state entities i.e. the open access customer such as the Appellant (Regulation 16(2) read with 2(h)). Similarly under GERC Open Access Regulations under Regulation 21 also provide for the transmission charges to be paid by Short term open access customers, i.e. the Appellant and not Power Exchange. Thus even assuming but not admitting that any procedure provides for Power Exchange to settle the transmission charges, this would not negate the liability of the Appellant who is the open access customer. The settlement of transmission charges by the Power Exchange is only a methodology or avenue to recover and does not change the liability of the Open Access Customer to pay the transmission charges. Even if the transmission charges are recovered from the power exchange, the same would be passed on to the Open Access Customer since the liability is of the Open Access Customer. Therefore in case the settlement by Power Exchange is not possible, the transmission charges are recovered directly from the Appellant. The Appellant cannot seek to evade the liability of payment of transmission charges by relying on the alleged protocols. Since the liability is of the short term open access customer

such as the Appellants, the invoices were raised by SLDC on the Appellants.

41. Regarding Doctrine of Estoppel/Promissory Estoppel, the learned counsel for the second Respondent/SLDC contended that, as per GERC Open Access Regulations, the SLDC is vested with the power to collect the transmission charges. Therefore SLDC is entitled to recover transmission charges for the open access granted as per the GERC Open Access Regulations which provided for transmission charges on maximum capacity reserved. There is no aspect of any dominant position in the present case. SLDC has only collected the transmission charges as per the GERC Open Access Regulations and Tariff Orders passed by the State Commission. It is, further, submitted that, if by inadvertence, there was under-recovery of the amounts, the differential amount can be recovered subsequently by raising corrected invoices/supplementary invoices. It is the obligation of the Appellants/short term open access customer to pay the transmission charges as per the GERC Open Access Regulations and Tariff Orders. They cannot deny the liability merely because the invoice was raised subsequently. The invoices raised by SLDC are not invalid merely because they were raised subsequently. This is particularly, when the claim for transmission charges had not been time barred. There had been an under-recovery of the transmission charges for the relevant period and the SLDC had sought to recover the said



amount. SLDC cannot be prevented from recovery of legitimate dues. The Appellant's claim of application of promissory estoppel is misconceived. There can be no application of such concept of estoppel in the present case. At the outset it is submitted that the Appellant had not raised the issue of doctrine of estoppel/promissory estoppel in the Petition before the State Commission or even in the Memorandum Appeal. The Hon'ble Supreme Court has held that the foundation has to be laid in the Petition itself by invoking the doctrine. In *Bannari Amman Sugars Ltd.v. Commercial Tax Officer and Ors.* (2005) 1 SCC 625, wherein the Hon'ble Apex Court has held in paragraph 19 of its judgment, which read thus:

*"19. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the court."*

*(Emphasis Supplied)*

**42.** The counsel for the second Respondent/SLDC vehemently submitted that, since the Appellant had not invoked the doctrine nor presented any supporting material, the same cannot be considered. Without prejudice to the above, it is submitted that the doctrine in any case

not applicable to the facts of the present case in hand on the ground that the Estoppel/Promissory Estoppel arises only when there is a clear and unequivocal assurance or promise by a party to induce the other party to believe in a position which is relied on by another party and acted upon. There was no such assurance or promise by the SLDC that the transmission charges would be charged as per energy scheduled and not on the basis of capacity reserved. The Appellant has not placed on record any such promise or assurance. In the cases relied on by the Appellant, there was a specific promise by the Government that an exemption would be provided for three years and on that basis, the person had set up an industry. The facts of the case are completely different. Therefore, reliance placed by the counsel for the Appellant are not applicable to the facts and circumstances of the present case. To substantiate his submission, he placed reliance on the following judgments of the Hon'ble Apex Court in the case of:

Bangalore Development Authority and Ors. vs. R. Hanumaiah and Ors. (2005) 12 SCC 508:

*“36. There is no provision in the Act and the Rules framed thereunder enabling the BDA to re-convey the land acquired to implement a scheme for forming of sites and their allotment as per rules. The rules do not provide for reconveyance. In the absence of any provision in the Act or the Rules framed thereunder authorizing the BDA to re-convey the land direction cannot be issued to the BDA to re- convey a part of the land on the ground that it had promised to do so. The rule of promissory estoppel cannot be availed to permit or condone a breach of law. It cannot be invoked to compel the Government to do an act prohibited by law. It would be going against*

the statute. The principle of promissory estoppel would under the circumstances be not applicable to the case in hand.

37. It is well-settled that there cannot be any estoppel against a statute.....

.....

39. Recently in *Devasahayam (D) BY LRS. v. P. Savithamma and Ors.* AIR2006SC779 , this Court observed:

"The doctrine of approbate and reprobate is a species of estoppel. However, there cannot be any estoppel against a statute. [See *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. v. Sumangal Services (P) Ltd.* MANU/SC/0797/2003 : , AIR2004SC1344 ]"

*Monnet Ispat and Energy Ltd. and Ors. vs. Union of India (UOI) and Ors.* (2012)11SCC1

"146. In my view, the following principles must guide a Court where an issue of applicability of promissory estoppel arises:

.....

(v) In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy.

.....

161..... In these circumstances, if the clauses in the MOU are allowed to be carried out, it would tantamount to enforcement of promise, assurance or representation which is against law, public interest and public policy which I am afraid cannot be permitted."

Thus, when the Open Access Regulations provide for transmission charges on capacity reserved, the Appellant cannot invoke the doctrine of estoppel to claim contrary to the PPA.

It is further submitted that the said doctrine would not apply when payments/non payments have been made due to a mistake. It is well settled principle that any amount paid/received without authority of law has to return and can be adjusted:

Chandi Prasad Uniyal v. State of Uttarakhand and Others (2012) 8 SCC 417

“14. We are ..... Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardship but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment”

*(Emphasis Supplied)*

**43.** The Appellants were aware of the Regulations itself which provided for transmission charges for the capacity reserved. The transmission tariff determined by the State Commission and therefore referenced in the NOC granted by SLDC also provided for the transmission charges based on per MW. The Appellant cannot now claim that the Appellant had assumed that the transmission charges were on energy scheduled. In the present case, the transmission charges were to be recovered on the basis of capacity for which NOC was granted but was not done due to a mistake/inadvertence. The SLDC cannot be prevented from correcting such mistake. Further it is

submitted that the recovery of transmission charges are provided in the GERC Open Access Regulations. There can be no claim of the Appellants to prevent recovery as per such Regulations. Further SLDC recovers on behalf of GETCO which is a transmission licensee. The transmission charges recovered through short term open access is to be adjusted against the revenue requirements of GETCO. GETCO cannot be denied its legitimate transmission charges as per Regulations due to any mistake or error. The first Respondent/GERC has also in the Impugned Order recognized the same at Para 7.26. The first Respondent/GERC, after due deliberation in the matter and after analyzing the entire relevant material on records, has rightly justified by assigning the valid and cogent reasons denied the reliefs sought by the Appellant is in accordance with law. Therefore, the present appeal filed by the Appellant deserved to be dismissed.

**OUR CONSIDERATION AND ANALYSIS:**

44. We have heard the learned counsel for the Appellant and the learned counsel for the Respondent Nos. 1 and 2 at considerable length of time. We have gone through the written submissions filed by the Appellant and the Respondents and also carefully perused the impugned Order dated 08.09.2017 passed by the first Respondent/GERC. After due consideration of the pleadings available on record, the following issues arise for our consideration in the instant Appeal:

- (A) Whether the impugned Order dated 08.09.2017 passed by the first Respondent/GERC suffers from any legal infirmity overlooking the decisions taken in the Minutes of Meeting (MoM) dated 24.11.2011 and is sustainable in law?
- (B) Whether the first Respondent/GERC can allow the second Respondent/SLDC to raise impugned bills after a period of two years contrary to the decisions taken in the MoM dated 24.11.2011 is justiceable?

**RE:ISSUE (A):**

45. The principal submission of the learned counsel for the Appellant is that, as per the GERC (Terms and Conditions of Intra State Open Access) Regulations, 2011 Sec. 21(2) – Transmission Charges for use of intra-state transmission system specifies Transmission Tariff for Long & Medium Term Open access users for part of a month. The second Respondent/SLDC had contended in Appeal No. 70 of 2015 decided by this Tribunal on 07.04.2016 that Short Term open Access gets lowest priority and can be accorded only when there is a surplus capacity available after meeting the requirements of Long Term and Medium Term Open access. Therefore, he contended that, the stand of the Respondent cannot be acceptable that even for Short Term Open Access transmission Charges are applicable on basis of Max. Capacity Reserved. The first Respondent/GERC has derived Transmission Tariff based on ACs i.e.

Sum of Capacities Allocated to all Long and Medium Term and Bilateral Short Term Open Access customers. For Short Term Open Access through Collective Transaction, granting Open Access is last priority in the whole chain. Therefore, he contended that, in the NOC/Prior Standing Clearance issued by second Respondent/SLDC vide letter dated 26.06.2013 para 1 states that Sufficient Transmission capacity is available but the same communication does not specify/stipulate any reservation of capacity for Appellant. Therefore, he submitted that, it leads to the interpretation that there is No Reservation of Capacity for Short Term Open Access through Power Exchange. Secondly, he contended that, in the meeting held between the first Respondent/GERC and State Utilities on 24.11.2011, the State Utilities sought clarification from first Respondent/GERC regarding treatment to be given to Short Term Open Access through Power Exchange i.e. Collective Transaction, first Respondent/GERC confirmed that for Short Term Open Access through Collective Transaction, CERC Regulations for Open access shall apply. It is pertinent to note that the said meeting was between the State Commission and State Utilities, where customers who are important Stake Holders in the whole process were never involved. Therefore, he vehemently contended that the meeting was to clear procedures is totally unfounded since detailed procedure already existed as per the relevant Regulation. Therefore, CERC Regulations for Open Access which were notified in 2008 - much before GERC Open access Regulations notified in

2011 - clearly mandates that State Transmission charges will apply as per State Commission. The first Respondent/GERC had not defined Transmission Charges in Rs./MWh, thereby making Transmission Charges of CERC as applicable for Short Term open Access through Collective Transactions. These relevant aspects of the matter has not been looked into nor considered nor appreciated by the first Respondent/GERC in the impugned Order. Therefore, he submitted that, the impugned Order passed by the first Respondent/GERC is liable to be set aside and the prayers sought by the Appellant in the instant Appeal may kindly be granted.

**46.** The submission of the learned counsel for the first Respondent/GERC, after evaluation of the oral and documentary evidences and other relevant material available on record and by assigning the valid and cogent reasons, has dismissed the petition filed by the Appellant by upholding the recovery of the applicable transmission charges on the basis of the maximum capacity reserved for the Short-Term Open Access ('STOA') granted to the beneficiaries for the period prior to 14.08.2014. In fact, the first Respondent/GERC has dealt with the issues raised in the petition before it, in detail taking in consideration the relevant regulations i.e. 16(3) of the CERC Regulations which specifically provides that, in the case of intra-state entities and transactions, additional payment of transmission charges for use of the state network shall be



determined by the respective State Commission(s). Thus, the aforesaid Regulation recognizes that when the Intra-State Transmission system is utilized, the Open Access customers are required to additionally pay the transmission charges as per the charges determined by the respective State Commission and once this exercise has been fulfilled by a respective State Commission, there is no occasion for application of the proviso to the aforesaid Regulation 16(3). It is pertinent to note that the Appellant is situated in the State of Gujarat and injecting power at injection point for collective transactions, utilizing the Intra-State network from the injection point to inter-connection point of Intra-State and Inter-State transmission network. It is also beyond any lis that the Appellant is liable to pay the transmission charges for utilization of Intra-State network. To substantiate his submissions, he placed reliance on the judgment of this Tribunal in the case of *State Load Dispatch Centre and Paschim Gujarat Vij Company Limited Vs. Gujarat Electricity Regulatory Commission and Steel Cast Limited*, wherein at paragraph no. 7 onwards, it has been specifically held that in case of users of Intra-State networks for collective transaction, it would fall within the jurisdiction of the State Commission within whose jurisdiction the intra-state network falls. Regarding reliance placed by the counsel for the Appellant on the Minutes of Meeting of the first Respondent/GERC dated 24.11.2011 is concerned, it is most respectfully submitted that the said reliance is misplaced as nowhere in the said Minutes has it been stated that the first Respondent/GERC's

relevant Regulations shall not apply and in fact, when the Intra-State network is also involved or utilized, in such case the GERC Regulations shall apply. Thus, the Appellant is bound to bear the transmission charges as determined by the answering Respondent, as per its Open Access Regulations. This aspect of the matter has been rightly considered and appreciated by the first Respondent/GERC and decided against the Appellant by assigning valid and cogent reasons. Therefore, the contention of the counsel for the Appellant is liable to be rejected at threshold.

**47.** As per GERC Regulation 21 provides for payment of the transmission charges on the basis of 'maximum capacity reserved', recoverable from Open Access customers who are availing the Long-Term, Medium-Term and Short-Term Open Access by the STU/Transmission Licensee. Further, on 04.03.2014, the first Respondent/GERC vide its notification no. 1 of 2014 (effective from 01.04.2014) carried out First Amendment in the GERC Regulations particularly Regulation 21 i.e. the transmission charges payable by a Short-Term Open Access customer and they were bought on par with the Long-Term and Medium-Term Open Access customers, however, the basis for these charges i.e. maximum capacity reserved was not amended or changed. The recovery of transmission charges from Short-Term Open Access customers on the basis of actual scheduled energy in the State of Gujarat has become operational and effective only from 14.08.2014 and such charges are/were payable on the basis of reserved capacity in MW

till 13.08.2014, i.e. prior to coming into effect of the aforementioned Second Amendment. Furthermore, it is necessary to clarify and state herein that the definition of the Reserved Capacity as per the Regulations proves that the capacity stated in the Regulations is on MW basis applied for NOC in Short-Term Open Access application and accordingly the same has been granted by the SLDC/second Respondent herein and it is neither on scheduled capacity basis nor on MWh basis and the term maximum reserved capacity cannot be equated with the scheduled capacity or energy actually scheduled. It is pertinent to note that there has been no revision of the applicable transmission charges by the first Respondent/GERC and the relevant Regulation and its subsequent amendments are distinct and have different meaning in the domain they cover. Hence, the recovery of transmission charges for NOC capacity/Reserved capacity by the second Respondent/SLDC, as per the first Respondent/GERC is legal and valid strictly in consonance with the relevant provisions of the Electricity Act and Rules. Therefore, interference by this Tribunal does not call for.

**48.** The learned counsel for the second Respondent/SLDC contended that, the matter in issue is the Recovery of the applicable transmission charges for the State network on the basis of the maximum capacity reserved under the Short Term Open Access granted to the beneficiaries and the applicable regulations are the Gujarat Electricity Regulatory

Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and the amendments thereto. The contention of the Appellant that it is selling power through Power Exchanges, a collective transaction regulated by the Central Commission and not by the State Commission. As per the Appellant, the open access is governed by only those regulations applicable to Inter State transactions notified by the Central Commission under Section 79 of the Electricity Act, 2003. Though the Power Exchange transactions is an Inter State Transaction involving the use of the Inter State Transmission Network owned, operated and maintained by the CTU/Powergrid/Transmission Licensees of the Central Commission, it also involves the use of the Transmission Network of the State Transmission Utility. Accordingly, the Transmission System involved are both the networks of the CTU/Powergrid/Inter State Transmission Licensees and also the network of the Intra State Transmission Licensee, as well as it may involve the network of the Distribution Licensees in the State. The transmission charges and other related charges for the state transmission network are to be paid as per the Tariff Terms and Conditions decided by the State Commission of Gujarat, in addition to any charges applicable to inter-state transmission network maintained by Power Grid Corporation of India Limited (Central Transmission Utility) or any transmission licensee of the Central Commission. The transmission charges are determined by the State Commission in exercise of its powers under Sections 61, 62, 74 and 86 of the Electricity Act, 2003. The fact that

the transmission charges are to be determined by the State Commission is also specifically provided in the Regulations of the Central Commission. It is submitted that the short term open access was sought by the Appellant for sale of power through Power Exchange. The nature of open access is short term open access and for such open access, there is no distinction under GERC Open Access Regulations between Bilateral or Collective Transactions. Similarly, the CERC Open Access Regulations also in so far as they relate to the State Network do not distinguish the bilateral or collective transactions. The attempt of the Appellant therefore to seek a special dispensation due to collective transaction is misconceived.

**49.** The transmission charges applicable for the short term open access to the State network have been determined as per the GERC Open Access Regulations. The Electricity Act, 2003 in Section 86 provides that the State Commission shall regulate the intra-state entities including the transmission network of the State Transmission Utility (Section 86(1)(c)) and the transmission charges for the State transmission network is determined by the State Commission. The transmission charges for the State network of Gujarat Energy Transmission Corporation is admittedly determined by the State Commission and it is not the case of the Appellant that the tariff has to be determined by the Central Commission. The Central Commission cannot determine the transmission charges in

respect of transmission lines/network of the State Transmission Utility nor can the Central Commission determine the methodology or otherwise any terms and conditions for such determination of tariff. As per Regulation 16(2), the intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) of this regulation. Therefore, the State Commission has jurisdiction over transmission charges of state networks and the Central Commission has jurisdiction over transmission charges of inter-state networks. The Central Commission does not mandate under Regulation 16(2) of CERC Regulation that the transmission charges to be determined by the State Commission have to be for energy scheduled. The proviso would only apply if the State Commission has not determined the transmission charges. Therefore, the contention of the appellant seeking to distinguish collective transaction from other transactions is not borne out by the GERC Open Access Regulations and is contrary to the judgment of this Tribunal. Therefore, he submitted that, as per relevant regulations, the first Respondent/GERC by assigning the valid and cogent reasons has rightly justified in taking the said view. The said reasons given are sound and proper. Therefore, interference by this Tribunal does not call for.

**50.** The counsel for the second Respondent/SLDC contended that, the counsel for the Appellant has sought to rely on a clarification in a Meeting

dated 24.11.2011 between State Commission and State Utilities. It is submitted that the clarification in the meeting was neither an order nor a Regulation and therefore cannot be relied on. In this regard, the State Commission has in the Impugned Order clarified the nature of the above clarification in para 7.10 of the order.

**51.** The contention of the counsel for the second Respondent/SLDC regarding transmission charges payable as per GERC Open Access Regulations is on maximum capacity reserve. Thus, the GERC Open Access Regulations provide for payment of transmission charges on maximum capacity reserved. Accordingly, the above methodology has been adopted for calculation of Short term Open Access charges. It is submitted that, in the present case, the Appellant had applied for open access for the entire period (not certain hours) and the NOC was also granted for the entire period. The first Respondent/GERC in the Impugned Order has also noted that in the NOC sought, there was no different capacity for different dates and the STOA was granted for the duration of a month and such capacity is kept reserved for the month. As per second Amendment notified by the first Respondent/GERC, vide Notification No. 3 of 2014 dated 12.08.2014, which came into effect on 14.08.2014 was made for the first time to recover the transmission charges payable for short-term open access on the energy actually scheduled for Short-Term transactions. However, prior to the above Amendment, the

transmission charges are to be based on the maximum reserved capacity as provided in the then prevailing Regulations. Therefore, the second amendment to the GERC Open Access Regulations applies prospectively and not retrospectively. To substantiate his submission, he placed reliance on the judgment of the Constitutional Bench of Hon'ble Apex Court in PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603 as held in paragraphs 40, 59 & 60 respectively. Therefore the contentions raised by the Appellant in regard to determination of transmission charges for short-term open access cannot be considered. The Short Term Open Access consumers are required to pay the transmission charges determined in accordance with the Open Access Regulations. The counsel for the second Respondent/SLDC submitted that the Appellant has failed to make out any ground to consider the relief sought in the instant appeal. Hence, the appeal filed by the Appellant may be dismissed as devoid of merits on this issue.

**OUR CONSIDERATION:**

**52.** After thoughtful consideration of the submission of the learned counsel for the Appellant and the learned counsel for the Respondent Nos. 1 and 2, as stated supra, the matter in issue is the recovery of the applicable transmission charges on the basis of the maximum capacity reserved for the Short-Term Open Access granted to the beneficiaries and the applicable regulations are the Gujarat Electricity Regulatory



Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 and the amendments thereto. The Appellant has claimed that it is selling power through Power Exchanges, a collective transaction regulated by the Central Commission and not by the State Commission. As per the Appellant, the open access is governed by only those regulations applicable to Inter State transactions notified by the Central Commission under Section 79 of the Electricity Act, 2003. Though, the Power Exchange transactions is an Inter State Transaction involving the use of the Inter State Transmission Network owned, operated and maintained by the CTU/Powergrid/Transmission Licensees of the Central Commission, it also involves the use of the Transmission Network of the State Transmission Utility (STU). Accordingly, the Transmission System involved are both the networks of the CTU/Powergrid/Inter State Transmission Licensees and also the network of the Intra State Transmission Licensee, as well as it may involve the network of the Distribution Licensees in the State. Therefore, the transmission charges and other related charges for the state transmission network are to be paid as per the Tariff Terms and Conditions decided by the first Respondent/GERC, in addition to any charges applicable to inter-state transmission network maintained by Power Grid Corporation of India Limited (Central Transmission Utility) or any transmission licensee of the Central Commission. The transmission charges are determined by the State Commission in exercise of its powers under Sections 61, 62, 74 and

86 of the Electricity Act, 2003. Therefore, the transmission charges are to be determined by the State Commission is also specifically provided in the Regulations of the Central Commission. It is submitted that the short term open access was sought by the Appellant for sale of power through Power Exchange. The nature of open access is short term open access and for such open access, there is no distinction under GERC Open Access Regulations between Bilateral or Collective Transactions. Similarly, the CERC Open Access Regulations also in so far as they relate to the State Network do not distinguish the bilateral or collective transactions. The attempt of the Appellant therefore to seek a special dispensation due to collective transaction is misconceived.

**53.** The transmission charges applicable for the short term open access to the State network have been determined as per the GERC Open Access Regulations. Section 86 of the Electricity Act, 2003 provides that the State Commission shall regulate the intra-state entities including the transmission network of the State Transmission Utility (Section 86(1)(c)) and the transmission charges for the State transmission network is determined by State Commission. The transmission charges for the State network of Gujarat Energy Transmission Corporation is admittedly determined by the State Commission and it is not the contention of the Appellant that the tariff has to be determined by the Central Commission. The Central Commission cannot determine the transmission charges in

respect of transmission lines/network of the State Transmission Utility nor can the Central Commission determine the methodology or otherwise any terms and conditions for such determination of tariff. The Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, which governs the short-term open access in inter-state transmission system, itself provides that the transmission charges payable for use of state network shall be as fixed by the concerned State Commission.

**54.** As per Regulation 16(3) of the CERC Regulations, 2008 i.e. the intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) and (2), provided that in case the State Commission has not determined the transmission charges, the charges for use of respective State network shall be payable at the rate of Rs.80/MWh for the electricity transmitted. After amendment i.e. 11.09.2013, section 16(2), the intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) of this regulation, provided that where the State Commission has not determined the transmission charges for use of the state network in `/MWh. The charges for use of respective State network shall be payable at the rate of `80/MWh for the energy approved. Therefore, the

transmission charges for use of the State network are in addition to the charges specified under Regulation 16(1) of the CERC Open Access Regulations for use of inter-state network. Such transmission charges are for the usage of the State network are to be determined by the State Commission. The Appellant has contended that to claim in terms of the amended regulations (effective 11.09.2013) that the transmission charges determined even for State network by the State Commissions are to be in MWh. This is contrary to the basic scheme of the Electricity Act, 2003 where-under the State Commission determines the terms and conditions for tariff in relation to transmission network of the intra-state transmission licensees such as GETCO. The Appellant cannot seek to interpret the CERC Regulations in a manner to contradict or overrule the Regulations of the State Commission. As stated supra, the State Commission has jurisdiction over transmission charges of state networks and the Central Commission has jurisdiction over transmission charges of inter-state networks as rightly pointed out by the counsel for the second Respondent/SLDC. This Tribunal in the case of State Load Despatch Centre, Gujarat held that the Appellant cannot seek to contend to the contrary. The Central Commission does not mandate under Regulation 16(2) of CERC Regulation that the transmission charges to be determined by the State Commission have to be for energy scheduled. The proviso would only apply if the State Commission has not determined the transmission charges, which is not the present case. In any case the

reference to MWh is due to the fact that the short term open access may be sought for a certain number of hours and not necessarily for an entire day. Therefore the MWh is the capacity multiplied by number of hours for which the Applicant may be granted short term open access. In the instant case, the Appellant had sought for and been granted open access for 24 MW for the entire day and, therefore, the MWh is 24 X 24 (per day). This is also manifest from the fact that the GERC Open Access Regulations also provide for transmission charges incorporating the number of hours for which allocation is made vis-à-vis number of hours in the year (Regulation 21 referred in Written Submissions of the Appellant). Hence, the contention of the appellant seeking to distinguish collective transaction from other transactions is not borne out by the GERC Open Access Regulations and is contrary to the judgment of this Tribunal. Therefore, the contention of the Appellant is neither acceptable nor has got any force to contend his submissions contrary to Regulation 16(2) of the CERC Regulation that the transmission charges to be determined by the State Commission have to be for energy scheduled and the said proviso would only apply if the State Commission has not determined the transmission charges, which is not the case in hand. Therefore, there is no substance in the submission of the learned counsel for the Appellant.

The counsel for the Appellant has placed reliance on a clarification in a Meeting dated 24.11.2011 between State Commission and State

Utilities. It is significant to note that the clarification in the meeting was neither an order nor a decision and, therefore, cannot be relied on. The first Respondent/GERC, in its impugned Order has clarified the nature of the above clarification, which reads hereunder:

*“7.10. The Petition has further relied upon clarification issued in the Minutes of Meeting dated 24.11.2011 issued by the Commission which reads as under:*

Sr. No.	Clarification Sought by the Discom	Decision taken in the meeting
4.	<p data-bbox="456 763 956 846"><i>Scope of the open access regulations notified by the Commission</i></p> <p data-bbox="456 880 956 1189"><i>The distribution licensee seek clarifications that as to whether regulations are applicable to the consumer who are availing power supply through power exchanges, particularly in regard to the Short Term Open Access.</i></p>	<p data-bbox="983 763 1362 1070"><i>It was clarified that OA transactions through power exchanges are to be treated as collective transactions and to be dealt according to the inter-state OA regulations of CERC.</i></p>

*We clarify that the aforesaid clarification was issued by the Commission on the issues sought to be clarified by the distribution licensee and the same is not on the disputes amongst the parties on the aforesaid subject matter issued by the Commission after hearing the parties. Moreover, the said clarification talks about the transactions carried out by Short Term Open Access customers through power exchanges are to be treated as collective transactions. It also states that the same are to be dealt as per the Inter-State Open Access Regulations of CERC. The said clarification does not say that GERC Open Access Regulations, 2011 also consist of provisions for the inter-state transactions as well as intra-state transactions. In case of utilization of only Inter-State network, the CERC Regulations apply exclusively. However, when the Intra-*

*State network is also involved or utilized, in such case the GERC Open Access Regulations apply.*

*Therefore, the reliance of the Petitioner on the clarification dated 24.11.2011 and CERC Open Access Regulations has no relevance and does not support to the contention of the Petitioner and the same is rejected.”*

The above clarification does not state nor can it state that the transmission charges even for State Network would be determined by the Central Commission and nor by the State Commission. The clarification can also not be considered contrary to the scheme of the electricity Act, 2003 which provides for transmission charges for state network to be determined by the State Commissions. In any event, the CERC Open Access Regulations, dealing with collective transactions, has also provided that the transmission charges for the State network are as fixed by the respective State Commission alone. It is rightly pointed out by the counsel for the second Respondent/SLDC that the transmission charges payable as per GERC Open Access Regulations is on maximum capacity reserve. The GERC Open Access Regulations as notified on 01.06.2011 (prior to 01.04.2014) by the State Commission provided as under in respect of transmission charges:

*“21....*

*(ii) By Short-Term Open Access Customers:*

*Transmission Charges payable by a Short-Term Open Access customer shall be at a rate one-fourth of the transmission*

*charges applicable to the Long-Term / Medium-Term customer, as described above.*

*Transmission charge payable by Short-term open access customers =  $1/4 \times$  Rate of transmission charge payable by long-term / medium-term open access*

*Provided that the Transmission charges payable by Short-term open access customers for use of the system for part of a day shall be as follows:*

(a)	<i>Upto 6 hours in a day in one block</i>	=	<i>(<math>1/4 \times</math> short-term open access rate)</i>
(b)	<i>More than 6 hours and upto 12 hours in a day in one block</i>	=	<i>(<math>1/2 \times</math> short-term open access rate)</i>
(c)	<i>More than 12 hours upto 24 hours in one block</i>	=	<i>short-term open access rate</i>

*Provided that transmission charges for short-term open access shall be payable on the basis of maximum capacity reserved for such customer.”*

Therefore, GERC Open Access Regulations provide for payment of transmission charges on maximum capacity reserved. Accordingly, the above methodology has been adopted for calculation of Short term Open Access charges in the instant case.

As stated supra, the Appellant has sought to rely on the table which provides for open access for part of the day. It is submitted that an applicant, as per the above, could have applied for open access for part of day – i.e. certain hours as against the entire day or different capacity for different hours/days. The application itself would specify the above



capacity and above hours and the NOC/Open Access would be granted for those specific hours. In such cases where the open access is granted only for part of the day, the capacity is reserved accordingly and the transmission charges are to be paid for such part of the day. However, this would apply only when the open access is granted for part of the day. It does not mean that an Applicant can seek open access for the entire day and then seek to pay for only part of day. In the instant case, the Appellant had applied for open access for the entire period (not certain hours) and the NOC was also granted for the entire period. The validity period as per one of the NOCs being NOC dated 28.11.2013 is reproduced hereunder:

*“8. Validity Period : From (01/12/2013) To: (31/12/2013)”*

**55.** The State Commission in its Impugned Order has also noted that in the NOC sought, there was no different capacity for different dates and the STOA was granted for the duration of a month and such capacity is kept reserved for the month.

*“7.13.....it is not the case in the NOCs as sought by the STOA customers as it does not provide different capacity on different dates and approved by the SLDC accordingly. As the STOA is granted for duration of a month by the SLDC, such capacity is reserved for such STOA customer, irrespective of whatever capacity is scheduled by the customer throughout the month.....”*

It is submitted that, the above Regulations were amended on 04.03.2014, effective 01.04.2014 wherein the transmission charges

payable by the Short term open access customers and made it equivalent to long and medium term open access customers. Even under the Amended Regulations, the transmission charges applicable were on reserved capacity. Thereafter, the State Commission notified the Second Amendment vide Notification No. 3 of 2014 dated 12.08.2014 which came into effect on 14.08.2014.

The said amendment was made for the first time to recover the transmission charges payable for short-term open access on the energy actually scheduled for Short-Term transactions. However prior to the above Amendment, the transmission charges are to be based on the maximum reserved capacity as provided in the then prevailing Regulations. The second amendment to the GERC Open Access Regulations applies prospectively and not retrospectively. It is well settled principle that subordinate legislation cannot be applied retrospectively. It is, further, contended that the Open Access Regulations and the principles of determination of transmission charges for short term open access provided therein cannot be challenged by the Appellant in the present Appeal. It is a settled principle that the Regulations are binding and the validity of the Regulations cannot be a subject matter of appeal. The counsel for the second Respondent/SLDC has rightly pointed out that the Constitutional Bench of the Hon'ble Apex Court in PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603 as held in

paragraphs 40, 59 & 60 respectively. In the light of the ratio of law laid down by the Hon'ble Apex Court in the said paragraphs, the contentions raised by the Appellant in regard to determination of transmission charges for short-term open access cannot be considered. The Short Term Open Access consumers are required to pay the transmission charges determined in accordance with the Open Access Regulations.

**56.** The contention of the learned counsel for the Appellant regarding maximum capacity reserved is the capacity for which NOC was granted, the counsel for the second Respondent/SLDC contended that the Appellant had sought the facility of Short Term Open Access on the state transmission system to sell electricity through the Indian Energy Exchange as a collective transaction. The consent or NOC of the SLDC is required for such open access on the state's transmission system and the same has been recognized in the CERC Regulations, 2008 also. The second Respondent/SLDC, after considering the surplus capacity available after allotment to the Long and Medium Term Open Access, grants the consent/NOC for a certain capacity in MW to the open access customer. Once granted, such capacity is accounted for and kept reserved for the open access customer. The spare capacity is considered at the time of allocation, but once such allocation is made, this capacity is blocked. The above capacity is not considered in the available surplus capacity considered while granting open access to the subsequent applicants. It is,

thus, wrong on the part of the Appellant to claim that there is no reservation of capacity for short term open access. Merely because the short term open access applicant has lowest priority for grant of open access does not mean that there is no capacity reserved once the short term open access is granted. The same capacity would not be granted to another short term open access applicant. The Consent/NOC granted by the second Respondent/SLDC is for a certain capacity, which is the maximum capacity reserved for the short term open access customer. Merely because the No Objection does not use the term 'maximum capacity reserved' does not negate the clear the provisions of the GERC Open Access Regulations. Otherwise, the above capacity for which NOC/Consent is granted would have no relevance. The fact that the short term open access also has capacity reserved is clear from the definition of 'Reserved Capacity' under the GERC Open Access Regulations. Therefore, contentions of the Appellant are contrary to the specific regulations of the first Respondent/GERC which are to be considered even for collective transactions.

**57.** The term 'maximum capacity reserved' in Regulation 21 has to be given a meaning, which is nothing but the capacity for which No Objection/Consent has been given by the second Respondent/SLDC. This is the 'maximum' capacity which can be utilized by the short term open access customer. The Appellant has wrongly sought to rely on the terms

“Maximum” “Ceiling” and “Up to” to claim that there was no reservation. Since the GERC Open Access Regulations refer to the ‘maximum capacity reserved’, the NOC also refers to Maximum/Ceiling/Up to to signify the ‘maximum’ capacity reserved. This only means that the Appellant is entitled to inject the power of 24 MW but there is no obligation on the Appellant to inject power exactly 24 MW but the Appellant can inject any quantum of power up to 24 MW. This is the reason why the term “up to 24 MW” is used. But since the Appellant is entitled to inject 24 MW, the transmission capacity of 24 MW has been reserved for the Appellant and therefore the Appellant has to pay the transmission charges for 24 MW for the entire day irrespective of whether the Appellant actually transmits power or not. It is reiterated that no further allocation of short term open access would be made for such 24 capacity for the said period.

**In view of the above discussions and findings, we answered this issue, i.e. ISSUE (A), against the Appellant.**

**RE:ISSUE (B):**

**58.** The learned counsel for the Appellant contended that the Appellant has never defaulted or disputed bills raised by Power Exchange as per procedure laid down in the applicable Regulation. It is a sound business proposition that while selling or buying any product or service, all parameters which have a bearing on the cost of product or service are factored. The Appellant been aware of this huge liability - to arise on a

future date after a period of over two years - of over ₹12 million with nil possibility of recovery from his customers, like any sane business entity, he would have acted prudently i.e. he would have added this part of the cost to the purchasers of his power sold thru' Open Access to Exchange or even not obtained NOC for such periods wherever not financially viable. It is, further, the case of the Appellant that, if the cost of his product would eventually turn out to be more than amount realized through sale of his product, he would have refrained from any such transaction. Therefore, the equity demands that Appellant cannot be put to a disadvantageous position due to error committed by Respondent when the Appellant has no such remedy available. The second Respondent/SLDC for over two years kept on accepting Transmission Charges without any demur. Their raising additional demand puts Appellant into disadvantageous position and causes Appellant irreparable loss for no fault of his. To substantiate his submissions, he placed reliance on the judgments of the Hon'ble Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors. [1979 ]2SCR641 and another judgment by High Court of Guwahati in the case of Union of India (UOI) vs. Raj Brothers AIR 2000 Gau 132 and contended that in the aforesaid judgment, the Hon'ble Supreme Court has allowed the appeal filed by the Appellant and set aside the judgment of the High Court, and in its judgment, the High Court of Guwahati has held that, the trial Court was not justified in directing the appellant to refer such new claims raised by the plaintiff respondent for

settlement by the arbitrator. The judgment and order passed by the trial Court being vitiated is accordingly set aside and appeal filed by the appellant succeeds with costs. Therefore, he submitted that, following the ratio of the judgment of the Hon'ble Apex Court and High Court, as referred above, the order impugned passed by the first Respondent/GERC is liable to be set aside directing the second Respondent/SLDC to refund the payment made against the impugned bills along with interest @ 18% per annum in the interest of justice and equity.

The learned counsel for the Appellant, further, submitted that, the Appellant's claim for promissory estoppels has not been considered by the first Respondent/GERC nor assigned any valid and cogent reason for rejecting the claim of the Appellant regarding promissory estoppels. Therefore, he submitted that, on this ground also the order impugned passed by the first Respondent/GERC is liable to be set aside.

**59.** The learned counsel for the first Respondent/GERC, on this issue, has contended that the second Respondent/SLDC has made a claim for recovery of Transmission Charges from the Appellant vide its invoice dated 28.01.2015 for the Financial Year 2013-14 and invoice dated 16.04.2015 for the Financial Year 2012-13. Further, the Appellant has contended that the second Respondent/SLDC is barred from recovering any dues which falls beyond a period of 2 years from the date when such dues first fell due as per Section 56 of the Electricity Act, 2003. As per

section 56 of the Electricity Act, 2003, in its entirety, this Tribunal in the case of *Ajmer Vidhyut Vitarant Nigam Limited vs. RERC* particularly, in paragraph nos. 32 to 39, a conjoined reading of Section 56 of the Electricity Act, 2003 and the aforesaid judgment of this Tribunal leads to a conclusion that Section 56(2) particularly provides for a barrier from disconnection with regard to default in payment of any pending due(s) that lies beyond a period of 2 years. However, there is no bar in the said section on the licensee/generating Company from recovering any pending due(s) that is beyond the period of 2 years but within the general limitation period of 3 years as provided under the Limitation Act, 1963. In the case at hand, it is beyond dispute that the invoices dated 28.01.2015 and 16.04.2015 are raised by the Respondent no. 2 on the Appellant within a period of 3 years period from the date of grant of Open Access to the Appellant. Therefore, he submitted that the first Respondent/GERC considering the case in hand as per the prevalent GERC Regulations along with the First Amendment held domain for recovery of transmission charges on reserved capacity basis until 13.08.2014 i.e. prior to coming into effect, the Second Amendment. He, further, contended that the second Respondent has recovered charges from the Appellant on scheduled capacity (energy) basis instead of reserved capacity basis, when the GERC Regulations along with the First Amendment specifically envisaged the latter under an erroneous application of the said Regulation. Thus, it is this error that was rectified by the second



Respondent/SLDC and the consequent supplementary invoices were raised for the under-billed balance amounts. Hence, the recovery by second Respondent/SLDC cannot be termed as recovery based of retrospective applicability of GERC Regulations. Further, estoppel cannot be pleaded against a statute or law and Regulations are a sub-legislative function conferred on the State Commission(s) having statutory force. Therefore, the stand taken by the Appellant has got no substance and is liable to be rejected. The invoices raised by the second Respondent/SLDC are strictly in consonance with the relevant provisions of the Electricity Act and Rules and, therefore, interference by this Tribunal does not call for.

**60.** The learned counsel for the second Respondent/SLDC contended that, as per GERC Open Access Regulations, second Respondent/SLDC is vested with the power to collect the transmission charges. Therefore, second Respondent/SLDC is entitled to recover transmission charges for the open access granted as per the GERC Open Access Regulations which provided for transmission charges on maximum capacity reserved. There is no aspect of any dominant position in the present case. The second Respondent/SLDC has only collected the transmission charges as per the GERC Open Access Regulations and Tariff Orders passed by the first Respondent/GERC. He further, contended that, if by inadvertence, there was under-recovery of the amounts, the differential amount can be recovered subsequently by raising corrected invoices/supplementary

invoices. The invoices raised by the second Respondent/SLDC are not invalid merely because they were raised subsequently. This is particularly, when the claim for transmission charges had not been time barred. The Appellant's claim of application of promissory estoppel is misconceived. There can be no application of such concept of estoppel in the instant case. He, further, vehemently contended that the Appellant had not raised the issue of doctrine of estoppel/promissory estoppel in the Petition before the State Commission or even in the Memorandum Appeal. Therefore, the said contention raised by the Appellant for the first time in this appeal and the same cannot be acceptable and liable to be rejected at threshold. To substantiate his submission, he placed reliance on the judgment of the Hon'ble Apex Court in the case of Bannari Amman Sugars Ltd.v. Commercial Tax Officer and Ors. (2005) 1 SCC 625, wherein the Hon'ble Apex Court has held in paragraph 19 of its judgment that foundation has to be laid in the Petition itself by invoking the doctrine of promissory estoppels. The Appellant has not taken this ground in its petition filed before the first Respondent/GERC nor he pleaded any specific ground in the memo of appeal before this Tribunal, therefore, on this ground, the contentions of the Appellant may be rejected at threshold.

**OUR CONSIDERATION:**

**61.** After careful consideration of the submissions of the learned counsel for the Appellant and the learned counsel for the Respondent Nos. 1 and

2, we are of the considered view that the submissions of the counsel for the Appellant regarding Doctrine of Estoppel/Promissory Estoppel, are misconceived for the reason that as per GERC Open Access Regulations, second Respondent/SLDC is vested with the power to collect the transmission charges and is entitled to recover transmission charges for the open access granted as per the GERC Open Access Regulations which provided for transmission charges on maximum capacity reserved.

**62.** In the instant case, the second Respondent/SLDC has only collected the transmission charges as per the GERC Open Access Regulations and Tariff Orders passed by the first Respondent/GERC. It is significant to note that, if by inadvertence, there was under-recovery of the amounts; the differential amount can be recovered subsequently by raising corrected invoices/supplementary invoices. Therefore, the obligation of the Appellants/short term open access customer to pay the transmission charges as per the GERC Open Access Regulations and Tariff Orders. They cannot deny the liability merely because the invoice was raised subsequently. The invoices raised by SLDC are not invalid merely because they were raised subsequently. This is particularly when the claim for transmission charges had not been time barred. There had been an under-recovery of the transmission charges for the relevant period and the second Respondent/SLDC had sought to recover the said amount. The second Respondent/SLDC cannot be prevented from recovery of

legitimate dues. Therefore, the contention of the Appellant claiming application of promissory estoppel is misconceived and there was no application of such concept of estoppel in the instant case on the ground that the Appellant had not raised the issue of doctrine of estoppel/promissory estoppel in the Petition before the State Commission or even in the Memorandum Appeal before this Tribunal. It is a well settled law laid down by the Hon'ble Apex Court and by this Tribunal in hosts of judgments that the foundation has to be laid in the Petition itself by invoking the doctrine of estoppels. It is worthwhile to refer the judgment in the case of Bannari Amman Sugars Ltd. v. Commercial Tax Officer and Ors. (2005) 1 SCC 625, wherein the Hon'ble Apex Court has held in paragraph 19 of its judgment, which is reproduced hereunder:

*“19. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the court.”*

*(Emphasis Supplied)*

**63.** It is pertinent to note that since the Appellant had not invoked the doctrine of estoppels nor presented any supporting material, the same cannot be considered. Without prejudice to the above, doctrine of estoppels in any case not applicable to the facts and circumstances of the case in hand on the ground that the Estoppel/Promissory Estoppel arises only when there is a clear and unequivocal assurance or promise by a party to induce the other party to believe in a position which is relied on by another party and acted upon. In the instant case, there was no such assurance or promise by the second Respondent/SLDC that the transmission charges would be charged as per energy scheduled and not on the basis of capacity reserved. Therefore, the Appellant has not placed on record any such promise or assurance. In the judgments relied on by the Appellant, there was a specific promise by the Government that an exemption would be provided for three years and on that basis, the person had set up an industry. The facts of the instant case are entirely different. Therefore, reliance placed by the counsel for the Appellant is not applicable to the facts and circumstances of the case in hand. Thus, when the Open Access Regulations provide for transmission charges on capacity reserved, the Appellant cannot invoke the doctrine of estoppel to claim contrary to the Power Purchase Agreement (PPA). It is pertinent to note that the said doctrine would not apply when payments/non payments have been made due to a mistake. It is well settled principle that any amount paid/received without authority of law has to return and can be

adjusted as held by the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal v State of Uttarakhand and Others (2012) 8 SCC 417, which reads as under:

*"14. We are ..... Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardship but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment"*

*(Emphasis Supplied)*

Therefore, the ground and the submissions/stands taken by the learned counsel for the Appellant regarding Doctrine of Estoppel/Promissory Estoppel cannot be acceptable and it is liable to be rejected at threshold.

**In view of the above discussions and findings, we answered this issue, i.e. ISSUE (B), against the Appellant.**

### **CONCLUSION:**

**64.** After thoughtful consideration of the entire material available on record and after re-appreciation of the oral and documentary evidences available on the file and also taking into consideration the relevant provisions of the Electricity Act, 2003 and the relevant regulations, as discussed above, we are of the considered view that we do not find any error, material irregularity or perversity in the impugned Order dated

08.09.2017 passed in Petition No. 1558 of 2016 on the file of the Gujarat Electricity Regulatory Commission, Gandhinagar (first Respondent herein). The impugned Order passed by the first Respondent/GERC is well founded and well reasoned. Hence, interference by this Tribunal does not call for. Accordingly, we answered both the issues i.e. ISSUE NO. (A) & (B), against the Appellant.

## **ORDER**

For the forgoing reasons, as stated above, the instant Appeal, being Appeal No. 83 of 2018, filed by the Appellant - Ultratech Cement Limited, is dismissed as devoid of merits and the issues raised in this Appeal are answered against the Appellant.

Accordingly, the impugned Order dated 08.09.2017 passed in Petition No. 1558 of 2016, on the file of the Gujarat Electricity Regulatory Commission, Gandhinagar, is hereby upheld.

Parties to bear their own costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 15<sup>TH</sup> DAY OF MARCH, 2019.**

**(Ravindra Kumar Verma)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

√ **REPORTABLE**  
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