

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 97 of 2008

Dated: December 18, 2008.

Present: -Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Shri H.L. Bajaj, Technical Member

Gujarat Energy Transmission Corporation Ltd.
Sardar Patel Vidyut Bhawan
Race Course
Vadodara-390007Appellant

Versus

1. Gujarat Electricity Regulatory Commission
Ist floor, Neptune Tower
Opp.Nehru Bridge, Ashram Road
Ahmedabad-380009
2. Gujarat Alkalies & Chemicals Ltd.
PO Petrochemicals
District Vadodara-391346
GujaratRespondents

Counsel for the appellant: Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms Swapna Seshadri

Counsel for the respondent: Mr. S.R. Pandey,
Dy. Director,
For GERC
Mr. B.C. Chokshi GMCE
For Resp. No. 2

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member.

In this appeal Gujarat Energy Transmission Corporation Ltd. (GETC in short) has challenged the order dated March 29, 2008 passed by the Gujarat Electricity Regulatory Commission (GERC or the Commission in short) in petition No. 930 of 2007 declining to grant approval to a settlement reached between the appellant and the Gujarat Alkalies and Chemicals Ltd. (GACL in short), respondent No. 2 in accordance with regulation 11 of the Open Access Regulations framed by the Commission for the relinquishment of wheeling capacity to the extent it required payment of compensation by the respondent No. 2 to the appellant.

2. The brief facts of the case are as under:-

3. The appellant is a transmission licensee under the provisions of The Electricity Act, 2003. Respondent No. 2 has installed a captive power plant (CPP) of 90 MW at Dahej, for supply of electricity to its caustic soda plant at Dahej. It

also has a unit at Vadodara for which it had obtained the approval from the Government of Gujarat in the year 1998 vide letter dated July 23, 2008 to wheel its surplus electricity generated at its CPP to its unit at Vadodara using the transmission system of the appellant (erstwhile GEB).

4. The Commission was established and started functioning on April 19, 1999 initially under the provisions of the Electricity Regulatory Commissions Act, 1998. After the coming into force of the Electricity Act, 2003 the Commission is functioning under the provisions of this Act.

5. On September 29, 2005 the Commission framed and notified the Gujarat Electricity Regulatory Commission (Open Access in Intra-state Transmission and Distribution) Regulations, 2005 (hereinafter called the Open Access Regulations) applicable to wheeling of electricity through open access in the state of Gujarat. The Open Access Regulations framed by the Commission, inter-alia, provides for transmission/wheeling charges payable by the open

access customer on the basis of the capacity required for transmission as opposed to the wheeling charges paid on the basis of the units transferred as applicable prior to the coming into force of the Open Access Regulations.

6. In accordance with the Open Access Regulations, the respondent No. 2 had contracted a capacity of 30 MW of the transmission capacity on which it was liable to pay the transmission/wheeling charges.

7. On or about July 31, 2007 the respondent No. 2 expressed its desire to reduce its contracted capacity of 30 MW for the transmission due to the expansion of its caustic soda plant at Dahej and the increased power requirement from CPP at Dahej. For relinquishment of the transmission capacity, the respondent No. 2 had to follow the procedure of the Open Access Regulations. In this context it is necessary to reproduce Regulation 11 of the Open Access Regulations which reads as under:

“ 11. Exit Option

- (i) *A long-term open access user shall not relinquish or Transfer his rights and obligations specified in the Bulk Power Transmission/Distribution Capacity Agreement, without prior approval of the Commission.*
- (ii) *The relinquishment or transfer of rights and obligations by a long-term open access user shall be subject to payment of compensation, as may be determined by the Commission”*

8. Thus, the Open Access Regulations contemplated a compensation payable by respondent No. 2 to the appellant for the relinquishment of the transmission capacity. However, since the Open Access Regulations did not provide any specific procedure for the determination of the compensation payable for the relinquishment of capacity, the appellant and the respondent No. 2 entered into negotiation to arrive at an appropriate figure of compensation payable to the appellant for the relinquishment of the capacity.

9. Pursuant to the negotiations, the parties arrived at an amicable and mutually acceptable basis of calculation of compensation payable by the respondent No. 2 to the appellant for the relinquishment of the transmission capacity, namely computation of levelised tariff on the basis of capital cost of lines, bays and sub-station equipments. Based on the above agreed basis, the cost of the compensation was calculated and after negotiations between the parties, the parties agreed, vide agreement dated October 12, 2007 to the payment of a sum of Rs. 2.5 crores by respondent No. 2 to the appellant as one time settlement for the reduction of the transmission open access demand by the respondent No. 2 from 30 MW to 12 MW.

10. Pursuant to the above agreement between the parties, the appellant filed a petition being petition No. 930 of 2007 before the Commission for the approval of the agreement entered into between the parties.

11. Vide order dated March 29, 2008, the Commission has disposed of the petition No. 930 of 2007 filed by the appellant approving the reduction of open access demand but holding that the respondent No. 2 was not liable to pay any compensation to the appellant for the relinquishment of the transmission open access capacity because the letter of grant of open access to the respondent No. 2 did not specify any such compensation payable by the respondent No. 2. The Commission has further held that the provisions of the statutory and binding Open Access Regulations providing for compensation payable for the relinquishment of the transmission capacity do not apply to the respondent No. 2.

12. Aggrieved by the order dated March 29, 2008 passed by the Commission, the appellant has preferred the present appeal before us.

13. We have heard the appellant and the respondents. Based on the ground pressed by the rival parties during the hearing, we proceed to analyse and decide herein below:

14. Admittedly respondent No. 2 is a user of the transmission net work on the date of coming into force of the Gujarat Electricity Regulatory Commission (open access intra state transmission and distribution) Regulations, 2005. Open access user has been defined as “anyone permitted to receive supply of electricity from a person other than distribution licensee of his area of supply, and the expression includes a generating company and a licensee, who has availed of or intends to avail of open access. As per Section 3 of these Regulations, these shall apply to open access for use of intra-state transmission system and/or the distribution systems of licensees in the state, including when such system is used in conjunction with inter-state transmission system unless explicitly stated to be applicable only for a specific category of licensee.

15. Respondent No. 2 has been an existing user of the transmission system belonging to the appellant GETC and therefore, the Open Access Regulations shall fully apply to both GETC as well as the respondent No. 2 GACL. The

Regulations in clause 11 titled 'Exit Option' specified as under:-

- (i) *A long term open access user shall not relinquish or transfer his rights and obligations specified in the Bulk Power Transmission/Distribution Capacity Agreement, without prior approval of the Commission.*
- (ii) *The relinquishment or transfer of rights and obligations by a long term open access user shall be subject to payment of compensation, as may be determined by the Commission.*

16. We do not find any force in the arguments of the Commission that the respondent No. 2 was not liable to pay any compensation to the appellant for the relinquishment of the transmission open access capacity because the letter of grant of open access to the respondent No. 2 did not specify any such compensation payable by the respondent No. 2 and that the provisions of the statutory and binding Open Access Regulations providing for compensation payable for

the relinquishment of the transmission capacity do not apply to the respondent No. 2.

17. The Open Access Regulations do not distinguish between the existing and the prospective users except that the existing user need not follow the procedure for long-term Open Access as given in Clause 9 of the Regulations. The proviso to Clause 4 (II) of the Regulations stipulates that the existing beneficiaries of an intra state transmission and distribution system owned or operated by the State Transmission Utility and distribution licensee respectively shall be deemed to be the long term open access users of the particular system; the application fee schedule according to Regulation 9(iii) shall not apply for them. Therefore, the plea of the Commission that the policies of the Government of Gujarat vide which the permission was granted to the respondent does not specify the charges leviable for the exit option on the CPP whenever CPP reduces wheeling or stops wheeling to its recipient units is of no consequence.

18. Once the regulations in force are applicable to the existing beneficiaries, only these regulations shall be of relevance and the Commission can not be guided by any policy directions before coming into effect of the regulation. If the intention of the Commission was to make an exception in case of the existing beneficiaries who were granted open access prior to the regulations, the regulations would have made specific exceptions in such cases.

19. The Commission has also argued in its order that the respondent had financed the cost of providing 220 kV double circuit line and 33 kV double circuit line and therefore it is essential to consider the cost of net work in proportion to its utilization. We do not find any clause of the Regulations which permits such a consideration.

20. The Regulations clearly provide for exit option subject to payment of compensation, as may be determined by the Commission. The appellant and the respondent GSEL had mutually agreed for compensation of Rs. 2.5 crores which

has not been contested by the Commission though the Commission has ruled that the compensation is not payable.

21. In view of the foregoing we allow the appeal and direct that the petition No. 930/2007 filed before the Commission be allowed. The Agreement dated October 12, 2007 be approved and compensation which has been mutually and amicably agreed to by the parties be given effect to.

No order as to costs.

(H.L. Bajaj)
Technical Member

(Mrs Justice Manju Goel)
Judicial Member