



CIVIL APPEAL NO.7964 OF 2019

VERSUS

WITH

AND

CIVIL APPEAL NO. 7965 OF 2019

J U D G M E N T

VIKRAM NATH, J.

1. The present appeals challenge two separate orders passed by the High Court of Rajasthan—one by the Jodhpur Bench dated 29.08.2016 and the other by the Jaipur Bench dated 06.09.2016. The appeals arise from challenges to the validity of the Rajasthan Electricity Regulatory Commission (Terms and

Conditions for Open Access) Regulations, 2016¹ framed by the Rajasthan Electricity Regulatory Commission² in the exercise of its powers under Section 42 read with Section 181 of the Electricity Act, 2003³. The primary grievance of the writ petitioners, appellants herein, before the High Court, and now the appellants before this Court, relates to the restrictions and conditions imposed by the Regulations of 2016 on the exercise of open access for captive power plants⁴ and other large consumers of electricity.

- 2.** The brief background of the facts giving rise to the challenge before us are that the writ petitioners before the High Court are engaged in industrial production and have substantial power consumption requirements. The facts, as taken by the High Court from one of the writ petitions filed by Hindustan Zinc Limited, respondent No.6 in Civil Appeal No. 7966 of 2019, for convenience, are that Hindustan Zinc Limited is a public limited company incorporated under the Companies Act, 1956, and is engaged in

¹ Regulations of 2016.

² RERC.

³ Act of 2003.

⁴ CPPs.

the business of mining, smelting, and production of non-ferrous metals, including lead and zinc. The company operates multiple units at Chanderia, Dariba, and Zawar, which are supported by CPPs. In addition to captive power generation, the company also has agreements with Ajmer Vidhyut Vitran Nigam Limited (respondent No.3 in Civil Appeal No. 7964 of 2019, respondent No.2 in Civil Appeal No. 7965 of 2019, and respondent No.3 in Civil Appeal no. 7966 of 2019) for the supply of power to meet its contractual demand. Under these agreements, Hindustan Zinc Limited is entitled to draw electricity up to 70 MW from the distribution licensee at its Dariba Zinc Smelter Unit at any time, as per its operational requirements.

- 3.** Prior to the introduction of the Regulations of 2016, the appellants were availing open access under the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004⁵, which permitted them to draw power from both, their captive generation and open access sources, without any reduction in the contracted demand from the

⁵ Regulations of 2004.

distribution licensee. The open access facility under the Regulations of 2004 allowed the appellants to schedule their power requirements on a day-ahead basis for each 15-minute block, with the flexibility to meet shortfalls through their contracted demand from the distribution licensee.

- 4.** RERC issued a draft of the proposed Regulations of 2016 through a public notice dated 06.07.2015 and invited comments and suggestions. Hindustan Zinc Limited, along with other stakeholders, submitted detailed objections, highlighting that certain provisions of the draft regulations were inconsistent with the objectives of the Act of 2003 and the principle of promoting open access. The Commission notified the Regulations of 2016 on 27.01.2016.
- 5.** The key change introduced by the Regulations of 2016 was the imposition of limitations on the simultaneous drawal of power through open access and contracted demand from the distribution licensee. Under the new regime, if a consumer opted to procure power through open access, the contracted demand from the distribution licensee would be reduced by the quantum of power scheduled through open access. Additionally, the

Regulations of 2016 imposed penalties for over-drawal and under-drawal from the contracted demand.

- 6.** The appellants before the Jodhpur Bench of the High Court challenged several specific provisions of the Regulations of 2016 on the ground that they were arbitrary, unreasonable, and contrary to the statutory scheme of the Act of 2003. The primary contention was that the Regulations of 2016 sought to undermine the statutory right of open access guaranteed under Section 42 of the Act of 2003 by imposing unreasonable restrictions on the simultaneous use of open access and contracted demand. The appellants further contended that the imposition of penalties for variations in drawal, even when caused by unforeseen breakdowns or operational exigencies, was unjust and discriminatory. The appellants argued that the Regulations of 2016, by reducing the contracted demand by the quantum of power scheduled through open access, effectively penalized consumers for exercising their statutory right to open access. It was submitted that the statutory framework under the Act of 2003 envisaged open access as a means to

promote competition and efficiency in the electricity market, and the Regulations of 2016 were contrary to this objective.

7. The appellants before the Jaipur Bench of the High Court were inter-state consumers, unlike the appellants before the Jodhpur Bench, who were intra-state consumers drawing power from their captive plants within the State of Rajasthan. The challenge before the Jaipur Bench specifically related to Regulations 26(6) and 26(7) of the Regulations of 2016, which the appellants contended imposed restrictions on inter-state open access, thereby exceeding the Commission's jurisdiction under the Act of 2003. The appellants argued that the Regulations of 2016 amounted to an extra-territorial application of the RERC's regulatory power, which was beyond the statutory mandate conferred under the Act of 2003. It was contended that the Act of 2003 empowered the State Commissions to regulate intra-state open access but not inter-state open access, which falls within the jurisdiction of the Central Electricity Regulatory Commission⁶. Therefore, the

⁶ CERC

appellants contended that the impugned regulations were ultra vires the Act of 2003 and liable to be struck down.

- 8.** The Jodhpur Bench in the judgment dated 29.08.2016 upheld the validity of the Regulations of 2016, holding that the Commission was empowered to regulate open access to ensure grid stability and efficient load distribution. The High Court observed that the impugned regulations have been notified with the objective to ensure that the consumers do not indulge in any gaming activities on the grid, and thus the rationale behind the Regulations of 2016 is to further the objectives of the Act of 2003 while ensuring that the interests of consumers as well as distribution licensees are balanced. Further, rejecting the appellants' claim that the regulations are violative of their rights protected under Part III of the Constitution of India, the High Court observed that they had failed to establish that the Regulations of 2016 violate their Fundamental Rights, or the RERC lacked competence to frame these regulations or that they are manifestly arbitrary or unreasonable; and thus merely because the Regulations of 2016 are claimed to cause certain inconvenience or hardship

to the appellants, they cannot be held to be illegal or ultra vires the Act of 2003.

- 9.** The Jaipur Bench also upheld the validity of the Regulations of 2016 and dismissed the writ petition of the appellants herein in C.A. 7964 of 2019 herein, holding that their challenge and the issues in their petition before the High Court were squarely covered by the judgment of the Jodhpur Bench.
- 10.** The appellants in all the three appeals before us are challenging the findings of the High Court on the grounds that the Jodhpur Bench failed to appreciate that the Regulations of 2016 are discriminatory against the CPPs as they impose unreasonable and excessive restrictions upon them for availing open access, contrary to the objectives of the Act of 2003. Further, the appellants challenging the order of the Jaipur Bench further contend that the Bench failed to consider that RERC lacked jurisdiction to regulate inter-state open access, which falls within the exclusive domain of the CERC under the Act of 2003.
- 11.** The issues for consideration before this Court are as follows:
 - i. Whether the RERC has the jurisdiction to regulate inter-state open access under the Act of 2003?

- ii. Whether the imposition of penalties for variations in drawal from contracted demand amounts to an unreasonable restriction on the right to open access under Section 42 of the Act of 2003?
- iii. Whether Regulation 26(7) is ultra vires for requiring an advance notice of 24 hours a day prior, thereby preventing urgent procurement and creating an artificial barrier to open access as protected by the Act of 2003?
- iv. Whether Regulation 21 is arbitrary and discriminatory, thereby discouraging captive power generation by creating unreasonable distinction between CPPs and state distribution companies?
- v. Whether the appellants' right to open access is foreclosed by the Regulations of 2016?

12. We have heard the learned counsels for the parties at great length.

ARGUMENTS OF THE APPELLANTS

13. The appellants have raised a comprehensive challenge to the validity of the Regulations of 2016. The challenge is primarily directed against regulations concerning the levy of additional

surcharge, scheduling requirement, and penalties for deviations. In Civil Appeal No. 7964 of 2019, appellants have also contested the jurisdiction of the RERC to regulate inter-state open access, arguing that such jurisdiction falls exclusively within the domain of the CERC under the Act of 2003.

- 14.** The appellants in Civil Appeal No. 7964 of 2019 have contended that the RERC lacked jurisdiction to regulate inter-state open access through Regulations of 2016. The appellants submitted that under the scheme of the Act of 2003, the authority to regulate inter-state open access lies exclusively with the CERC. It is the case of the appellants challenging the jurisdiction of the RERC with respect to regulating inter-state open access that the Regulation 26(7) essentially forecloses the appellants from purchasing powers as it imposes conditions on inter-state open access. The appellant argued that these conditions, such as requiring a 24-hour scheduling period, advance intimation of power usage, and a minimum consumption threshold of 75% of the scheduled quantum, exceed the jurisdiction of the State Commission and infringe upon the powers vested in the CERC.

15. The appellants referred to Section 2(36) of the Act of 2003, which defines "inter-state transmission" as:

“(36) “ inter-State transmission system” includes –

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

In light of the above definition, the appellants argued that merely because the transmission lines in the state of Rajasthan are used to convey electricity it does not cease to be an inter-state transaction as the usage of the said lines is only incidental to the conveyance of electricity using inter-state open access.

16. Appellants contended that inter-state open access is a matter falling within the exclusive domain of the CERC under Section 79(1)(c) of the Act of 2003. The

Act of 2003 clearly demarcates the jurisdiction between CERC and State Commissions. It was argued that the power of the State Commission, RERC in this case, under Section 86(1)(c) is confined to regulating intra-state open access, and therefore, any attempt to regulate inter-state open access by the RERC is ultra vires the Act of 2003. The appellants highlighted that the petitioners in Civil Appeal No. 7965 of 2019 and Civil Appeal No. 7966 of 2019 are intra-state consumers of captive power from their captive generating plants located within Rajasthan. However, the appellants in Civil Appeal No. 7964 of 2019 are inter-state consumers, purchasing power from sources located outside Rajasthan. Therefore, the challenge to Regulation 26(7) by the appellants in Civil Appeal No. 7964 of 2019 is on a different footing, as it concerns the extra-territorial application of the Regulations of 2016 to inter-state transactions, which is beyond the legislative competence of the RERC.

- 17.** The appellants while referring to Section 79(1)(c) of the Act of 2003, submitted that it explicitly provides that the CERC shall regulate the transmission of electricity and determine tariffs for inter-state

transmission of electricity. Section 2(36) of the Act of 2003 defines "inter-state transmission" to mean the conveyance of electricity from one state to another. Therefore, any open access transaction involving the transmission of electricity across state boundaries would qualify as an inter-state transaction, which falls exclusively within the regulatory domain of the CERC. The appellants submitted that Section 86(1)(c) of the Act of 2003 empowers the State Commissions to facilitate intra-state open access only. The power to regulate intra-state open access does not include the authority to regulate inter-state open access transactions. The regulatory scheme under the Act of 2003 establishes a clear division of jurisdiction between the CERC and the State Commissions, with the CERC having exclusive authority over inter-state transactions and the State Commissions having authority over intra-state transactions.

- 18.** It was the argument of the appellants that any surcharge or regulatory requirement imposed by the RERC on such inter-state transactions is *ultra vires* the Act of 2003 and amounts to an extra-territorial application of state law. The appellants further submitted that the findings of the Jodhpur Bench of

the High Court, which upheld the validity of Regulations of 2016 with respect to intra-state consumers, cannot be applied to inter-state consumers. The challenge before the Jaipur Bench of the High Court concerned inter-state consumers, whose transactions are governed by the regulatory framework established by the CERC, not the RERC, and thus would not be covered by the judgment of the Jodhpur Bench.

- 19.** Further, the appellants submitted that the jurisdiction of the RERC is circumscribed by Section 86(1)(a) of the Act of 2003, in terms of which the State Commission shall determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail “within the state”. Thus, the RERC’s powers with respect to open access are only within the state and not beyond it. Whereas, the CERC has been empowered under Section 79(1)(c) to regulate inter-state transmission of electricity.
- 20.** Appellants also made a reference to Section 42 of the Act of 2003 which provides that the RERC in exercise of its powers under this provision may impose cross subsidy surcharge; wheeling charges; additional surcharge on wheeling, if any, to meet fixed cost of

the distribution licensee arising out of its obligation to supply. Thus, the RERC is within its power to factor operational costs only. Reference was also made to the definition of “open access” provided under Section 2(47), which reads as follows:

“(47) “open access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.”

- 21.** Appellants thus submitted that Section 42 of the Act of 2003 only refers to the State Commissions whereas the definition of open access contained in Section 2(47) refers to the Appropriate Commission which includes the CERC. Therefore, the power of the State Commissions does not extend to regulating inter-state open access transactions which power has been conferred upon the Central Commission. A conjoint reading of Sections 42 and 86(1)(a) of the Act of 2003 makes it clear that the regulations of the State Commissions only apply within the state. In the case of inter-state transmission of electricity, the governing regulation is the CERC (Connectivity and

General Network Access to the 'inter-state' Transmission System) Regulations, 2022⁷. All inter-state transactions (including collective transactions) on the power exchange are necessarily inter-state transactions and governed by the CERC GNA Regulations. In the event of transmission of inter-state power from outside the state into Rajasthan, it is not the RERC Regulations of 2016 which apply within the state but the CERC GNA Regulations.

- 22.** The appellants relied upon the decision of this Court in **Energy Watchdog v. Central Electricity Regulatory Commission**⁸, wherein it was held that the authority to regulate inter-state transmission and inter-state open access vests exclusively with the CERC. The appellants argued that the ratio of this judgment squarely applies to the present case, rendering the impugned regulation beyond the competence of the RERC. The appellants relied upon the following findings of this Court in **Energy Watchdog (Supra)**:

"...24. The scheme that emerges from these sections is that whenever there is inter State generation or supply of electricity, it is the

⁷ CERC GNA Regulations.

⁸ (2017) 14 SCC 80.

Central involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (a), (b) and (d), and "intra-State" in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted.

This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State."

- 23.** Thus, the appellants submitted that by curtailing the purchase power on the exchange by imposing conditions on inter-state open access transactions taking place outside the state of Rajasthan, Regulation 26(7) is ex-facie contrary to the objectives of Act of 2003 and the National Tariff Policy, and thus RERC has encroached upon the jurisdiction of the CERC in framing these arbitrary regulations. By imposing these conditions in excess of its territorial jurisdiction, the RERC has essentially banned the purchase of power under real time contracts, intraday contracts, and contingency contracts and thereby ensured that industrial consumers such as the appellants have no option but to purchase power from the Distribution Licensee (Jaipur Vidyut Vitran Nigam), contrary to the objectives of promoting competition such that consumers can avail quality and cheaper power from different sources on the power exchange via the inter-state open access mechanism. It was submitted that the impugned

regulation, by interfering with inter-state scheduling, exceeds the regulatory authority of the RERC and violates the statutory framework established under the Act of 2003.

- 24.** In Civil Appeal Nos. 7965 and 7966 of 2019, the challenge is to the vires of the regulation by the captive generators supplying power within the state of Rajasthan. Appellants have challenged the Regulations of 2016 on the grounds that the Regulations of 2016 are discriminatory against the CPPs as they put illegal fetters upon them for availing open access which is a statutory right of the such power generators under Section 9 of the Act of 2003.
- 25.** The appellant submitted that Regulation 21 of the Regulations of 2016 is arbitrary and discriminatory against CPPs. Section 9 of the Act of 2003 recognizes the right of industries to set up captive generation plants and ensures non-discriminatory access to transmission and distribution networks. However, Regulation 21 creates an unreasonable distinction between captive generators and state distribution companies⁹, discouraging captive power generation.

⁹ DISCOMs.

The appellants contend that the pricing mechanism imposed under Regulation 21 unfairly penalizes captive generators while providing undue advantages to state DISCOMs. Under the regulation, any under-injection by an open access consumer is settled at higher rates, whereas over-injection is compensated at lower rates. Further, Regulation 21 also provides that any energy injected by the power plant but not utilised by its captive units is not paid for at all to the captive unit/drawer/buyer. Such a pricing mechanism creates a disincentive for captive generators to sell their surplus power through open access and effectively forces them to rely on state utilities. The appellants further argued that the discriminatory treatment of captive generators under Regulation 21 is inconsistent with the intent of the Act of 2003, which promotes competition and self-sufficiency in power generation. By creating an uneven playing field, the regulation hampers industrial consumers' ability to optimize their power procurement strategies and forces them into an unfair dependence on state utilities.

- 26.** The appellants have challenged Regulation 21 on the ground that by imposition of heavy penalty in case of under-injection by CPPs as provided in Regulation 21 and at the same time exemption of the State Generators and other generators supplying power to DISCOMS on long term basis (by virtue of Regulation 5 and Regulation 6), the Regulations of 2016 have created a discriminatory regime detrimental to the interest of CPPs which is totally against the spirit of the proviso to Section 9(1) of the Act of 2003.
- 27.** It is the argument of the appellants that these regulations discourage open access by providing extremely stringent provisions for normal and practically uncontrollable deviations from schedule and are thereby creating artificial barriers on CPPs and consumers availing open access by making the supply from open access non feasible and economically unviable by forcing the captive generators and consumers to incur very steep payments as well as enriching the DISCOMs at the expense of the open access consumers.

28. Appellants further highlighted that the National Electricity Policy 2005¹⁰ realises the enormous potential of CPPs and envisages encouraging generation from such plants for the overall development of the power market in the country. A conjoint reading of the provisions of the Act of 2003 and NEP of 2005 establishes that it is the explicit intention of the legislature that the CPPs should be encouraged and developed as a source of decentralised power generators. Therefore, any regulation putting CPPs at a position disadvantageous *vis-a-vis* other generator in the matter of providing open access or regulating supply of power from them is in violation of and *ultra vires* to the provisions of Act of 2003 and the NEP of 2005.

ARGUMENTS OF THE RESPONDENTS

29. The respondents, including the RERC and the distribution licensees have strongly defended the validity of the Regulations of 2016, contending that the same have been framed well within the jurisdiction of the RERC as conferred under the Act

¹⁰ NEP of 2005.

of 2003 and are essential for maintaining grid discipline, ensuring fair competition, and safeguarding the financial viability of the electricity DISCOMs. Further, it has also been vehemently submitted that open access cannot be absolutely free, untrammelled, un-controlled or unrestricted. The submissions of all the respondents defending the validity of the Regulations of 2016 have been reproduced below.

- 30.** At the outset, it is submitted that the regulation of electricity is an intricate and highly specialized domain requiring expertise in technical, economic, and legal considerations. The Act of 2003, entrusts regulatory commissions with the responsibility of ensuring an efficient, reliable, and economically viable electricity sector while balancing the interests of generators, consumers, and DISCOMs. Electricity, being a form of energy that cannot be stored in its raw form, necessitates continuous real-time management to maintain grid stability. Any mismatch between demand and supply can lead to severe disruptions, including grid failure, thereby causing widespread economic and social ramifications. To prevent such contingencies,

electricity regulatory commissions, including RERC, are mandated to frame and enforce operating norms that promote efficiency and discipline among participants in the electricity sector. The primary objective of these norms is to ensure that the benefits derived from improved operational efficiency are passed on to consumers while simultaneously maintaining grid stability.

- 31.** The respondents submitted that RERC possesses regulatory authority over certain aspects of open access transactions, even where electricity is procured from outside the state of Rajasthan but delivered within Rajasthan. The jurisdiction of CERC is defined under Section 79(1) of the Act of 2003 Act, granting it regulatory powers over inter-state transmission of electricity. However, this does not preclude State Commissions, including RERC, from exercising jurisdiction over intra-state aspects of open access. Section 42(2) of the Act of 2003 specifically empowers State Commissions to regulate intra-state open access, ensuring fair access to transmission and distribution networks within the state. While the appellant argues that only CERC has the power to regulate inter-state open access, this

contention is misplaced. RERC retains regulatory oversight over intra-state transactions, even if the power originates from another state but is ultimately transmitted within Rajasthan's intra-state grid. Thus, while CERC has jurisdiction over inter-state transmission, RERC retains regulatory authority over the intra-state aspects of open access transactions, even if the power source is located outside the state but the power is delivered within the State through the intra-state grid. This is in consonance with the framework of the Act of 2003, which provides for a clear demarcation of responsibilities between central and state regulators without unduly restricting state regulatory authority. Further, Section 42 of the Act of 2003 expressly empowers the State Commissions to introduce and regulate open access within the state. Nowhere in the parent Act has the legislature conferred the power to regulate open access to the Central Government or CERC for consumers falling under the purview of Section 42.

- 32.** It is thus the submission of the respondents that the appellant's assertion that only CERC has the power to regulate inter-state open access is misleading. While CERC indeed has jurisdiction over inter-state

transmission under Section 79(1) of the Act of 2003, RERC retains regulatory authority over the intra-state aspects of open access transactions, even if the power is sourced from outside the state. Further, it has been contended that as rightly pointed out by the appellants, Section 2(47) of the Act of 2003 defines open-access as non-discriminatory access to transmission or distribution system; but this encompasses in its ambit both, inter-state as well as intra-state transactions, without creating any distinction between them for regulatory purposes. Therefore, it is a natural consequence that State Commissions will retain the power to regulate open access within their jurisdictions, even if it involves powers sourced from another state. Hence, from the plain reading of Section 2(47) with Section 42 of the Act of 2003, it is clear that the statute treats open access uniformly, regardless of the source and the legislature did not intend to create any unnecessary distinction. Hence, the power to regulate open access, as per Section 42, rests with the RERC, especially since the consumer, as defined under Section 2(15) of the Act of 2003, is the one who consumes electricity via the distribution licensee, which

operates within the state. Section 2(15) defines a "consumer" as any person who is supplied electricity by a licensee or whose premises are connected to a distribution system. Since distribution licensees operate within specific states, the regulation of open access for consumers naturally falls within the jurisdiction of the respective State Commission. Since open access transactions ultimately facilitate the supply of electricity to consumers through the distribution network of a state licensee, their regulation necessarily falls within the purview of the concerned State Commission. This reinforces the position that State Commissions, rather than CERC, have jurisdiction over open access transactions where power is consumed within the state, irrespective of its source.

- 33.** Section 181 of the Act of 2003 grants State Commissions the power to frame regulations to implement the provisions of the Act of 2003. This includes the power to introduce and regulate open access, determine applicable charges, and establish conditions for access to intra-state transmission and distribution networks. The ability of State Commissions to make rules regarding open access

further affirms that RERC, in the exercise of its statutory functions, can formulate regulations governing open access transactions within Rajasthan. Moreover, Section 181 of the Act of 2003 reinforces the independent authority of State Commissions by specifying their role in electricity regulation at the state level. This provision upholds the principle of decentralization in electricity governance and affirms the legislative intent to vest regulatory control over intra-state electricity transactions with State Commissions, including RERC. While, Section 181 of the Act of 2003 specifically grants the State Commissions the authority to make regulations concerning the classes of consumers falling under Section 42 of the Act of 2003, Section 178 of the Act of 2003 grants the CERC broad powers to make regulations on a wide range of subjects while intentionally withholding powers related to Section 42 of the Act. In furtherance of this, Section 79 of the Act of 2003, which outlines the functions of the CERC, does not confer any responsibility upon the Central Commission regarding the regulation of consumer classes. The absence of any such provision is evident of the

legislature's intent to not extend the CERC's role in regulating the supply of power to end consumers from distribution licensee, either through intra-state transmission or inter-state transmission. Therefore, inter-state open access falls within the purview of the State Commissions, RERC herein, for regulatory purposes.

- 34.** The respondents further submitted that Regulation 26(7) of the Regulations of 2016, which mandates a one-day advance scheduling requirement for 24-hour power procurement, serves a legitimate regulatory purpose. This is a reasonable and necessary provision and is only applicable in the case of 'short-term inter-state open access'. This requirement ensures grid stability, facilitates proper load forecasting, and prevents last-minute fluctuations that could destabilize the electricity network. The advance scheduling requirement is neither arbitrary nor unreasonable but is in line with best practices for efficient power system management.
- 35.** The contention that this requirement forecloses urgent procurement is misplaced. The regulations provide alternative mechanisms, including short-term market purchases, that allow participants to

address urgent electricity shortages. Respondents submitted that the real-time market and day-ahead market operated under the guidelines of the CERC still allow purchase of power for urgent needs. However, the scheduling requirement is only applicable to procurement through open access within the state of Rajasthan in order to integrate the demanded power securely. Thus, such a requirement is a rational measure to ensure that the grid operates in a stable and reliable manner without the risk of sudden fluctuations, and thus is in no way *ultra vires* the provisions of the Act of 2003 or against the objectives of open access. The argument that the scheduling requirement creates an artificial barrier to open access is completely misplaced, as the intention is to ensure a stable and moderated open access, thereby protecting the reliability of the grid. This in no way forecloses the access to urgent procurement, which is available through other sources, but only ensures that open access consumers follow grid discipline, which is imperative to prevent any imbalances. Therefore, the imposition of a structured scheduling mechanism is necessary for maintaining an efficient and stable grid.

- 36.** It has been further submitted by the respondents that the consistent under-utilization of contract demand by such consumers can lead to financial losses for the distribution licensees. This is because the fixed costs associated with maintaining the infrastructure necessary to support higher demand must still be covered, irrespective of the actual consumption levels. By allowing only consumers who demonstrate genuine demand to access open access, the regulatory framework seeks to create a more equitable and efficient system. This furthers the aim of the Act of 2003 while ensuring transparency and accountability among consumers of open access.
- 37.** The respondents contend that the Regulations of 2016 do not arbitrarily foreclose the petitioner's right to open access, which was previously available under the Regulations of 2004. The Regulations of 2016 are an evolved framework aimed at aligning open access policies with the current realities of electricity distribution and transmission. The modifications introduced in the new regulations, including changes in scheduling requirement, charges, and penalties, are intended to address inefficiencies and ensure a level playing field for all stakeholders. These changes

are well within the regulatory domain of RERC and do not constitute an unlawful revocation of rights granted under the previous framework.

38. The appellants argued that its transactions qualify as 'collective transactions' under the CERC GNA Regulations, thereby falling outside RERC's regulatory jurisdiction. The respondents counter this argument by asserting that collective transactions, as defined under the applicable regulations, pertain to centralized power exchanges and structured market transactions. The appellants' transactions, however, involve bilateral arrangements and open access usage within Rajasthan's network. Therefore, they do not automatically fall under the exclusive purview of CERC. The respondents submit that RERC's jurisdiction remains intact concerning aspects of the transactions that involve intra-state transmission and distribution.

39. The respondents next submitted that Regulation 21 of the Regulations of 2016, which imposes penalties for under-injection of power by captive power plants, is a necessary regulatory measure designed to ensure grid discipline. The contention that Regulation 21 is discriminatory against CPPs is unfounded, as the

provision applies equally to all entities responsible for power injection into the grid. The rationale behind this regulation is to prevent deviation from scheduled generation, which can disrupt grid stability. Captive generators, unlike state generators under long-term power purchase agreements¹¹, have greater flexibility in their operations, necessitating stricter scheduling norms to maintain system integrity. The imposition of penalties is intended to discourage any kind of gaming or foul play and ensure that all participants bear the cost of grid imbalances, as deviation charges are necessary to discourage under-injection and over-drawal, to ensure grid stability. The imposition of penalties for under-injection by CPPs is an essential regulatory measure aimed at ensuring predictability in electricity scheduling and preventing deviations that could jeopardize grid stability. The respondents further emphasize that Regulation 21 does not violate the rights of captive consumers under Section 9(1) of the Act of 2003. The proviso to Section 9(1) merely recognizes the right of captive consumers to establish and operate generation

¹¹ PPAs.

plants for self-use. However, this right is not absolute and is subject to regulatory oversight to ensure that the operation of CPPs does not disrupt grid stability or create imbalances in electricity supply. The regulatory measures imposed under the Regulations of 2016 are well within the powers conferred upon RERC under the Act of 2003, and are consistent with the broader objectives of the statute.

- 40.** It is a settled principle of law that courts should exercise judicial restraint when reviewing the validity of regulations framed by expert regulatory bodies. The respondents argued that this Court has consistently recognized that regulatory commissions are vested with specialized knowledge and expertise, and their decisions should not be lightly interfered with unless they are manifestly arbitrary, unreasonable, or in direct contravention of statutory provisions. In **Reliance Infrastructure v. State of Maharashtra**¹², this Court held that regulatory decisions should be accorded deference unless it is demonstrated that they are wholly irrational, ultra vires the parent statute, or violate Fundamental

¹² (2019) 3 SCC 352, Para 38.

Rights. Similarly, in **Hindustan Zinc v. RERC**¹³, this Court reaffirmed the well-established presumption of constitutionality that extends to subordinate legislation, including regulations framed under statutory authority. The respondents submitted that unless a regulation is shown to lack legislative competence, be inconsistent with the provisions of the parent statute, exceed the authority conferred upon the regulatory body, or be manifestly arbitrary and unreasonable, it must be presumed to be valid. The burden lies on the party challenging the regulation to establish its invalidity, and in the present case, the appellant has failed to discharge this burden.

- 41.** The respondents lastly asserted that the Regulations of 2016 as a whole are justified, necessary, and within the regulatory mandate of RERC. The evolution of open access regulations is a dynamic process, requiring periodic modifications to address emerging challenges in electricity distribution and transmission. The Regulations of 2016 aim to enhance grid reliability, ensure economic efficiency,

¹³ (2015) 12 SCC 611, Para 32.

and promote non-discriminatory access to the power network. Further, regulatory measures such as scheduling requirements, charges, and penalties are established to prevent market manipulation, ensure fair competition, and protect consumer interests. The respondents, therefore, submit that the appellants have failed to establish any legal infirmity in the Regulations of 2016 warranting interference by this Court. The respondents further submitted that the Regulations of 2016 are framed in alignment with national policies and regulatory precedents across various states. The objective of open access is to promote competition and consumer choice while ensuring grid stability and financial viability of distribution licensees. The levy of surcharges and charges under the regulations serves this dual purpose. It is further argued that the appellants' interpretation of the Act of 2003, disregards the financial impact on state utilities and the broader policy intent. The respondents emphasized that regulations framed by RERC are based on detailed public consultations and impact assessments, taking into account the interests of all stakeholders. The regulations are neither arbitrary nor excessive but

are necessary for ensuring an equitable and sustainable electricity sector.

ANALYSIS

42. Before delving into the issues before us, the relevant provisions referred to are reproduced below:

42.1. THE ELECTRICITY ACT, 2003

“Section 2. Definitions: - In this Act, unless the context otherwise requires –

xxx xxx xxx

(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

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(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;

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(36) “inter-State transmission system” includes

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

(ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

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

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(47) “open access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;

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Section 9. Captive generation:

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

[Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub- section (2) of section 42.]

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

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Section 32. Functions of State Load Despatch Centres: -

(1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall -

(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;

(b) monitor grid operations;

(c) keep accounts of the quantity of electricity transmitted through the State grid;

(d) exercise supervision and control over the intra-State transmission system; and

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

(3) The State Load Despatch Centre may levy and collect such fee and charges from the generating companies and licensees engaged in intra-State transmission of electricity as may be specified by the State Commission.

Section 33. Compliance of directions: -

(1) The State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the State Load Despatch Centre under sub-section (1).

(3) The State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(4) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under sub-section (1), it shall be referred to the State Commission for decision:

Provided that pending the decision of the State Commission, the directions of the State Load Despatch Centre shall be complied with by the licensee or generating company.

(5) If any licensee, generating company or any other person fails to comply with the directions

issued under sub-section(1), he shall be liable to a penalty not exceeding rupees five lacs.

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

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

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

Provided that [such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

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

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

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

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections.

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Section 79. Functions of Central Commission: -

(1) The Central Commission shall discharge the following functions, namely:-

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
- (c) to regulate the inter-State transmission of electricity;
- (d) to determine tariff for inter-State transmission of electricity;
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;
- (g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :-

(i) formulation of National electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National

Electricity Policy, National Electricity Plan and tariff policy published under section 3.

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Section 86. Functions of State Commission: -

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

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

(d) issue licences to persons seeking to act as transmission licensees, distribution

licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:-.

- (i) promotion of competition, efficiency and economy in activities of the electricity industry;
 - (ii) promotion of investment in electricity industry;
 - (iii) reorganization and restructuring of electricity industry in the State;
 - (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.
- (3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.
- (4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

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Section 178. Powers of Central Commission to make regulations: -

- (1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.
- (2) In particular and without prejudice to the generality of the power contained in sub-

section (1), such regulations may provide for all or any of following matters, namely: -

(a) period to be specified under the first proviso to section 14;

(b) the form and the manner of the application under sub-section (1) of section 15;

(c) the manner and particulars of notice under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub- section (2) of section 18;

(f) publication of alterations or amendments to be made in the licence under clause(c) of sub-section (2) of section 18;

(g) Grid Code under sub-section (2) of section 28;

(h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;

(i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;

(j) payment of the transmission charges and a surcharge under-sub- clause (ii) of clause (d) of sub-section (2) of section 38;

(k) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(l) payment of transmission charges and a surcharge under sub-clause (ii) of clause(c) of section 40;

(m) reduction of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;

(n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(o) duties of electricity trader under sub-section (2) of section 52;

(p) standards of performance of a licensee or class of licensees under sub-section (1) of section 57;

(q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

[(r) the manner of reduction of cross subsidies under clause (g) of section 61;]

(s) the terms and conditions for the determination of tariff under section 61;

(t) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(v) the manner of making an application before the Central Commission and the fee payable therefor under sub-section (1) of section 64;

(w) the manner of publication of application under sub-section (2) of section 64;

(x) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(y) the manner by which development of market in power including trading specified under section 66;

(z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;

(za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;

(zb) the rules of procedure for transaction of business under sub- section (1) of section 92;

(zc) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zd) the manner of service and publication of notice under section 130;

(ze) any other matter which is to be, or may be, specified by regulations.

(3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication.

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Section 181. Powers of State Commissions to make regulations: -

(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

(a) period to be specified under the first proviso of section 14;

(b) the form and the manner of application under sub-section (1) of section 15;

(c) the manner and particulars of application for licence to be published under sub-section (2) of section 15;

(d) the conditions of licence section 16;

(e) the manner and particulars of notice under clause(a) of sub-section (2) of section 18;

(f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;

(g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;

(h) rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;

(i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause(d) of sub-section (2) of section 39;

(j) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(k) manner and utilisation of payment and surcharge under the fourth proviso to sub-

clause(ii) of clause (d) of sub-section (2) of section 39;

(l) payment of the transmission charges and a surcharge under sub-clause(ii) of clause (c) of section 40;

(m) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;

(n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;

(o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(p) reduction of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;

(q) payment of additional charges on charges of wheeling under sub-section (4) of section 42;

(r) guidelines under sub-section (5) of section 42;

(s) the time and manner for settlement of grievances under sub-section (7) of section 42;

(t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;

(u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;

(v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;

(w) payment of interest on security under sub-section (4) of section 47;

(x) electricity supply code under section 50;

(y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;

(z) duties of electricity trader under sub-section (2) of section 52;

(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;

(zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

[(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;]

(zd) the terms and conditions for the determination of tariff under section 61;

(ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;

(zh) issue of tariff order with modifications or conditions under sub-section(3) of section 64;

(zi) the manner by which development of market in power including trading specified under section 66;

(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be

maintained under sub-section (8) of section 128;

(zn) the manner of service and publication of notice under section 130;

(zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;

(zp) any other matter which is to be, or may be, specified.

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.”

42.2. Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2016:

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R.5. Special Provisions for existing Distribution Licensees: The Distribution Licensees, using intra-State transmission system and the distribution system in the State under an existing agreement or arrangement on the date of coming into force of the RERC (Terms and Conditions for Open Access) Regulations, 2004, shall be entitled to continue to avail open access to such transmission and distribution system on the same terms and conditions for the term of the existing agreement or arrangement on payment

of transmission charges and wheeling charges as may be determined by the Commission.

R.6. Provisions for existing consumers and generating companies: The existing consumer or an existing generating company other than the licensees availing open access under government policy or under agreements entered on the date of coming into force of RERC (Terms and Conditions for Open Access) Regulations, 2004 may continue to avail open access on terms and conditions laid down under these Regulations to the extent they are not covered by any policy directive by the State Government to the Commission.

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R.21. Unscheduled Interchange Pricing

The payment settlement for mismatch between the schedule and the actual drawal/injection in both intra-State and inter-State transactions by customers connected to transmission/distribution network of the State licensees shall be governed by the pricing mechanism as specified below:

- (i) Any under-injection with respect to the schedule approved by the SLDC by an open access customer shall be settled at higher of the applicable deviation rates as notified in CERC Deviation Settlement Mechanism Regulations 2014 amended from time to time or energy charge at the rate of Temporary Tariff

applicable for HT (NDS) category as determined by the Commission from time to time;

(ii) Any over-injection upto 5% in a time block of 15 minutes and averaging upto 1% over a day with respect to the schedule approved by the SLDC by an open access customer shall be compensated at the deviation charge rate at frequency of 50 Hz. or applicable deviation charge rate (as notified in CERC Deviation Settlement Mechanism Regulations 2014 amended from time to time) whichever is less;

(iii) Any underdrawl with respect to the schedule approved by the SLDC by an open access consumer shall not be compensated and this underdrawl shall be considered to be attributable to the consumer;

(iv) Any over drawl with respect to the schedule approved by the SLDC by an open access customer who is not a consumer of Distribution Licensee of his area of supply shall be settled at higher of the applicable deviation rates (as notified in CERC Deviation Settlement Mechanism Regulations 2014 amended from time to time) or energy charge at rate of Temporary Tariff applicable for HT (NDS) category as determined by the Commission from time to time;

(v) Any over drawl with respect to the schedule approved by the SLDC, by an open access customer who is also a consumer of Distribution Licensee of his area of supply, shall be considered as the drawal from Discom

and the open access consumer shall be required to pay charges for the excess capacity utilized computed in the manner specified in regulation 26 for the entire month equal to the same percentage of the fixed and energy charges by which percentage the excess demand has actually been availed during the month on the rates specified in the tariff orders in force. However, the excess capacity utilized up to 5% of capacity allocation occurring to the extent of two time blocks of 15 minutes each during a month shall be exempted.

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R.26. Compliance and Grid Discipline

(1) The open access customer shall abide by the Indian Electricity Grid Code, the State Grid Code and instructions given by State Transmission Utility and State Load Dispatch Centre as applicable from time to time.

(2) The open access customer shall also comply with the requirements of the CEA (Technical Standards for Connectivity to the Grid) Regulations, 2007 as amended from time to time.

(3) The open access consumer shall restrict the sum of his total drawal from all sources including open access and Distribution Licensee up to the total sanctioned contract demand with the Distribution Licensee.

Provided that open access may be allowed over and above the contract demand to a consumer

who sources power both by captive generation and Discom to the extent of captive power supply subject to availability of transmission and/or distribution system as the case may be.

Provided further that long term open access may be allowed over and above the contract demand to the extent of sanctioned open access capacity.

(4) The consumer shall be levied fixed charge based on the maximum demand recorded in the ABT meter as per tariff applicable from time to time.

Provided that if the open access is allowed over and above the contract demand in terms of proviso to sub regulation (3) above, the fixed charges shall be levied based on the total demand recorded in the ABT meter less open access demand scheduled in terms of proviso of sub regulation (3) above.

(5) The long term/ medium term open access customer shall provide the injection schedule at the generator end and drawal schedule at the supply end to SLDC, RDPPC, supplier end Distribution Licensee and to the consumer end Distribution Licensee before 10.00 AM of the day preceding the day of scheduling. The Injection schedule shall have the open access consumer and supplier identification. Where open access is provided to more than one open access consumer, supplier shall provide a break up of injection schedule as applicable to each open access consumer considering that the

adjustment of energy in such case shall be as per Regulation 25.

(6) The short term open access customer shall provide the injection/ drawal schedule for intra-State transactions every day to the SLDC, RDPPC and the Distribution Licensee before 10:00 AM of the day preceding the day of drawal/injection as per the open access capacity sanctioned.

(7) The power purchase under short term inter-State open access including transactions through power exchange shall be subject to the following:

(i) The consumer shall schedule power from open access for complete 24 hours of the day.

(ii) The consumer shall intimate in writing the block wise maximum power to be scheduled from inter-State open access each day to the SLDC, RDPPC and Distribution Licensee before 10:00AM of the day preceding the day of drawal.

(iii) The schedule so given shall be uniform at least for a period of eight hours and the minimum schedule during the day shall at any time not be less than 75% of the maximum schedule of the day.

(iv) The schedule so given shall be used to calculate the block wise maximum admissible drawal from the Discom.

(v) If actual schedule approved in inter-State transactions is less, then the admissible drawal shall be reduced to that extent.

(8) If the actual drawal in a block is higher than the admissible drawal, then the percentage excess drawal shall be calculated on the admissible drawal and the highest percentage of such excess drawal of all blocks during a month shall be considered as excess capacity (demand) utilized during that month and shall be billed as per regulation 21(v).

(9) Annual maintenance outage, other maintenance outage and forced outage shall be subject to the provisions of the State Grid Code. Intimation of the forced outage shall be sent to SLDC and to the Distribution Licensees, within 30 minutes of the outage and shall incorporate the estimated outage/rectification time. Restoration of unit under outage shall be conveyed to SLDC at least 30 minutes prior to its synchronization with the State Grid.

(10) Wherever required, unity power factor shall be considered for the purpose of unit conversion from MVA/kVA to MW/kW or vice versa.”

43. Upon a judicious and careful consideration of the rival submissions made by the parties and perusal of the statutory provisions under the Act of 2003 and the Regulations of 2016, we are of the view that the contentions raised by the appellants, both inter-state

as well as intra-state captive generators, cannot be agreed with in light of the objectives of the Act of 2003 which the Regulations of 2016 seek to achieve.

I. Whether the RERC had the jurisdiction to regulate inter-state open access under the Act of 2003?

- 44.** The primary contention of the appellants regarding the jurisdiction of the RERC to regulate inter-state open access is without any merit. The Act of 2003 establishes a clear distinction between the regulatory functions of the CERC and State Commissions. While inter-state transmission falls within the domain of the CERC under Section 79(1)(c), the power of the State Commission to regulate intra-state transmission and distribution under Section 86(1)(c) is well established. Furthermore, the appellants' argument that the Regulations of 2016 have an extraterritorial effect is misplaced. The Regulations of 2016 do not seek to regulate inter-state transmission per se but rather ensures that transactions impacting the Rajasthan grid remain under the oversight of the State Commission.

- 45.** Section 79(1)(c) of the Act of 2003, defines the regulatory authority of the CERC over inter-state transmission of electricity. However, this provision does not strip State Commissions, including RERC, of their jurisdiction over intra-state aspects of open access. Section 42(2) of the Act of 2003 expressly empowers State Commissions to regulate open access within their respective states, ensuring fair and non-discriminatory access to transmission and distribution networks within the state. Further, Section 42(3) of the Act of 2003 provides that whenever a consumer, with premises within the area of supply of a distribution licensee, requires supply of electricity from a generating company other than such distribution licensee, such transmission and supply shall be in accordance with the regulations made by the State Commission.
- 46.** The respondents have, in their submissions, drawn a relevant and appropriate parallel with the regulation of National Highways in the country, which also run across state borders. It has been rightly analogised by the RERC that even though National Highways falls under Entry 23 of List I of the Seventh Schedule of the Constitution of India and is a central subject,

nevertheless when it passes through the respective states it is subject to tolls under the respective state laws as per Entry 59 of List II of the Seventh Schedule. Therefore, when 'Electricity' which is a subject matter of Entry 38, List III is wheeled from outside the state and distributed within the state, the regulations governing such distribution within the state cannot, by any stretch, be termed to be suffering from any excess of jurisdiction.

- 47.** The key determinant is not the source of power but its delivery, end-user, and consumption within Rajasthan's intra-state grid. The Act of 2003 provides a framework for demarcating responsibilities between CERC and State Commissions, ensuring that intra-state aspects of electricity regulation remain within the purview of State Commissions. The appellants' interpretation would render Section 42 redundant and contradict the legislative intent behind decentralizing regulatory authority to the State Commissions. Thus, the claim that only CERC has the authority to regulate inter-state open access cannot be accepted in light of the legislative intent behind the Act of 2003. Therefore, RERC retains

jurisdiction over intra-state transactions even if the power originates from another state.

- 48.** Further, Section 2(47) of the Act of 2003 defines open access as non-discriminatory access to transmission and distribution systems, encompassing both inter-state and intra-state transactions. The respondents argue that the statute does not differentiate between them for regulatory purposes, meaning that State Commissions naturally retain authority over open access within their jurisdictions. This interpretation aligns with Section 42, which explicitly grants State Commissions the power to regulate open access for consumers in their states. Additionally, Section 2(15) of the Act of 2003 defines a “consumer” as any person who receives electricity from a licensee or whose premises are connected to a distribution system. Since distribution licensees operate within state boundaries, the regulation of open access for consumers falls squarely within the State Commission’s jurisdiction. Section 2(17) further strengthens this position by defining a “distribution licensee” as an entity authorized to distribute electricity within a specific area, reinforcing the role of State Commissions in regulating transactions that

ultimately facilitate electricity supply to consumers within the state.

- 49.** Section 181 of the Act of 2003 empowers State Commissions to frame regulations necessary for implementing the provisions of the Act of 2003. This includes establishing conditions for open access, determining charges, and ensuring fair access to intra-state transmission and distribution networks. By granting State Commissions the authority to introduce and regulate open access, the legislature has clearly vested regulatory oversight with RERC in Rajasthan. The omission of any reference to CERC's jurisdiction over open access consumers in Section 42 of the Act further reinforces the respondents' argument. Section 79, which delineates CERC's functions, does not extend its authority to the regulation of end consumers or the supply of power via distribution licensees. This omission is indicative of the legislature's intent to keep such matters under State Commissions' oversight, ensuring that electricity consumers and distribution networks within a state remain subject to state-level regulation.

50. Thus, the respondents' argument is well-founded in statutory provisions, legislative intent, and the structural framework of the Act of 2003. RERC's authority to regulate intra-state aspects of open access transactions, even when electricity is sourced from another state, aligns with the Act's objectives and ensures effective regulatory oversight.

II. Whether the imposition of penalties for variations in drawal from contracted demand amounts to an unreasonable restriction on the right to open access under Section 42 of the Act of 2003?

51. The imposition of penalties for variations in drawal from contracted demand is a regulatory measure designed to ensure grid stability and prevent commercial gaming in the electricity market. The respondents contend that such penalties are neither arbitrary nor unreasonable but are a necessary mechanism to maintain the reliability of the grid. The Act of 2003 guarantees non-discriminatory open access to consumers but does not exempt them from complying with regulatory conditions essential for the effective functioning of the electricity network. Regulation of drawal variations is crucial for

balancing power supply and demand, particularly in the context of the grid's technical constraints and the need to prevent unscheduled fluctuations that may disrupt the system.

52. Further, the penalty mechanism is not an unreasonable restriction but rather a measure to ensure that consumers adhere to their contractual obligations, preventing undue burden on the system and other stakeholders. Uncontrolled variations can lead to deviations that may cause frequency imbalances, affecting overall grid security. Section 32 and Section 33 of the Act of 2003 empower SLDCs to ensure the smooth operation of the power system, which includes imposing necessary safeguards against unregulated deviations. The penalties, therefore, serve a larger public interest by deterring erratic consumption patterns and aligning open access with grid discipline.

53. Additionally, the regulations apply uniformly to all open access consumers, ensuring that there is no arbitrary targeting or discrimination. The principle of open access is not absolute and must be exercised in a manner that does not compromise the operational integrity of the power sector. Therefore, the

imposition of penalties for variations in drawal is a justifiable regulatory measure that aligns with the objectives of the Act of 2003 and does not amount to an unreasonable restriction on open access.

- 54.** The electricity grid operates on principles of frequency stability and demand-supply balance. Any deviation from scheduled drawal or injection can lead to grid instability, potentially affecting all consumers. The impugned regulations, therefore, serve a critical function in preventing such disruptions by enforcing discipline among generators and consumers alike. The penalties imposed are a deterrent mechanism to prevent strategic gaming of the system and to ensure that all stakeholders adhere to scheduling norms. The State Commission's role is to balance the rights of individual market participants with the broader objective of ensuring an efficient, reliable, and stable power supply to all consumers in the State.

III. Whether Regulation 26(7) is ultra vires for requiring an advance notice of 24 hours, thereby preventing urgent procurement and creating an artificial barrier to open access as protected by the Act of 2003?

55. The Act of 2003 was enacted with the objective of promoting competition, efficiency, and consumer interest while ensuring the stability of the electricity grid. The RERC's regulations align with these objectives by:

- i. Ensuring predictability and reliability in power supply through scheduling norms,
- ii. Preventing market distortions by imposing penalties for deviations that can destabilize grid operations, and
- iii. Curtailing gaming practices where open access consumers, particularly captive power generators, might manipulate the grid to gain an undue advantage.

56. Regulation 26(7), which mandates a 24-hour advance notice for availing short-term inter-state open access, serves a critical function in maintaining grid stability and ensuring proper scheduling of power. The respondents argue that this requirement is not *ultra vires* but is in consonance with the broader regulatory framework governing open access transactions. The power system operates on a structured scheduling mechanism, and unregulated short-term access without prior notice could lead to

disruptions, frequency imbalances, and operational inefficiencies. The Act of 2003 does not provide an absolute right to open access but subjects it to conditions necessary for the reliability and efficiency of power distribution.

- 57.** The requirement of prior notice is a reasonable procedural safeguard that aligns with the objectives of the Act of 2003, particularly those laid out in Section 42, which envisages a structured approach to open access. The 24-hour notice period ensures that both transmission and distribution licensees, as well as load despatch centres, have adequate time to adjust their schedules and prevent system disturbances. Moreover, it prevents misuse by entities that may attempt to take advantage of real-time price fluctuations, thereby engaging in speculative trading rather than genuine demand-based procurement. Further, the option of purchasing power from the real-time market and day-ahead market in need of urgent procurement is always available, and is not prevented by the impugned regulations.
- 58.** Furthermore, the regulation does not create an insurmountable barrier to open access but rather

seeks to bring order and predictability to its implementation. The requirement is uniformly applicable to all consumers, ensuring that no undue advantage is given to any particular category. Considering the technical and regulatory imperatives involved, the 24-hour advance notice condition under Regulation 26(7) cannot be considered *ultra vires*, as it falls within the regulatory domain of the State Commission to establish fair, transparent, and non-disruptive mechanisms for open access.

IV. Whether the Regulation 21 is arbitrary and discriminatory, thereby discouraging captive power generation by creating unreasonable distinction between captive generators and state distribution companies?

- 59.** The appellants' argument that the regulations unfairly burden CPPs is misplaced. The impugned regulations apply uniformly to all power generators availing open access, whether captive or non-captive. Section 9 of the Act of 2003 recognizes the rights of captive generators but does not exempt them from compliance with open access regulations framed under Section 42 of the Act of 2003. The regulatory

measures—such as scheduling, penalties for deviations, and drawal limits—are imposed in furtherance of the larger goal of grid discipline and market stability. There is no evidence to suggest that captive generators are being singled out or subjected to harsher conditions compared to other generators.

60. Regulation 21, which governs aspects of scheduling, penalties, and compliance for captive power generators, has been challenged on the ground that it creates an unreasonable distinction between captive generators and state DISCOMs, allegedly discouraging captive generation. However, the respondents argue that the regulation is neither arbitrary nor discriminatory but rather a necessary framework to ensure that all power generators operate under fair and transparent rules. The Act of 2003, through Sections 9 and 42, recognizes the rights of captive power generators while also subjecting them to regulatory oversight to prevent system inefficiencies and inequitable advantages.

61. The distinction between captive power generators and state DISCOMs is not arbitrary but arises from the structural differences in their roles and obligations. While captive generators primarily

generate electricity for self-consumption, distribution companies serve a wider consumer base, requiring them to adhere to broader regulatory commitments, including universal supply obligations. As such, differential treatment based on the nature of their functions is legally justified and does not amount to unfair discrimination. Moreover, Regulation 21 does not impose undue restrictions on captive generators but ensures that their operations align with grid discipline, preventing any adverse impact on the larger power ecosystem.

- 62.** Additionally, the principle of non-discrimination under the Act of 2003 does not mandate identical treatment for all entities but rather requires a rational basis for any differentiation. In this case, the regulatory conditions imposed on captive generators are aimed at ensuring a level playing field and preventing misuse of open access provisions. The regulatory framework ensures that captive generators contribute fairly to system stability without imposing additional burdens on distribution licensees and other grid participants. Thus, Regulation 21 is neither arbitrary nor discriminatory but rather a necessary and proportionate measure to

balance the interests of various stakeholders in the electricity sector.

V. Whether the appellants' right of open access is foreclosed by the Regulations of 2016?

- 63.** The appellants argue that the Regulations of 2016 impose unreasonable restrictions on captive power generators, effectively foreclosing their right to open access as guaranteed under Section 9 of the Act of 2003. However, the respondents contend that the Regulations of 2016 do not foreclose open access but rather prescribe conditions necessary for its fair and efficient implementation. Section 42 of the Act provides for non-discriminatory open access but also subjects it to regulations framed by the State Commission to ensure grid security, operational discipline, and non-disruptive power transactions. The restrictions imposed by the Regulations of 2016 are thus regulatory safeguards rather than prohibitive barriers.
- 64.** A careful analysis of the Regulations of 2016 indicates that they primarily aim at maintaining the reliability of the electricity grid, ensuring fair pricing, and preventing speculative misuse of open access

provisions. The requirement of advance notice for short-term open access, penalties for deviations from contracted demand, and specific conditions for captive power generators are all designed to create a structured and predictable electricity market. These provisions do not prevent eligible consumers from availing open access but instead ensure that they do so within a framework that safeguards the interests of all stakeholders, including distribution licensees and other consumers. Moreover, Section 181 of the Act of 2003 empowers State Commissions to frame regulations necessary for implementing statutory provisions, thereby validating the regulatory measures introduced by RERC.

- 65.** Furthermore, the Act of 2003, envisages a balance between the rights of open access consumers and the operational concerns of the power sector. The Regulations of 2016, while imposing certain conditions, do not outright deny open access but ensure that its implementation is equitable and does not jeopardize grid discipline. Open access remains available to consumers who comply with regulatory prerequisites, including scheduling obligations and financial commitments. Thus, the appellants'

assertion that their right to open access is foreclosed is misplaced. The Regulations of 2016 are consistent with the legislative intent of the Act of 2003, ensuring that open access is exercised in a manner that does not compromise system stability, fairness, or economic viability. Therefore, the regulatory framework does not foreclose open access but rather operationalizes it within reasonable constraints essential for sustaining the electricity sector.

CONCLUSION

- 66.** The statutory scheme under the Act of 2003 mandates that regulations framed by State Commissions must serve the larger public interest. The respondents have successfully established that the impugned regulations serve this purpose by ensuring equitable treatment of all market participants while safeguarding the integrity of the power grid.
- 67.** The RERC derives its authority from the Act of 2003, which vests in it the power to frame regulations governing open access, scheduling, and penalties. Section 86(1)(c) of the Act of 2003 specifically empowers State Commissions to facilitate intra-state

transmission and wheeling of electricity. Furthermore, Section 181 empowers the Commission to make regulations consistent with the Act of 2003 and its objectives. The impugned regulations have been framed in exercise of these statutory powers. The requirement for scheduling, imposition of penalties, and limits on drawal are not arbitrary but are measures falling within the regulatory ambit of the Commission to ensure grid stability and fair competition. The Act of 2003 envisions a structured and fair mechanism for open access while ensuring that market participants do not engage in practices detrimental to the larger consumer base. Moreover, under Section 42 of the Act of 2003, the State Commission has the mandate to regulate open access in distribution and specify the charges and conditions applicable. The respondents have demonstrated that these conditions are necessary for maintaining discipline in power scheduling and ensuring that open access consumers do not gain an unfair advantage over other consumers by evading scheduling norms or penalties.

68. The Jodhpur Bench in common order dated 29.08.2016, which has been challenged before us in

Civil Appeals No. 7965 of 2019 and 7966 of 2019, has rightly upheld the validity of the Regulations of 2016 holding that any inconvenience caused or even some hardship faced by the captive power generators shall not make the regulations illegal. The High Court also rightly pointed out that the appellants have failed to establish that the impugned regulations are in contravention of their rights protected under Part-III or any other provision of the Constitution of India or that the regulations have been enacted without having the competence to do so or they are manifestly arbitrary or unreasonable. It has been rightly held by the High Court that the Regulations of 2016 are in consonance with the objects of the Act of 2003 and have been framed as per the competence available under Section 181 read with Section 42 of the Act of 2003.

- 69.** The Jaipur Bench in its order dated 06.09.2016, which has been challenged before us in Civil Appeal No. 7964 of 2019, has rightly held that the issues before it, were squarely covered by the order of Jodhpur Bench.

70. In light of the above discussion, the appeals are dismissed, and the orders of the High Court are upheld.

.....**J.**
(VIKRAM NATH)

.....**J.**
(PRASANNA B.VARALE)

NEW DELHI
APRIL 01, 2025