



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 2 of 2021

Dated 14.03.2022

Present

Sri T. Sriranga Rao, Chairman
Sri M. D. Manohar Raju, Member (Technical)
Sri Bandaru Krishnaiah, Member (Finance)

Between:

Indian Railways through
South Central Railway,
Rail Nilayam, Secunderabad 500 025.

... Petitioner

AND

1. Telangana State Transmission Corporation Company Limited,
Vidyut Soudha, Khairatabad, Hyderabad.
2. Southern Power Distribution Company of Telangana Limited,
Corporate Office, # 6-1-50, Mint Compound,
Hyderabad - 500 063.
3. Northern Power Distribution Company of Telangana Limited,
H.No.2-5-31/2, Corporate Office, Vidyut Bhavan,
Nakkalgutta, Hanamkonda, Warangal 506 001.

... Respondents

The petition came up for hearing on 29.07.2021 and 25.08.2021. Sri Pulkit Agarwal, Advocate for petitioner and Sri Mohammad Bande Ali, Law Attaché for

respondents have appeared through video conference on 29.07.2021 and 25.08.2021. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

The petitioner has filed a petition under section 86 (1) (k) of the Electricity Act, 2003 (Act, 2003), seeking declaration as a deemed distribution licensee in the State of Telangana and for consequential reliefs. The averments of the petition are as below:

a. It is stated that Indian Railways is part of the Government of India and in the present petition is represented by the Chief Electrical Distribution Engineer, South Central Railway, a zone of the petitioner. The petitioner operate the rail system in India as per the provisions of the Railways Act, 1989. Section 2 (31) of the Railways Act, 1989 defines the term 'Railways' as under:

“(31) railway” means a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes—

- (a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;
- (b) all lines of rails, sidings, or yards, or branches used for the purposes of, or in connection with, a railway;
- (c) all electric traction equipments, power supply and distribution installations used for the purposes of, or in connection with, a railway;
- (d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water II works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway;

- (e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and
- (f) all ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland waters for the purposes of the traffic of a railway owned, hired or worked by a railway administration, but does not include-
 - (i) a tramway wholly within a municipal area; and
 - (ii) lines of rails built in any exhibition ground, fair, park, or any other place solely for the purpose of recreation;”

Section 2 (32) of the Railways Act, 1989 defines the term ‘railway administration’ as under:

- “(32) "railway administration", in relation to—
- (a) a Government railway, means the General Manager of a Zonal Railway; and
 - (b) a non-Government railway, means the person who is the owner or lessee of the railway or the person working the railway under an agreement;”

Section 11 of the Railways Act, 1989 deals with the powers of railway administration to execute all necessary works of railways. Section 11 of the Act reads as under:

“11. Power of railway administrations to execute all necessary works.-

- (1) Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or companies, and subject also, in the case of a non-government railway, to the provisions of any contract between the non-government railway and the Central Government, a railway administration

may, for the purposes of constructing or maintaining a railway -

(a) make or construct in or upon, across, under or, over any lands, or any streets, hills, valleys, road's, railway, tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water pipes, gas oil pipes, sewers, electric supply lines, or telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of railways, passages, conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;

(b) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;

(c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;

(d) erect and construct such houses, warehouses, offices and other buildings, such yards, stations, wharves, engines, machinery apparatus and other works and

conveniences as the railway administration thinks proper;

- (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or of them and substitute others in their stead;
- (f) erect, operate, maintain or repair any telegraph and telephone -Lines in connection with the working of the railway;
- (g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and
- (h) do all other acts necessary for making, maintaining, altering or repairing and using the railway.”

b. It is stated that thus, the powers of the railways administration include the power to construct and establish of electric supply lines or telegraph lines as specifically provided for in sub-clause (a). Sub clause (g) of section 11 provides for the powers of the railway administration to erect, operate, maintain, repair etc any electric traction equipment, power supply and distribution installation in connection with the working of the railways. Besides the above, sub-clause (h) of section 11 provides for the power to the petitioner to do all other acts necessary for making, maintaining, altering and repairing and using railways. Section 12 of the Railways Act empowers the petitioner to alter the electric supply lines. Section 12 reads as under:

“12. Power to alter the position of pipe, electric supply line, drain or sewer, etc. –

- (1) A railway administration may, for the purpose of exercising the powers conferred on it by this Act, alter the position of any pipe for the supply of gas, water, oil or compressed air, or the position of any electric supply line, drain or sewer:

Provided that before altering the position of any such pipe, electric supply line, drain or sewer, the railway administration shall give a notice indicating the time at which the work of such alteration shall commence, to the local authority or other person having control over the pipe, electric supply line, drain or sewer.

(2) The railway administration shall execute the work referred to in sub-section(1) to the reasonable satisfaction of the local authority or the person receiving the notice under the proviso to sub-section(1).”

- c. It is stated that the petitioner being authorised under the Railways Act, 1989 are entitled to procure electricity from any source of its choice including a generating company, a captive generating plant, a trader or through power exchange to meet the electricity requirements, as it may consider appropriate.
- d. It is stated that further, the Railways Act, 1989 is a special enactment relating to railways and the functioning of railways is governed by the said Act. In *General Manager, Northern Railways represented by Union of India Vs. Chairman, Uttar Pradesh State Electricity Board and Others*, 2012 (3) SCC 329, the Hon’ble Supreme Court had considered the status of the Railways under Railways Act. The Hon’ble Court held as under:

“15. ... it is true that in terms of Section 27D of the Electricity Supply Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other than those authorized or otherwise exempted by an Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution of electricity. However, in the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989, and not by the enactment governing electricity.

16. That apart, Section 11 (a) and (g) of the Railways Act, 1989 clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorises the Railway Administration to execute all works for the purpose of constructing or maintain railways. Sub-Section (a) of the Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-Section (g) thereof, the Railways are authorized to erect traction equipment, power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by UPSEB as well.”

e. It is stated that the empowerment of the petitioner to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of railways under section 11 of the Railways Act, 1989 is not in any manner affected by provisions of the Act, 2003. The Act, 2003 though a latter enactment, gives supremacy to the provisions of the Railway Act, 1989 under section 173 as under:

“173. Inconsistency in laws - Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.”

f. It is stated that thus the status of the petitioner as being authorised to distribute electricity under the Railways Act, 1989 is recognized notwithstanding anything contrary in the Act, 2003. So long there is a nexus between the erection, distribution and use of electricity by Indian railways in connection with working of the railways as envisaged in

section 11 of the Railways Act, 1989, the action of railways will be within the scope of the authority vested under the Railways Act, 1989.

g. Independent of the above, the petitioner is a 'deemed licensee' in terms of the provision of the Act, 2003. Section 14 third proviso of the Act, 2003 provides as under:

“Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:”

Accordingly, the status of the petitioner as a 'deemed licensee' is statutorily provided for.

h. The status under section 14 third proviso of the Act, 2003 has been recognized by the letter dated 06.05.2014 by Ministry of Power.

i. It is stated that on a petition filed by the Indian Railways being No. 197 / MP / 2015, by order dated 05.11.2015, the Central Electricity Regulatory Commission (CERC), inter alia, decided on certain specific issues related to Indian Railways and Open Access sought for by the Indian Railways to the transmission system.

(i) The Central Commission had framed the following issues for consideration:

(a) Whether the petition is maintainable before the Commission?

(b) Whether the petitioner's claim as an authorized entity under the provisions of the Railways Act to undertake distribution of electricity in connection with the working of the railways can be sustained in law. If so, whether the petitioner is entitled for grant of connectivity and open access as a distribution licensee in connection with the working of the railways?

(c) Whether the petitioner can be treated as a 'deemed licensee' under the Electricity Act?

- (d) Whether the petitioner should be treated as a separate regional entity for the purpose of scheduling and energy accounting in terms of deviation settlement?
- (ii) On the first issue the Central Commission held the petition filed by the petitioner to be maintainable, rejecting the contention to the contrary raised by some of the State Utilities in the said petition.
- (iii) On the second issue, the Central Commission had held as under:
- “42. In view of the above discussion, we hold that since the Indian Railways is an authorized entity to distribute and supply electricity in connection with the working of the Railways under the Railways Act, the petitioner shall be entitled for grant of open access in connection with the working of the railways as per the provisions applicable to a distribution licensee.”
- (iv) On the third issue, the Central Commission was pleased to hold that the Indian Railways is a ‘deemed licensee’ under the third proviso to section 14 of the Act, 2003 and there is no requirement for a declaration to that effect that it is the licensee.
- (v) On the fourth issue, the Central Commission was pleased to hold that the group of traction substations situated in a State and connected directly with ISTS shall be treated as one “fragmented control area” and the responsibility for the purpose of scheduling, metering, balancing, applicability of ISTS charges and losses etc, shall vest in the concerned RLDC. In so far as the TSSs of Indian Railways connected to State network are concerned, the responsibility for these functions shall vest in the concerned SLDC.
- (vi) Further, the Central Commission had directed all concerned RLDCs, State Transmission Utilities and SLDCs to facilitate long term access and medium term access in terms of Connectivity

Regulations from the generating stations or other sources to the facilities and network of Indian Railways.

- j. It is stated that the West Bengal State Electricity Distribution Company Limited filed an Appeal bearing Appeal No. 276 of 2015 before the Hon'ble Appellate Tribunal against the above Order dated 05.11.2015 passed by the Central Commission along with an application for interim orders. The Hon'ble Appellate Tribunal has rejected the application for interim stay vide I. A. No. 445 of 2015 in Appeal No. 276 of 2015 dated 16.12.2015 and has held as under:

“10. We find substance in the contention of Respondent No. 2 that the power to erect, maintain and operate traction equipment, lines, power supply and distribution installation necessarily includes the distribution and supply of electricity because otherwise the power to erect, operate and maintain these equipment and installations would serve no purpose. This provision necessarily implies use of traction equipment, lines, distribution installation, etc. to distribute and supply electricity for the working of the Railways. Pertinently, power of the Railway Administration under Section 11 of the Railways Act is not curtailed by any provisions of the Electricity Act. Section 173 of the Electricity Act saves the Railways Act in case of inconsistency. Thus, prima facie, it appears to us that Respondent No. 2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act particularly Section 11 thereof.

11. In this connection, Respondent No.2 has rightly relied on the judgment of the Supreme Court in UPSEB.
12. Bearing in mind the Supreme Court's observation that Section 11 of the Railways Act cannot be given a restricted meaning, we need to approach this case. Prima facie, we feel that Respondent No. 2 is empowered to carry out construction work necessary for power supply and

distribution installations in connection with the working of the Railways and, therefore, it can distribute and supply electricity. It is not possible to agree with the submission of the Appellant that this judgment is not applicable to the present case because there the Supreme Court was not called upon to decide whether the Railway is a deemed distribution licensee or a distribution licensee.

... ..

14. It is the contention of the Appellant that a distribution licensee has to distribute electricity and if it is procuring power for self consumption it does not get the deemed distribution licensee status. It is submitted that

respondent No. 2 is procuring electricity for self consumption. Respondent No. 2 is not distributing electricity and, therefore, it does not get the status of 'deemed licensee'. In this connection reliance is placed on Sesa Sterlite Limited.

15. The Supreme Court considered the definition of the term "distribution licensee" contained in section 2 (17) of Electricity Act and section 2(70) of the Electricity Act which defines "supply" to mean sale of electricity to a licensee or a consumer. While confirming this Tribunal's order, the Supreme Court held that by virtue of the status of a developer in the Special Economic Zone, the Appellant therein was undoubtedly treated as a deemed distribution licensee. However, because of deemed distribution licensee status, the Appellant merely gets exemption from specially applying for license under Section 14 of the Electricity Act. In order to avail further benefits under the Electricity Act it has to show that it is in fact having distribution system and it has a number of consumers to whom it is supplying electricity.

16. In our prima facie opinion, the Appellant cannot draw any support from Sesa Sterlite Limited. In Sesa Sterlite

Limited, the Supreme Court was concerned with Special Economic Zones Act and the Electricity Act. As per Section 49 of the Special Economic Zones Act, the Central Government had issued a notification making all provisions of the Electricity Act applicable to the generation, transmission and distribution of power whether stand-alone or captive power. The Appellant therein had placed reliance on third proviso to Section 14 of the Electricity Act to claim deemed distribution licensee status. The Supreme Court considered Section 2(17) of the Electricity Act, which emphasis upon the distribution licensee to operate and maintain distribution system and supply power to the consumers. The Supreme Court considered definition of the term 'supply' appearing in Section 2 (70) of the Electricity Act and observed that 'supply' means sale of electricity to consumers. The Supreme Court observed that being authorized to operate and maintain a distribution system as a 'deemed licensee' would not confer the status of distribution licensee to any person. Power must be supplied to consumers and since the Appellant therein was consuming the power purchased by it for its own use and was not distributing and supplying it to consumers, it was not a distribution licensee. It must, however, be noted here that the Supreme Court was considering the provisions of the Special Economic Zones Act. Whereas Section 173 of the Electricity Act saves the Railways Act in case of inconsistency, it does not save the Special Economic Zones Act. Section 174 states that the Electricity Act shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act. Section 175 of the Electricity Act provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law time

being in force. The observations of the Supreme Court must be considered against the backdrop of these provisions.

17. In the present case, we are concerned with the Railways Act and, the Electricity Act saves it in case of inconsistency. Therefore, Section 11 of the Railways Act which empowers Railway Administration to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Respondent No. 2 is not affected by the provisions of the Electricity Act. Respondent No. 2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act. It will also not lose its status as a deemed distribution licensee acquired under third proviso to Section 14 of the Electricity Act merely because it consumes the power procured by it. Reliance placed on Sesa Sterlite Ltd. prima facie appears to us to be misplaced.”

k. It is stated that as per the deemed distribution licensee status under the Railways Act, 1989, the petitioner is undertaking distribution of electricity within its area of operation and restricted to the purposes and in connection with the working of railways.

l. It is stated that South Central Railway is availing power supply for railway traction from TSTransco at 132 kV for 20 traction substations (TSSs) spread over the State of Telangana. The Ministry of Railways, in the larger public interest, to reduce the cost of operation for train services, have decided to procure economical power through competitive bidding and bilateral arrangements as deemed distribution licensee for self consumption for electric traction.

m. It is stated that as per policy decision of Ministry of Railways, South Central Railway vide its letters requested TSTransco and the Government of Telangana (Energy Department) (GoTS) for issuance of no-objection certificate for availing power through open access and also

for up gradation of existing meters by ABT meters at all the TSSs. It was also stated that the up gradation shall be done at the cost of Indian Railways.

n. It is stated that on 27.06.2016, M/s GMR ETL on behalf of South Central Railway submitted the application for Interstate short term open access. However, SLDC of Telangana returned the application stating that ABT metering is required as basic need for open access and without the approval of this Commission, South Central Railway may not be treated as distribution licensee and issue open access approval.

o. It is stated that subsequently, Ministry of Power (MoP) has allotted 50 MW of power from M/s Ratnagiri Gas and Power Private Limited (RGPPL), Maharashtra to South Central Railway as a 'deemed distribution licensee' for use in the State of Telangana for five years upto 31.03.2022.

p. It is stated that on 28.04.2017, South Central Railway representing petitioner has entered into PPA with RGPPL on 28.04.2017 for supply of 50 MW of power in the State of Telangana for five years from 01.04.2017 to 31.03.2022, as per the allocation of MOP.

q. It is stated that consequent to signing of PPA with RGPPL, the petitioner vide its letters dated 21.03.2017 and 27.03.2017 requested TSTransco and GoTS to issue no-objection certificate for availing power from RGPPL through open access.

r. It is stated that the petitioner once again vide its letter dated 08.05.2017 and 22.05.2017 requested TSTransco to provide estimates for upgradation of existing meters to ABT meters for all the TSSs in the State of Telangana along with the estimate towards data acquisition system (DAS). Further, it was also requested that the ABT meters and the DAS system may be provided at the earliest to enable the petitioner to procure power through open access.

s. It is stated that a meeting was also held between the parties on 28.04.2017 to resolve the issues pertaining to open access to be availed by the petitioner.

t. It is stated that subsequent to the estimates provided by the TSTransco as regards installation of ABT meters and DAS, the petitioner has

deposited an amount of Rs. 14.30 crore towards installation of ABT meters at 15 out of 20 TSSs including Rs. 3.80 crore towards DAS over till February, 2018. As regards the balance 5 TSSs, the ABT meters have already been provided. However, till date TSTransco has failed to complete the process of installation of ABT meters and DAS.

- u. It is stated that the petitioner vide its letter and application both dated 21.06.2019 once again requested TSTransco to issue NOC for availing the 50 MW power allocated from RGPPL, under MTOA through ISTS of CTU. However, TSTransco has again declined to accord NOC for availing open access as deemed distribution licensee vide letter dated 14.08.2019. It was stated that the petitioner have to obtain 'deemed licensee' status from this Commission.
- v. It is stated that the petitioner vide its letter dated 25.09.2017 have requested this Commission to clarify on the status of the petitioner as a 'deemed licensee' and also to direct the respondents to issue NOC to the petitioner for availing power through open access as a 'deemed licensee'.
- w. It is stated that in addition to the above, it is stated that this Commission has been determining the cross subsidy surcharge and additional surcharge for the petitioner in case, it is permitted to procure open access. In this regard, it is stated that the petitioner being a 'deemed licensee' is not liable to pay cross subsidy surcharge and additional surcharge.
- x. It is stated that in view of the abovementioned circumstances, the petitioner is constrained to file the present petition and seek directions from this Commission to the effect that the respondents are directed to facilitate and issue NOC to the petitioner for availing power through open access in its status as a 'deemed licensee' at the traction substations situated in the State of Telangana. Further, this Commission may clarify as regards the applicability and liability of the petitioner to pay cross subsidy surcharge and additional surcharge on the power being sourced by it through open access in its status as a 'deemed licensee'.
- y. It is stated that the petitioner is a deemed distribution licensee in the State of Telangana, as per the following–

- i. provisions of the Railways Act, 1989 empowering the petitioner to undertake distribution of electricity for the purpose of railway administration;
- ii. Section 14 third proviso of the Act, 2003 recognizing the petitioner which is part of the Government of India to be a 'deemed licensee' for undertaking distribution of electricity;
- iii. Section 173 of the Act, 2003 which provides for supervening application of the provisions of the Railways Act, 1989 vis-à-vis the Act, 2003;
- iv. The decision of the Central Commission in the judgment and order dated 05.11.2015 passed by the Central Commission in Petition No. 197 / MP / 2015;
- v. The decision of the Hon'ble Appellate Tribunal for Electricity (ATE) in I. A. No. 445 of 2015 filed in Appeal No. 276 of 2015 dated 16.12.2015 holding that the petitioner is a distribution licensee; and
- vi. The decision of the Hon'ble Supreme Court in General Manager, Northern Railways Vs. Chairman, Uttar Pradesh State Electricity Board and Others 2012 (3) SCC 329 recognizing that the petitioner is governed by Railways Act, 1989.
- vii. The petitioner has the authority to distribute electricity under the Railways Act, 1989. The relevant provisions of the Railways Act, 1989 are Sections 2 (31), 2 (32), 11 and 12 (quoted above). The powers of the railways administration includes construction and establishment of electric supply lines as well as erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with working of the railways. Further sub-clause (h) of section 11 provides for power to all other acts necessary for making, maintaining, altering, repairing and using railways. The power to erect, maintain and operate traction equipment, lines, power supply and distribution installation necessarily means the distribution and supply of electricity. The status of the petitioner as being authorised to distribute electricity under the Railways Act, 1989 is recognized

notwithstanding anything contrary in the Act, 2003. So long there is a nexus between the erection, distribution and use of electricity by petitioner in connection with working of the petitioner as envisaged in section 11 of the Railways Act, 1989, the action of petitioner will be within the scope of the authority vested under the Railways Act, 1989.

- viii. The petitioner has been authorized to distribute electricity under the Railways Act, 1989 and also recognized as a 'deemed licensee' under the third proviso to section 14 of the Act, 2003. The Central Commission vide its order dated 05.11.2015 in Petition No. 197 / MP / 2015 has held that the petitioner to be an authorized entity to distribute and supply electricity in connection with the working of the railways under the Railways Act, 1989 and that it shall be entitled for grant of open access as a distribution licensee in connection with the working of the railways as per the provisions applicable to a distribution licensee. The Central Commission has also directed all concerned RLDCs, State Transmission Utilities and SLDCs to facilitate long term access and medium term access in terms of the connectivity regulations from the generating stations or other sources to the facilities and network of petitioner
- ix. Once the Central Commission vide order dated 05.11.2015 has decided an issue, the principle of comity would require that all the State Commissions also recognize the same. Otherwise, this would result in contradiction wherein various Regulatory Commissions would decide differently. In this context, the petitioner has already been granted open access as a distribution licensee in many States on the basis of the order dated 05.11.2015 of the Central Commission. If the order of the Central Commission is not accepted, it would lead to an anomalous situations wherein the status of the petitioner as 'deemed licensee' is recognized in some States and not in some, particularly when the said status is as per the interpretation of

the Railways Act, 1989 and the Act, 2003 which is equally applicable to all the States.

x. In an appeal bearing Appeal No. 276 of 2015 filed before the Hon'ble ATE, the appellant had sought for a stay of the above order. However, the Hon'ble ATE rejected the application for interim stay vide I. A. No. 445 of 2015 in Appeal No. 276 of 2015 dated 16.12.2015 and the Hon'ble ATE has prima facie held that the petitioner has full authority to distribute electricity. The Hon'ble ATE has further held that the considerations of denial of open access to the petitioners outweigh the possible loss of revenue to the respondents.

xi. The MoP vide letter dated 06.05.2014 has acknowledged and recognized that petitioner being central government is a 'deemed licensee' under third proviso of section 14. Further, the said letter has been issued by the MoP, being the nodal ministry, in consultation with Ministry of Law and Justice which has been vested with the power to render advice to Ministries on legal matters including interpretation of the Constitution and the laws.

xii. The Hon'ble Supreme Court in Union of India Vs. Chairman, UP State Electricity Board, 2012 (3) SCC 329 has held that
"in the case of railways, transmission of electricity by railways is governed by the provisions of a special enactment, that is the Railways Act, 1989 and not by the enactments governing electricity."

Though the above judgment was in reference to the transmission activity being done by the petitioner, it is stated that the same is applicable in respect of the distribution activity of the petitioner. Further, even the Hon'ble Supreme Court in paragraph 16 of the judgement (quoted above) has held that provisions of section 11 (a) and (g) of Railways Act, 1989 cannot be read in a restricted manner. This means that based on the above provisions, where there is distribution of electricity, even that has to be governed by Railways Act, 1989.

- xiii. The respondents have neither provided/completed installation ABT meters at all TSSs and have also failed to provide for data acquisition system (DAS) nor issued NOC to petitioner to avail power supply through open access. This is despite the petitioner having made payment of the entire amount as per the estimate given by TSTransco. It is stated that after payment of the entire amount as estimated by TSTransco, there was no reason and/or justification for TSTransco to not complete the upgradation of ABT Meters and installation of DAS. Further, it is stated that TSTransco is continuously revising the estimates for additional amounts towards ABT meters which railways is complying as and when demanded by TSTransco. However, the progress of provision of ABT meters and DAS is very slow even after lapse of eighteen months. It is submitted that TSTransco is deliberately delaying the installation/ upgradation of ABT Meters and DAS to somehow delay the petitioner in exercising its right to procure power through Open Access.
- xiv. The petitioner has the right to seek open access under the Act, 2003 in its status as a 'deemed licensee' independent of any other provision. It is stated that the respondents cannot be allowed to delay the open access sought for by the petitioner by delaying installation of ABT meters and DAS system.
- xv. The petitioner is unable to avail supply in absence of open access and is prejudiced by the fact that it is unable to avail supply of power under the power purchase agreements it has entered into due to the non-availability of open access.
- xvi. The petitioner has been granted open access/no objection as a distribution licensee already in various States such as Maharashtra, Gujarat, Punjab, Delhi, Uttar Pradesh, Rajasthan, Madhya Pradesh, Jharkhand, Karnataka, Bihar and Haryana.
- xvii. The respondents by delaying and in fact denying open access is forcing the petitioner to procure power from the State Distribution Utilities, contrary to the petitioners' interests and further contrary to the right of open access under the Act, 2003. It is

therefore requested that the open access be granted to allow the flow of power from RGPPL to the petitioner as a 'deemed licensee'.

xviii. The denial of open access and issuance of NOC to petitioner as a deemed distribution licensee is contrary to the public interest as the petitioner is forced to procure more expensive power as compared to the power it proposes to procure through its PPA executed with RGPPL. It is stated low power procurement cost would ultimately reduce the service cost to the general public at large.

xix. The petitioner is one of the largest rail networks in the world and are an essential part of the transport infrastructure in India and play an important role in the growth and development of the national economy as well as of the backward and underdeveloped areas of the country. The petitioner not only provide an affordable transport facilities to the common man but also facilitate transport of coal, minerals, steel, cement, mineral oil, food grains and fertilizer at a competitive rates. The petitioner is of strategic importance in the country and therefore it is essential for the petitioner to construct, operate and maintain the railway network in an efficient and economical manner. Any delay or hampering of the exercise of the rights by the petitioner would also adversely impact the transport services in the country.

xx. The open access to transmission system for a distribution licensee are to be governed as per the provisions of sections 38 (2) (d) (i), 39 (2) (d) (i), 40 (c) (i).

“Section 38 (Central Transmission Utility and functions):

... ..

(2) The functions of the Central Transmission Utility shall be –

... ..

(d) to provide non-discriminatory open access to its transmission system for use by-

- (i) any licensee or generating company on payment of the transmission charges; or.....”

“Section 39 (State Transmission Utility and functions):

... ..

- (2) The functions of the state transmission utility shall be –

... ..

- (d) to provide non-discriminatory open access to its transmission system for use by-

- (i) any licensee or generating company on payment of the transmission charges; or ... ”

“Section 40 (Duties of transmission licensees):

... ..

- (c) to provide non-discriminatory open access to its transmission system for use by-
- (i) any licensee or generating company on payment of the transmission charges; or a ”

As per above, Indian Railways shall have open access to transmission of CTUs / STUs on payment of transmission charges as decided by respective Commissions.

xxi. The cross subsidy surcharge is leviable in terms of the provisions of section 42 (2) read with section 38(2)(d)(ii), section 39 (2) (d) (ii) and 40 (c) (ii) only when the open access is sought for the conveyance of electricity to a consumer. There is no imposition of any surcharge including cross subsidy surcharge when there is procurement of power by a licensee/'deemed licensee'. Thus, there cannot be any levy of cross subsidy surcharge on the

petitioner being a distribution licensee in the State of Telangana on the energy being sourced by it through open access.

xxii. The section 42 (2) and 42 (4) of the Act, 2003 dealing with cross subsidy and additional surcharge provides as under:

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

... ..

(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 that¹ [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.

... ..

(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 maybe specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

xxiii. The section 42 (2) of the Act 2003 provides for levying of cross subsidy surcharge in addition to wheeling charges on the consumer by the distribution licensee. The wheeling charges are towards the use of distribution network of distribution licensee and cross subsidy surcharge to compensate it financially for subsidized electricity in its area of supply. Thus, cross subsidy surcharge can only be in addition to wheeling charges. The petitioner after disconnecting from the distribution licensee shall not be using distribution licensee’s network and shall have a distinct area of supply; and being distribution licensee shall not liable to pay either wheeling charges or cross subsidy surcharge.

xxiv. The petitioner in the present case, is seeking to avail power through open access from RGPPL at its traction substations as a deemed distribution licensee. The petitioner as the distribution licensee shall not supply to any consumers of the State distribution licensee in the State of Telangana thereby taking

away their subsidizing consumers for which purpose the cross subsidy surcharge has been devised as payable. The petitioner shall not therefore be liable to pay cross subsidy surcharge to another distribution licensee.

xxv. With regard to additional surcharge, it is stated that under section 42 (4) of the Act, 2003, 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. As mentioned earlier, the petitioner shall neither be connected nor shall be using distribution Discoms' network, hence the question of levying of wheeling charges or additional surcharge does not arise. It is stated that the petitioner cannot be fastened with a liability dehors the Act.

xxvi. The section 42 of the Act, 2003 deals with the cross subsidy and additional surcharge. Section 42(2) specifically speaks about the cross subsidy surcharge in the context of a consumer of electricity and not when the electricity is procured by a licensee. The purpose of cross subsidy surcharge is to compensate the distribution licensee of the area in regard to the prevalent extent of the cross-subsidization of one category of consumers by another category. It cannot have any application in the case of a licensee. Similarly, section 42(4) speaks about the additional surcharge in the context of the State Commission permitting a consumer of a class of consumer and not in the case of a distribution licensee procuring power.

xxvii. Thus, section 42(2) of the Act, 2003 only provides for applicability of cross subsidy surcharge and additional surcharge on wheeling charges on consumers of distribution licensee who are seeking open access in the area of licensee and not on other distribution licensees who are neither connected nor using their distribution network. Therefore, there can be no cross subsidy surcharge and additional surcharge applicable on the petitioner being a deemed distribution licensee in the State of Telangana.

xxviii. The Commission has notified Telangana State Electricity Regulatory Commission (Adoption) Regulations, 2014, whereby the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation, 2005 (open access regulation) have been made applicable in the State of Telangana. Clause 2(i)(j) of the regulation provides as under:

“user” or “ open access user” means a person using or intending to use the transmission system and/or the distribution system of the licensees in the State for receiving supply of electricity from a person other than the distribution licensee of his area of supply, and the expression includes a generating company and licensee.”

Further, a perusal of the clauses 17.1(iii) and (iv) of open access regulation dealing with cross subsidy surcharge and additional surcharge would show that the same is applicable for only those open access users, who are the consumers of the distribution licensee and not on the entities, such as the petitioner, procuring power through open access as a ‘deemed licensee’. Regulations 17.1 (iii) and (iv) provide as under:

“17. Open Access charges

17.1 The charges for the use of the transmission and/or distribution system by an open access user shall be regulated as under:

... ..

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(iii) The Open access users of the Transmission and/or Distribution System where such access is for delivery of electricity to the consumer’s premises in the area of supply a distribution licensee, shall pay to the distribution licensee the (cross subsidy) surcharge as determined by the Commission from time to time under Section 42(2) Act:

Provided that no (cross-subsidy) surcharge shall be payable if the 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.

(iv) The Open Access user shall also be liable to pay additional surcharge on charges of wheeling as may be specified by the Commission from time to time under section 42 (4) of the Act, in case open access is sought for receiving supply from a person other than the distribution licensee of such consumer's area of supply, to meet the cost of the distribution licensee arising out of his obligation to supply.

xxix. As stated hereinabove, the petitioner shall cease to be a consumer of the distribution licensee when they start procurement of power through open access in its status as a 'deemed licensee'. The petitioner shall be operating in its own area of distribution under its jurisdiction and control of Indian Railways which is distinct and separate from the area of distribution/area of supply of the distribution licensee.

xxx. An open access user who is availing open access is required to pay charges as may be determined by this Commission. It is stated that even in terms of Open Access Regulations, only a consumer of the distribution licensee is also liable to pay wheeling charges or cross-subsidy surcharge or additional surcharge as may be determined by this Commission. However, the petitioner shall be procuring power through open access as a licensee. Therefore, the petitioner shall not be liable to pay any charges on account of cross-subsidy surcharge and/or additional surcharge.

Thus neither the Act, 2003 nor the Open Access Regulations as framed by this Commission provide for the applicability of cross subsidy surcharge and additional surcharge on a licensee.

xxxi. The judgment dated 25.04.2014 of the Hon'ble Supreme Court in the case of M/s Sesa Sterlite Limited Vs. Orissa Electricity Regulatory Commission and Others in Civil Appeal No.5479 of 2013 as referred to in the order dated 27.03.2018 is not applicable in so far procurement of power by the petitioner in its status as deemed distribution licensee is concerned.

xxxii. The said case was related to Special Economic Zone (SEZ) Act which provided for developers of special economic zones (SEZ) as 'deemed licensee' authorised to distribute electricity within the SEZ area. However, the provisions of SEZ Act and Railways Act are materially different in its relation to the Act, 2003. It was noted by the Hon'ble Supreme Court that section 49 of the SEZ Act gives authority to the central government to declare that any provisions of a Central Act shall apply to the SEZ and in furtherance to this, Government of India (GoI) had issued a notification with regard to power generation in SEZ declaring that all provisions of the Act shall be applicable to the generation, transmission and distribution of power whether stand-alone or captive power. Unlike Railways Act 1989, the Act 2003 does not save the SEZ Act. On the other hand, the notification under SEZ Act specifically recognized the applicability of provisions of the Act, 2003. Therefore, the Hon'ble Supreme Court considered the provisions of the Act, 2003 to hold that power must be supplied to consumers. However, the same cannot be applied to the present case. Railways Act, 1989 would prevail over the Act, 2003 as per section 173 of the Act, 2003.

xxxiii. The petitioner in terms of section 11 and 12 of the Railways Act, 1989 is permitted to undertake distribution/supply of electricity only in relation to the railways administration, namely, for self or associated consumption.

xxxiv. The basis under the Act, 2003 is that a distribution licensee is required to supply electricity to its consumers in terms section 2 (17) and 2 (70) of the Act, 2003. section 2 (17) and 2 (70) of the Act, 2003 read as under:

“(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;

(70) ‘supply’, in relation to electricity, means the sale of electricity to a licensee or consumer;”

Thus, there is inconsistency in so far as the obligation of the petitioner to supply under the Railways Act, 1989 and the Act, 2003 is concerned. However, in terms of section 173, the requirement of supply under section 2 (17) and 2 (70) of the Act, 2003 shall not have any effect in so far as distribution activity of the petitioner is concerned.

xxxv. Further, section 2 (17) and 2 (70) of the Act, 2003 cannot have any overriding effect over the provisions of Railways Act, 1989 in terms of section 174 of the Act, 2003. Section 174 of the Act, 2003 provides that subject to section 173, the Act 2003 shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act, 2003.

xxxvi. Further, the Appellate Tribunal for Electricity vide its interim order dated 16.12.2015 passed in I. A. No. 445 of 2015 (filed in Appeal No. 276 of 2015) has prima facie held Sesa Sterlite judgement to be not applicable in the case of Indian Railways. Relevant paras of the order are as under:

“16. In our prima facie opinion, the Appellant cannot draw any support from Sesa Sterlite Limited. In Sesa Sterlite Limited, the Supreme Court was concerned with Special Economic Zones Act and the Electricity Act. As per Section 49 of the Special Economic Zones Act, the Central Government had

issued a notification making all provisions of the Electricity Act applicable to the generation, transmission and distribution of power whether stand-alone or captive power. The Appellant therein had placed reliance on third proviso to Section 14 of the Electricity Act to claim deemed distribution licensee status. The Supreme Court considered Section 2 (17) of the Electricity Act, which emphasis upon the distribution licensee to operate and maintain distribution system and supply power to the consumers. The Supreme Court considered definition of the term 'supply' appearing in Section 2 (70) of the Electricity Act and observed that 'supply' means sale of electricity to consumers. The Supreme Court observed that being authorized to operate and maintain a distribution system as a 'deemed licensee' would not confer the status of distribution licensee to any person. Power must be supplied to consumers and since the Appellant therein was consuming the power purchased by it for its own use and was not distributing and supplying it to consumers, it was not a distribution licensee. It must, however, be noted here that the Supreme Court was considering the provisions of the Special Economic Zones Act. Whereas Section 173 of the Electricity Act saves the Railways Act in case of inconsistency, it does not save the Special Economic Zones Act. Section 174 states that the Electricity Act shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act. Section 175 of the Electricity Act provides that the provisions of the

Electricity Act are in addition to and not in derogation of any other law time being in force. The observations of the Supreme Court must be considered against the backdrop of these provisions.

17. In the present case, we are concerned with the Railways Act and, the Electricity Act saves it in case of inconsistency. Therefore, Section 11 of the Railways Act which empowers Railway Administration to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Respondent No. 2 is not affected by the provisions of the Electricity Act. Respondent No. 2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act. It will also not lose its status as a deemed distribution licensee acquired under third proviso to Section 14 of the Electricity Act merely because it consumes the power procured by it. Reliance placed on Sesa Sterlite Ltd. prima facie appears to us to be misplaced.”

xxxvii. Thus, the petitioner is not liable to make payment of cross-subsidy surcharge or additional surcharge either in terms of Act, 2003 or as per open access regulations.

xxxviii. The petitioner craves leave to add to the grounds mentioned herein above and submits that the contentions are in the alternative and without prejudice to one another.

xxxix. It is stated that it is in the public interest that the Commission may consider exercising its power under section 86 (1) (k) of the Act, 2003 and clause 24 of Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation, 2005 to the effect that the petitioner be allowed to procure power through open access at the TSSs situated in the State of

Telangana in its status as a deemed distribution licensee and with further clarification as regards non-applicability of cross subsidy surcharge and additional surcharge on such power procurement.

xl. It is stated that it is just and proper that the petitioner shall be permitted to procure power through open access at the TSSs situated in the State of Telangana in its status as a deemed distribution licensee without any liability towards cross subsidy surcharge and additional surcharge on such power procurement.

2. The petitioner has prayed the following reliefs in the petition:

- (i) To declare that Indian Railways is entitled to procure power at its traction substations (TSSs) situated in the State of Telangana in its status as a 'Deemed Distribution Licensee';
- (ii) To direct respondents to facilitate open access to the Indian Railways in its status as a deemed distribution licensee' in the State of Telangana as per the order dated 05.11.2015 passed by the Central Commission in Petition No. 197 / MP / 2015;
- (iii) To direct the respondents to issue "No objection Certificate" to the Indian Railways for grant of open access to Indian Railways as deemed distribution licensee with immediate effect for facilitating the flow of power from M/s Ratnagiri Gas and Power Private Limited or any other sources till the Railway traction substations;
- (iv) To direct the respondents to provide ABT meters with associated equipment and DAS immediately as payments for all the above have been made towards provision of ABT meters and DAS to enable power procurement through open access by Indian Railways;
- (v) To declare that Indian Railways shall not be liable to make payment towards cross subsidy surcharge and additional surcharge on the power procured through open access in its status as a 'Deemed Distribution Licensee'.

3. The respondent No. 1 has filed counter affidavit and the contents of it are as below.

a. It is stated that the contention of the petitioner that it has the right to seek open access as a deemed distribution licensee is untenable. This respondent is not competent to issue no objection certificate for grant of open access as a deemed distribution licensee to the petitioner without the approval of the Commission. It is stated that as per Regulation No.4 of 2016 issued by this Commission, the 'deemed licensee' has to apply before the Commission to be identified as deemed distribution licensee in the State of Telangana including those covered under third proviso of section 14 of the Act, 2003 and shall abide by all the general terms and conditions of the license as required under chapter IV of the regulation.

The petitioner without getting it identified as deemed distribution licensee in the State of Telangana cannot seek no objection certificate from this respondent. Therefore, the petitioner at the first instance is required to submit an application before the Commission in accordance with schedule 2 of the above said Regulation and get itself identified as deemed distribution licensee in the State of Telangana even though the petitioner is covered by third proviso of section 14 of the Act, 2003.

Therefore, the contention of the petitioner that it is a deemed distribution licensee becomes untenable and hence does not deserve consideration.

b. It is stated that as per clause 8.3 of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008, the State Load Dispatch Centre (SLDC), while processing the application for concurrence or 'no-objection' or prior standing clearance, shall verify with the licensees for the existence of infrastructure necessary for time block wise energy metering and accounting in accordance with the provisions of the grid code in force and availability of surplus transmission capacity in the State network.

c. It is stated that in view of the above and for operationalization to issue no objection certificate, the TSSLDC has conducted various meetings with railways and other entities involved and informed the petitioner for fulfilment of following prerequisites to issue NOC.

- i. The railways as a 'deemed licensee' shall be bound by the terms and conditions of license specified or to be specified by the appropriate commission under proviso to section 16 of the Act, 2003. Hence Railways have to obtain license approval and also general and specific conditions from the Commission.
 - ii. As per CERC order, all SLDCs and RLDCs were directed to facilitate long term access and medium term access in terms of connectivity regulations from the generating stations or other sources to the facilities and network of the petitioner. Since the period of allocation is 5 years it is advised to go for STOA or MTOA.
 - iii. For processing the OA application, Railways have to provide 0.2S class ABT meters at the drawl points along with associated CT and PT equipment as per CEA metering regulations.
 - iv. Any Licensee has to apply for connectivity to STU.
 - v. Data Acquisition System (DAS) for monitoring of data at the Load Despatch Centre is required. DAS shall be arranged at all the drawal points for availing power from RGPPL.
- d. It is stated that the purchase order was placed on M/s Secure Meters Limited, Rajasthan for procurement of 3 Nos. summation meters and meters are available at TLC Stores, Erragadda. The status of provision of ABT meters at various RTSS is tabulated below:

SI. No.	Name of the TSTransco EHT SS	Status of the work
1	220/132 kV SS Ghanapur	Work under progress.
2	132 kV Sanathnagar Railway Traction sub-station	All works completed. Awaiting for ABT Meters from TSSPDCL.
3	132 kV Vikarabad SS	
4	220 kV Tandur SS	
5	132/33 kV Kolanpaka SS	All works completed. ABT meters allotment awaited from TSSPDCL
6	132 kV SS Dornakal SS	All works completed. Awaiting

SI. No.	Name of the TSTransco EHT SS	Status of the work
		for ABT Meters from TSSPDCL.
7	132 kV Waddepally SS	Structure erection completed. Materials drawn from stores and are to be erected.
8	132 kV Nekkonda SS	All works completed. Awaiting for ABT Meters from TSSPDCL.
9	132 kV Ghanpur SS	Structure erection completed, Materials drawn from stores and are to be erected.
10	132 kV SS Bonakal	All works completed. Awaiting for ABT Meters from TSSPDCL.
11	132 kV SS RTSS Kothagudem	Foundations completed. Structure Materials received at site, erection not completed.
12	132 kV Malyalapally SS	All works completed. Awaiting for ABT Meters from TSSPDCL.
13	132 kV Jammikunta SS	CTs and PTs erection works are completed. Awaiting for ABT Meters from TSSPDCL.
14	132/33 kV SS Bellampally	CTS and PTS erection works are completed. Awaiting for ABT Meters from TSSPDCL.
15	132/33 kV SS Sirpurkagaznagar	CTS and PTS erection works are completed. Awaiting for ABT Meters from TSSPDCL.

- e. It is stated that TSSPDCL/respondent-2 has accepted to allot/issue the ABT meters in principle, but till date sale order was not issued by TSSPDCL for want of clarification from the petitioner regarding deemed distribution licensee status.
- f. It is stated that the installation of data acquisition system at the 15 Nos. out of 16 Nos. TSTransco traction feeder substations have been completed. The DAS related to the remaining one substation that is Bonakal RTSS is pending due to non availability of CTS. In this regard, the petitioner was requested for permission to utilize the 132 kV CTS available at Bonakal, but this respondent did not receive any response from the petitioner. The status of DAS at various RTSS is tabulated below.

Sl. No.	Name of the RTSS	Name of the TSTransco station for which DAS is established	Status of DAS
1	Alair	132 kV SS Kolanupaka	Establishment of DAS is completed
2	Vikarabad	132 kV SS Vikarabad	
3	Krishna RTSS	132 kV SS Makthal	
4	Sirpurkagaznagar	132 kVSS Sirpurkaaznagar	
5	Bellampally	132 kV SS Bellampally	
6	Jammikunta	132 kV Jammikunta	
7	Nekkonda	132 kV Nekkonda	
8	Station Ghanapur	132 kV SS Raghunathapally	
9	Kazipet	132 kV SS Waddepally	
10	Kothagudem	132 kV SS Kothagudem	
11	Bonakal		Communication is established, RTU is erected at Bonakal, CT PT connections are to be given to MFTs. But CT is not available

Sl. No.	Name of the RTSS	Name of the TSTransco station for which DAS is established	Status of DAS
12	Ghatkesar	220 kV Ghanapur	DAS is already existing
13	Sanathnagar	132 kV SS Erragadda	
14	Tandur	220 kV SS Tandur	
15	Ramagundam	220 kV SS Ramagundam	
16	Dornakal	220 kV SS Budidampad	

g. It is stated that further, TSSPDCL/respondent 2 has informed that without getting any clarification on the status of approval of 'deemed licensee' to the petitioner from the Commission, the matter of facilitation of ABT metering provision to railways traction substations cannot be processed further.

h. It is stated that the petitioner has submitted a short term open access application vide letter dated 21.03.2019 to the TSSLDC for issue of no objection certificate to avail allocated 50 MW power through open access. In this regard, TSSLDC has addressed a letter to the petitioner informing that their application is not in the prescribed format i.e., without any information of period and type of open access required as per CERC open access regulation and also requested the petitioner to obtain 'deemed licensee' status from TSERC and to follow the relevant procedures for further action in the matter.

i. It is stated that the petitioner has to comply the following clauses of Regulation No. 4 of 2016 (Distribution License Regulation) issued by the Commission to claim the status of 'deemed licensee':

i. As per the clause 11 of Regulation No. 4 of 2016, distribution licensee regulations of the Commission, the 'deemed licensee' shall make an application in the form specified in schedule 2 to the Commission to get identified as the 'deemed licensee'.

ii. As per clause 14 of Regulation No.4 of 2016, the distribution license including deemed license shall commence from such date as the Commission may specify and shall be valid for 25 years from the date of commencement.

iii. Further, as per clause 49 of Regulation No.4 of 2016, the general condition of chapter IV and other provisions of this regulation, other than specifically excluded rules, shall apply to a deemed license under subsection (b) of section 14 and first, third and fifth provisions of section 14 of the Act.

It is stated that the petitioner failed to file application in the prescribed form as mentioned in schedule 2 of the regulation till date for obtaining 'deemed licensee' status.

j. It is stated that the petitioner was requested from time to time to furnish clarifications in respect of the status of 'deemed licensee' and necessary approval / orders to be obtained from the Commission. The petitioner has also been informed that the provision of ABT meters cannot be initiated without clarification on 'deemed licensee' status. The petitioner without giving any reply to the clarifications and approvals sought by the respondent has filed this petition before the Commission blaming the respondent for delay in installation of ABT meters.

k. It is stated that the estimates for providing ABT meters were sanctioned treating the petitioner as an open access consumer that is a scheduled consumer of the TSDiscoms. Now the petitioner intends to move to the status of deemed distribution licensee, it can no longer be treated as a consumer and shall have to be treated as a distribution licensee just like TSDiscoms. In such case, the metering is to be provided as interface metering between two different licensees that is TSTransco/respondent No.1 and the petitioner. As per clause 7(1)B of CEA metering regulations, meters are to be installed at both ends of the line and both are treated as main meters for respective licensee.

(i) It is stated that as per clause 6(1)(c) of CEA metering regulations, the meters shall be owned by the respective licensee. In such view of the matter, if the petitioner is to be treated as deemed distribution licensee, it has to procure, install and maintain the meters at their end too.

(ii) It is stated that the respondent therefore states that, without there being any clarifications from the Petitioner, the provision of ABT meters cannot be finalized.

- I. It is stated that once the railways of Telangana becomes a distribution licensee, it has to obtain grid connectivity from the State Transmission Utility / respondent No. 1. Further, it is stated that the railway traction substations are being fed from various substations of the respondents for which separate dedicated service lines have been laid and are being maintained by the respondents.
- (i) It is stated that as per the clause 5.3.2.2 of GTCS,
'Notwithstanding the fact that a portion or full cost of the service line has been paid for by the consumer, the service line shall be the property of the company, which shall maintain it at its own cost. The company shall also have the right to use the service line for supply of energy to any other person(s).'
- (ii) It is stated that therefore, as per the above condition, the existing service lines of Railways are deemed to be the property of TSTransco / TSDiscoms. Hence, the petitioner is required to clarify whether they intend to lay new service lines to their RTSSs on obtaining 'deemed licensee' status or to pay the present cost of their dedicated service lines as determined by the Commission for usage of the lines of the respondents for availing power under open access.
- m. It is stated that the petitioner cannot refer the procedure followed by the other States in respect of grant of open access to deemed distribution licensee, since the petitioner being a consumer of respondents No. 2 and 3 is governed by the regulations of this State.
- n. It is stated that the petitioner without filing any petition for getting the status of 'deemed licensee' before the Commission has now filed this petition praying to direct the respondents to facilitate open access and issue 'No objection Certificate' as a deemed distribution licensee in the State of Telangana and the same clearly indicates that the petitioner wants to avail the status of 'deemed licensee' without following the regulations framed by the Commission.
- o. It is stated that in view of the above submissions, the petitioner has to follow the procedures laid down in the Regulation No.4 of 2016 to get

itself identified as deemed distribution licensee. The petitioner is not entitled to seek open access permission from this respondent unless it gets the status of 'deemed licensee'.

4. The respondent No. 2 and the respondent No. 3 had filed individual and identical counter affidavits and the contents are as below:

a. It is stated that the petitioner has been proclaiming on its own as deemed distribution licensee in the State of Telangana taking shelter under the provisions of Railways Act, 1989, the 3rd proviso to section 14 of Act, 2003, section 173 of the Act, 2003, decision of CERC in order dated 05.11.2015, order in I. A. No. 445 of 2015 in Appeal No. 276 of 2015 of the Hon'ble ATE dated 16.12.2012 and the decision of the Hon'ble Supreme Court in General Manager Northern Railways Vs. Chairman, Uttar Pradesh State Electricity Board and Other 2012 (3) SCC 329 vide para 6 (A), 6 (B), 6 (C), 6 (D), 6 (E), 6 (F), 6 (G) of the petition. This respondent submits the following for consideration of the Commission in this regard:

i. The distribution licensee is governed by the distribution license Regulations No. 4 of 2016 issued by the Commission.

ii. As per clause 2 (13) of Regulation No. 4 of 2016, distribution licensee is

"a person authorised by a distribution license to operate and maintain a distribution system for supply or conveyance or wheeling of electricity to the consumers in his / its area of supply and shall include a 'deemed licensee'".

iii. Further as per clause 11 of the Regulation No.4 of 2016,
"The 'deemed licensee' shall make an application in the form specified in Schedule 2 to the Commission to get itself identified as the 'deemed licensee'.

Provided that nothing in Rules 4 to 11 shall apply to a 'deemed licensee'"

iv. In continuation to the above, clause 14 of the Regulation No.4 of 2016 stipulates that

"the Distribution Licence including a deemed licence shall commence from such date as the Commission may specify and shall be valid for a period of 25 years from the date of its commencement, unless it is duly suspended or revoked by the Commission."

v. In accordance to clause 20 of the Regulation 4 of 2016, the licensee including 'deemed licensee' has to pay license fee every year to the Commission.

vi. Further, all general terms and conditions of distribution license such as development and maintenance of Distribution System, obligation to supply, open access, standards of performance, metering, submission of power procurement and business plans, maintenance of accounts, submission of aggregate revenue requirement and tariff proposals etc. ... as laid out in chapter-4 of the Regulation No. 4 of 2016 are also applicable to the 'deemed licensee' as per clause 49. The relevant clause of the above said regulation is reproduced below:

"49. Provisions applicable to 'deemed licensee's
The General Conditions of Chapter IV and other provisions of this Regulation, other than specifically excluded Rules, shall apply to 'deemed licensee' under sub-section (b) of section 14 and also under the first, third and fifth proviso of section 14 of the Act."

As per Regulation No.4 of 2016 issued by the Commission, the 'deemed licensee' has to apply before the Commission to be identified as deemed distribution licensee in the State of Telangana including those covered under third proviso of section 14 of the Act, 2003 and shall abide by all the general terms and conditions of the license as required under chapter IV of the regulation. Hence, at the first instance, the petitioner has to make an application before the Commission in accordance with Schedule 2 of the above said regulation and need to get itself identified as deemed distribution licensee in the State of

Telangana even though the petitioner has been covered under third proviso of section 14 of the Act, 2003. Therefore, the contention of the petitioner that it is a deemed distribution licensee cannot be acknowledged unless the petitioner files application before the Commission in accordance with the Regulation No. 4 of 2016. Therefore, the petition under reply is not maintainable.

b. It is stated that the petitioner has to comply the following clauses of Regulation No. 4 of 2016 issued by the Commission to claim the status of 'deemed licensee'.

i. As per the clause 11 of Regulation No.4 of 2016, distribution licensee regulations of TSERC, the 'deemed licensee' shall make an application in the form specified in Schedule-2 to the Commission to get identified as the 'deemed licensee'.

ii. As per clause 14 of Regulation No.4 of 2016, the distribution license including deemed license shall commence from such date as the Commission may specify and shall be valid for 25 years from the date of commencement.

iii. Further, as per clause 49 of Regulation No.4 of 2016, the general condition of chapter IV and other provisions of the Regulation, other than specifically excluded rules, shall apply to a deemed license under subsection (b) of section 14 and first, third and fifth provisions of section 14 of the Act, 2003.

But, the petitioner has not filed any application in the prescribed form as mentioned in schedule-2 of the regulation till date for getting itself identified it as 'deemed licensee'.

c. It is stated that the petitioner has been informed vide letters dated 04.09.2018, 22.10.2018 and 02.02.2019 to furnish few clarifications in respect of the status of 'deemed licensee' and necessary approval/orders to be obtained from TSERC and also requested to comply relevant clauses of the applicable regulations. The petitioner has also been informed/clarified that provision of ABT meters cannot be initiated without addressing/complying the relevant clauses of the applicable regulations. The petitioner without giving any reply to the clarifications and approvals sought by the TSSPDCL has filed this

petition before this Commission blaming the respondents for delay in installation of ABT meters. The contention of the petitioner that it has the right to seek open access as a deemed distribution licensee is incorrect. The petitioner cannot claim a no objection certificate for grant of open access as a deemed distribution licensee from this respondent, since the same is not permissible under the Act, 2003. It is stated that the petitioner reference of the other States in the matter of grant of open access is not acceptable, since the petitioner being a consumer of this respondent is governed by the Regulations of this State.

d. It is stated that wheeling charges are payable by all including the consumers of the respondent who use the distribution network of the respondent to avail supply of power. Similarly, cross subsidy surcharge and additional surcharge are payable by the consumers, who wish to avail open access besides continuing to be the consumer of this respondent. Therefore, if the petitioner continues to be the consumer of this respondent, it is liable to pay wheeling charges, cross subsidy surcharge and additional surcharge as determined by the Commission. In case the petitioner intends to get its agreement with this respondent terminated it can do so in accordance with the clause 5.9.4 of the general terms and conditions of supply issued by the Commission and in such case, the petitioner is not liable to pay cross subsidy surcharge / additional surcharge as it is no longer remains the consumer of this respondent. However, the petitioner is liable to pay the wheeling charges to this respondent if it wishes to use the distribution network as an open access user. It is stated that the contention of the petitioner in regard to applicability and payment of wheeling charges, cross subsidy surcharge and additional surcharge is not acceptable being incorrect since the same is against the provisions of the Act, 2003. The petitioner is a consumer of this respondent as of now and hence, it has to abide by the terms and conditions of supply as stipulated by the Commission as per the agreement of supply and has to pay all the applicable charges. In case the petitioner terminates its agreement with this respondent on attaining of deemed distribution licensee status from the Commission, it will be an open access user or user as defined in the APERC Terms

and Conditions of Open Access Regulation, 2005 (as adopted by TSERC vide Adoption Regulation No. 1 of 2014). An open access user who is not the consumer of this respondent is liable to pay wheeling charges to this respondent for usage of the distribution network. The contention of the petitioner that no cross subsidy surcharge and additional surcharge applicable on the petitioner being a deemed distribution licensee as the cross subsidy surcharge and additional surcharge is payable by all the consumers of this respondent subject to the terms and conditions of the cross subsidy and additional surcharge order issued by the Commission is false, baseless and incorrect.

e. It is stated that the Commission in its cross subsidy surcharge order 2017-18 has stated that, if the petitioner desires to avail 'deemed licensee' status,

'in order to avail the exemption from payment of cross subsidy surcharge, it can approach the Commission through a petition as per the Regulations in force and such petition shall be disposed of in accordance with the provisions of the Act, 2003 after following the principles of natural justice.'

f. It is stated that further, the Commission in its cross subsidy surcharge order 2018-19 has stated that the prayer of the petitioner to exempt it from payment of CSS cannot be accepted at this stage. This issue shall be addressed by the Commission while deciding on the representation of the petitioner for 'deemed licensee'.

g. It is stated that the petitioner without filing any petition for getting the status of 'deemed licensee' before the Commission has now filed this petition praying to direct the respondents to facilitate open access and issue 'No objection Certificate' without any payment of cross subsidy surcharge and additional surcharge to them as a 'deemed licensee' in Telangana and the same clearly indicates that the petitioner wants to avail the status of 'deemed licensee' without abiding the regulations framed by the Commission.

h. It is stated that in view of the submissions mentioned supra, the petitioner has to follow the procedures laid down in the Regulation No.4 of 2016 to get itself identified as deemed distribution licensee and that

the open access permission cannot be given to a deemed distribution licensee by the respondent. Therefore, this petition is not maintainable and hence the same is liable to be dismissed.

5. The respondent No. 2 and the respondent No. 3 had filed individual and identical additional counter affidavit and the averments are as below:

- a. It is stated that section 181 (2) of the Act, 2003 the State Commission is conferred with powers to make regulations that are to be abided by the licensee (including deemed distribution licensee). The Act, 2003 also empowers the Commission to make regulations with respect to Section 14, 15 and 16 which needs to be obeyed by the licensees. Therefore, the petitioner who is eligible to the status of a deemed distribution licensee, is bound to follow the rules framed under Regulation No.4 of 2016 to attain the status of the deemed distribution licensee in the State of Telangana as per section 181(2) read with Sections 14, 15 and 16 of the Act, 2003. Hence, the contention of the petitioner that there is no requirement either under the Railways Act, 1989 or the Act, 2003 (third proviso to Section 14) to obtain distribution licence from the Commission and also mentioned that the nature of the license or authorization granted has not been made subject to any decision by any functionary or Commission constituted under the Act, 2003 is untenable.
- b. It is stated that section 16 of the Act, 2003 which clearly provides that

"The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act."

Clause 49 of Regulation No. 4 of 2016 also specifies that the general condition of chapter IV and other provisions of this Regulation, other than specifically excluded rules, shall apply to a deemed license under subsection (b) of section 14 and first, third and fifth provisions of section 14 of the Act. Therefore, the petitioner has to follow the provisions of the Regulation No. 4 of 2016 unless it is exempted specifically by the Commission and there is no exception to it and hence the contention of the petitioner that the general conditions of licence is not applicable to them as they are deemed distribution licensee, is against the Regulation No. 4 of 2016 and contravene the provisions of the Act and consequently deserves no consideration.

- c. It is stated that the petitioner cannot claim no objection certificate for grant of open access as a deemed distribution licensee from this respondent unless it complies with the necessary provisions of Regulation No. 4 of 2016 as framed by the Commission.
- d. It is stated that the contention of the petitioner that the petitioner is not required to file an application in the prescribed form is against the provisions contained in clause 11 of the Regulation No. 4 of 2016 for the reason that any exemption or saving from the clauses of the regulation needs to be specifically mentioned by the Commission through an amendment to the regulation. The petitioner being the consumer shall abide by the existing regulations framed in accordance to the Act, 2003. Hence, the respondent/licensee prays the Commission to dismiss the petition.

6. The petitioner has filed rejoinder in respect of the counter affidavit of the respondent No. 1, stating as below:

- a. It is stated that the contention of the respondent No. 1 that the petitioner has to get itself identified as a deemed distribution licensee by way of an application under Telangana State Electricity Regulatory Commission (Distribution License) Regulations, 2016 is wholly misconceived and denied. In this regard, it is stated that the petitioner shall undertake distribution of electricity under the Railways Act, 1989 and therefore is governed by the Railways Act, 1989 read along with

the Act, 2003 for such activity as held by the Hon'ble Supreme Court in General Manager, Northern Railways represented by Union of India Vs. Chairman, Uttar Pradesh State Electricity Board and others decided on 09.02.2012 in Transfer Case No.37 and 38 of 2001 reported in 2012 (3) SCC 329. The Hon'ble Supreme Court had considered the status of the railways under Railways Act and held as under:

- "15. ... it is true that in terms of Section 27 D of the Electricity Supply Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other than those authorized or otherwise exempted by an Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution of electricity. However in the case railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989, and not by the enactment governing electricity.
16. That apart, Section 11 (a) and (g) of the Railways Act, 1989 clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorizes the Railway Administration to execute all works for the purpose of constructing or maintain railways. Sub-Section (a) of the Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-Section (g) thereof, the Railways are authorized to erect traction equipment, power supply and distribution installation which is in connection with the work of the railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by UPSEB as well."

- b. It is stated that the petitioner has been recognised as a 'deemed licensee' by the Central Commission vide its order dated 05.11.2015. The concept of 'deemed licensee' is that it is not required to obtain any licence for the purposes of distribution of electricity. Further, MoP too clarified the status of railways as 'deemed licensee' under third proviso to section 14 of the Act, 2003 in consultation with the Department of Legal Affairs and Ministry of Law and Justice.
- c. It is stated that the empowerment of the petitioner to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of railways under section 11 of the Railways Act, 1989 is not in any manner affected by provisions of the Act, 2003. The Act, 2003 though a latter enactment, gives supremacy to the provisions of the Railway Act, 1989 under section 173 as under:

"173. Inconsistency in laws

Nothing contained in this Act or any rule or regulation made there under or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989."

- d. It is stated that thus, in so far as the petitioner is concerned, the status of the petitioner as being authorised to distribute electricity under the Railways Act, 1989 is recognized notwithstanding anything contrary in the provisions of the Act, 2003. So long there is a nexus between the erection, distribution and use of electricity by petitioner in connection with working of the railways as envisaged in section 11 of the Railways Act, 1989, the action of railways will be within the scope of the authority vested under the Railways Act, 1989.
- e. It is stated that without prejudice to the above that the petitioner is a 'deemed licensee' under third proviso to section 14 of the Act, 2003. In this regard, third proviso to Section 14 reads as under:
- "Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes

trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not, be required to obtain a license under this Act."

- f. It is stated that the petitioner is a department and part of the central government under the Ministry of Railways and is the central government. Therefore, the petitioner is a 'deemed licensee' under the third proviso. The above aspects have been duly considered by the Central Commission. The petitioner has been recognised as a 'deemed licensee' by the Central Commission vide its order dated 05.11.2015 passed in Petition No.197/MP/2015.
- g. It is stated that the concept of 'deemed licensee' is that it is not required to obtain any licence for the purposes of distribution of electricity. There is no such requirement either under the Railways Act, 1989 or the Act, 2003 (third proviso to section 14). In fact third proviso makes it clear that the 'deemed licensee' is not required to obtain a licence. The nature of the license or authorisation granted has not been made subject to any decision by any functionary or Commission constituted under the Act, 2003.
- h. It is stated that it is correct that the SLDC of the concerned State is required to verify with the licensees for the existence of infrastructure necessary for time-block wise energy metering and accounting. However, it is stated that the respondents have neither provided/completed installation ABT meters at all TSSs and Data Acquisition System (DAS) nor issued NoC to the petitioner to avail power supply through open access as a 'deemed licensee'. This is despite the petitioner having made payment of the entire amount as per the estimate given by TSTransco. It is stated that after payment of the entire amount as estimated by TSTransco, there was no reason and for justification for TSTransco to not complete the up gradation of ABT meters and installation of DAS. Further, it is stated that TSTransco is continuously revising the estimates for additional amounts towards ABT meters which the petitioner is complying as and when demanded by TSTransco. However, the progress of provision of

ABT meters and DAS is very slow even after lapse of considerable time. It is stated that TSTransco is deliberately delaying the installation/upgradation of ABT meters and DAS to somehow delay the petitioner in exercising its right to procure power through open access.

- i. It is stated that as stated hereinabove, the petitioner is a 'deemed licensee' in terms of third proviso to section 14 of the Act, 2003 and the said proviso itself provides that a 'deemed licensee' under third proviso need not obtain any license. The petitioner has made detailed submissions in this regard in the preceding paras and craves leave to refer to same in reply to this paragraph as the same are not being reproduced for the sake of brevity.
- j. It is stated that as regards conditions under section 16 of the Act, 2003 are concerned, the open access to be allowed to the intrastate transmission network in the State cannot be deferred till the regulations in regard to general and specific conditions are notified. The statement of object and reasons of the Act, 2003 specifically provides in para 4(iv) that there would be open access in transmission from the outset with...
... . Further, section 39 (ii) (d) of the Act, 2003 provides for a non-discriminatory open access to the transmission system of the State transmission utility for use by any licensee without any condition such as the one held by the State Commission of notification of general or special conditions. Similarly, section 40 (1) (c) (i) of the Act, 2003 also provides for such non-discriminatory open access to the transmission system of any transmission licensee other than State transmission utility. Section 16 of the Act, 2003 also provides that the general or special conditions to be provided is at the discretion of the State Commission and that could be done within one year from the appointed date.
- k. It is stated that a combined reading of the provisions of the Act, 2003, clearly establish that that the specification of general or special conditions of license is not a pre-condition for grant of non-discriminatory open access for use of the transmission system.
- l. It is stated that in addition to the above, in terms of section 16 of the Act, 2003 the specification of the general or special conditions is by

notifying a regulation in exercise of the powers under section 181 (2) (d) of the Act, 2003 at the discretion and function of the State Commission. Any licensee, including a 'deemed licensee' shall always be bound by such regulations notified from time to time including any amendment, modification or variation in the regulations. Unless such regulations are interfered by the Hon'ble High Court in appropriate writ petition or any other proceeding.

- m. It is stated that further, it is not the case of the petitioner that no terms and conditions can be framed by the State Commission with regard to the availing of power by the Indian Railways through open access. The case of the petitioner is that such conditions have to be framed by the State Commission itself by way of regulations without there being a necessity of filing a petition and further, that framing of such conditions cannot be a condition precedent for allowing the petitioner to avail power through open access as a 'deemed licensee'.
- n. It is stated that the non-grant of open access by respondents is contrary to the public interest as the petitioner is forced to procure more expensive power as compared to the power it proposes to procure through its power purchase agreement (PPA) executed with M/s Ratnagiri Gas Power Plant Limited (RGPPL). The low power procurement cost would ultimately reduce the service cost to the general public at large.
- o. It is stated that as regards, provision for ABT and DAS meters is concerned, as stated hereinabove, the petitioner has already deposited the amount as per the estimate provided by the respondent No. 1 for installation of ABT and DAS, however, even after a lapse of considerable time, the respondent No. 1 has failed to complete installation of the same.
- p. It is stated that it is reiterated that the petitioner is a 'deemed licensee' in terms of third proviso to section 14 of the Act, 2003 and the said proviso itself provides that a 'deemed licensee' under third proviso need not obtain any license. Thus, the contention of the respondent No.1 that the petitioner is required to file an application in the prescribed form for obtaining a 'deemed licensee' status is wholly

misconceived and denied. The petitioner has made detailed submissions in this regard in the preceding paras and craves leave to refer to same in reply to this paragraph as the same are not being reproduced for the sake of brevity.

- q. It is stated that as regards conditions of license, the perusal of the general conditions of distribution licence and other regulations as framed by this Commission shows that the same substantially have no application to the petitioner. This is because petitioner as an entity authorised under the Railways Act as well as a deemed distribution licensee, are confining its operation in connection with the working of railways.
- r. It is stated that the petitioner is undertaking distribution of electricity within its area of operation and restricted to the purposes of railways and there being no business of distributing electricity to public at large as in the case of other licensees. It is stated that the existing conditions of licence and standards of performance as applicable to the other distribution licensees as well to other deemed distribution licensees in the State will not be relevant to the petitioner because of the above features on the operation of the petitioner.
- s. It is stated the petitioner undertakes distribution for the purpose of maintaining and operating railways and unlike distribution licensee under the Act, 2003 does not supply to the public at large. It is stated the power is being procured and consumed by the petitioner in connection with the working of railways that is for train operation etc. Since the petitioner is not engaging in the activities of distribution or supply of electricity to the public, there is no purpose in imposing conditions which are generally applicable when electricity is distributed or supplied to the public. The railways are not procuring electricity for supplying to the public at large and therefore, there is no purpose of regulating the power procurement or determining the tariff for the supply of power by the petitioner. The standard of performance qua the consumers is not applicable to the petitioner. However, the safety security and other issues including the standards required to be

maintained are already subjected to detailed regulations under the Railways Act, 1989 and other allied Acts.

- t. It is stated that the primary activities of the petitioner is operation of the rail network and the distribution of power is undertaken in pursuance to the Railway Act, 1989 and therefore the requirements regarding other businesses of the licensee etc. cannot be applied to the petitioner. Similarly, the conditions of distribution licensee as existing will have no relevance for the petitioner. It is however stated that the petitioner shall duly comply with the requirements relating to connectivity, grid security and stability as well as conditions of open access.
- u. It is stated that as regards, the provision of ABT meters is concerned, the stand being taken by the respondent No. 1 in its reply is contrary to its action. On the one hand, the respondent No. 1 is contending that the provision of ABT Meters cannot be initiated without clarification on 'deemed licensee' status of the petitioner and on the other hand, it has given the estimates and in fact received money from the petitioner in this regard. The respondent No. 1 after receiving the amount of Rs. 14.30 crore towards installation of ABT meters and DAS over till February, 2018 is now trying to evade its responsibility of installing the ABT Meters on the totally illegal grounds.
- v. It is stated that the petitioner from the very beginning has been trying to source power through open access as a 'deemed licensee' and not as an open access consumer as sought to be now contended by the respondent No. 1. Further, the estimates that were given to the petitioner were for providing ABT Meters and DAS for the purpose of procurement of power by the petitioner in the State of Telangana as a deemed distribution licensee. The contention as regards submitting of estimates considering the petitioner as an open access consumer is nothing but an afterthought. As stated hereinabove, the petitioner has already deposited huge sums to the tune of Rs. 14.30 crore (Rs. 10.50 crore towards installation of ABT meters and Rs. 3.80 crore towards DAS) and at no point of time, while receiving the above payment or at any point thereafter, till the present reply, the respondent No. 1 has ever communicated that the said estimates were considering the

petitioner as an open access consumer and not as a deemed distribution Licensee.

- w. It is stated that the traction substation of the petitioner at present are directly connected to the transmission system of the transmission company and as and when the petitioner commences procurement of power through open access, it shall be liable to pay all the charges as applicable upon a 'deemed licensee' for sourcing power through open access.
- x. It is stated that the nature of activities in so far as the petitioner are concerned are identical across the country irrespective of a State. The petitioner is an authorized entity under the Railways Act, 1989 and a 'deemed licensee' under the Act, 2003 to distribute power for the purposes of operation and maintenance of Railways. Thus, the status of the petitioner is recognized under these Acts, independent of the State Regulations. Even otherwise, it is stated that the petitioner has been recognized as a 'deemed licensee' by the Central Electricity Regulatory Commission in Petition No.197 / MP / 2015 vide order dated 05.11.2015 and by various other State Commissions. The principle of comity would require the Commission to also consider the petitioner as a deemed distribution licensee otherwise, it would lead to an anomalous situation where the petitioner is a 'deemed licensee' in one State and as a consumer in other. For example, in the State of Andhra Pradesh, the petitioner is recognized as a deemed distribution licensee whereas if this Commission was to take a different view it would be a consumer despite the two States being neighbouring States, more so with same open access regulations being in operation in both the States and with Indian Railways having same nature of activities.
- y. It is stated that the petitioner has made detailed submissions in this regard in the preceding paras and craves leave of the Commission to refer to the same in reply to this paragraph also as the same are not being reproduced for the sake of brevity.

7. The petitioner has also filed a separate common rejoinder to the counter affidavit filed by the respondent Nos. 2 and 3 in this petition. The averments made thereon other than made in the rejoinder to the counter affidavit of respondent No. 1 are as below:

- a. It is stated that it is not the case of the petitioner that it shall not abide by the general terms and conditions of the license as specified by this Commission. As regards conditions of license, it is stated that the perusal of the general conditions of distribution licence and other regulations as framed by this Commission shows that the same substantially have no application to the Indian Railways. This is because Indian Railways, as entity authorised under the Railways Act as well as a deemed distribution licensee, are confining its operation in connection with the working of railways.
- b. It is stated that the petitioner is undertaking distribution of electricity within its area of operation and restricted to the purposes of railways and there being no business of distributing electricity to public at large as in the case of other licensees. It is stated that the existing conditions of licence and standards of performance as applicable to the other distribution licensees as well to other deemed distribution licensees in the State will not be relevant to the petitioner, because of the above features on the operation of the petitioner.
- c. It is stated the petitioner undertakes distribution for the purpose of maintaining and operating railways and unlike distribution licensee under the Act, 2003 does not supply to the public at large. It is stated that the power is being procured and consumed by the petitioner in connection with the working of railways that is for train operation. Since the petitioner is not engaging in the activities of distribution or supply of electricity to the public, there is no purpose in imposing conditions which are generally applicable when electricity is distributed or supplied to the public. The railways are not procuring electricity for supplying to the public at large and therefore, there is no purpose of regulating the power procurement or determining the tariff for the supply of power by the petitioner. The standard of performance qua the consumers is not applicable to the petitioner. However, the safety, security and other

issues including the standards required to be maintained are already subjected to detailed regulations under the Railways Act, 1989 and other allied Acts.

- d. It is further stated that the primary activities of the petitioner is operation of the rail network and the distribution of power is undertaken in pursuance to the Railway Act, 1989 and therefore the requirements regarding other businesses of the licensee cannot be applied to the petitioner. Similarly, the conditions of distribution license as existing will have no relevance for the petitioner. It is however stated that the petitioner shall duly comply with the requirements relating to connectivity, grid security and stability as well as conditions of open access.
- e. It is stated that the contention that the petitioner will have to obtain license approval from this Commission is wholly misconceived and denied. As stated hereinabove, the petitioner is a 'deemed licensee' in terms of third proviso to section 14 of the Act, 2003 and the said proviso itself provides that a 'deemed licensee' under third proviso need not obtain any license. The petitioner has made detailed submissions in this regard in the preceding paras and craves leave to refer to same in reply to this paragraph as the same are not being reproduced for the sake of brevity.
- f. It is stated that as regards, the contention of the respondent Nos. 2 and 3 that no objection certificate for grant of open access as a deemed distribution licensee cannot be claimed by the petitioner, as stated hereinabove, the petitioner is authorized entity under the Railways Act, 1989 and a 'deemed licensee' under the Act, 2003 for the purposes of distribution of electricity for the operation and maintenance of railways.
- g. It is stated that the non-grant of open access by respondents is contrary to the public interest as the petitioner is forced to procure more expensive power as compared to the power it proposes to procure through its power purchase agreement (PPA) executed with M/s Ratnagiri Gas Power Plant Limited (RGPPL). The low power procurement cost would ultimately reduce the service cost to the general public at large.

- h. It is stated that the nature of activities insofar as the petitioner is concerned are identical across the country irrespective of a State. The petitioner is an authorized entity under the Railways Act, 1989 and a 'deemed licensee' under the Act, 2003 to distribute power for the purposes of operation and maintenance of railways. Thus, the status of the petitioner is recognized under these Acts, independent of the State Regulations. Even otherwise, it is stated that the petitioner has been recognized as a 'deemed licensee' by the Central Commission in Petition No. 197 / MP / 2015 vide order dated 05.11.2015 and by various other State Commissions. The principle of comity would require this Commission to also consider the petitioner as a deemed distribution licensee, otherwise, it would lead to an anomalous situation where the petitioner is a 'deemed licensee' in one State and as a consumer in other. For example in the State of Andhra Pradesh, the petitioner is recognized as a deemed distribution licensee where as if this Commission was to take a different view it would be a consumer despite the two States being neighbouring States, more so with same open access regulations being in operation in both the States and with the petitioner having same nature of activities.
- i. It is stated that the petitioner is seeking procurement of power at its traction substations in the State of Telangana through open access as a deemed distribution licensee. Further, the petitioner is and has always been ready and willing to pay all the charges that are applicable upon it on sourcing power through open access as a deemed distribution licensee. Further, once the petitioner starts procuring power through open access as a deemed distribution licensee, it shall cease to be the consumer of the distribution licensee. Admittedly, when the petitioner ceases to be the consumer of the distribution licensee it shall not be liable to pay cross-subsidy and / or additional surcharge. As regards, wheeling charges, it is stated that the traction substations of the petitioner are connected directly to the transmission system of the transmission licensee and as such for the purposes of availing power through open access, the petitioner shall not be utilizing the distribution network and as such no wheeling charges shall be payable.

- j. It is stated that the petitioner is a 'deemed licensee' in terms of third proviso to section 14 of the Act, 2003 and the said proviso itself provides that a 'deemed licensee' under third proviso need not obtain any license. Thus, the contention of respondent Nos. 2 and 3 that the petitioner is required to file an application in the prescribed form for obtaining a 'deemed licensee' status is wholly misconceived and denied. The petitioner has made detailed submissions in this regard in the preceding paras and craves leave to refer the same in reply to this paragraph as the same are not being reproduced for the sake of brevity. It is wrong and denied that the petitioner cannot question the action of respondent Nos. 2 and 3. The petitioner reiterates the contents of the petition and the preceding paras.
- k. It is stated that the contents of the replies filed by respondent Nos. 2 and 3 are wrong and denied. It is wrong and denied that the present petition is liable to be dismissed. It is stated that in view of the facts stated and submissions made in the petition and in the present rejoinder it is stated that the petitioner is entitled to the reliefs claimed in the petition.

8. The Commission has heard the counsel for the petitioner and the representative of the respondents in the matter on the dates mentioned in the preamble to this order. It has perused the material available on record. The submissions made on the relevant days of hearing are extracted below:

Record of proceedings dated 29.07.2021:

"... .. The counsel for petitioner stated that the petition is filed for declaration of Indian Railways as deemed distribution licensee in the State of Telangana and also allow open access. He stated that the railways is governed by the Railways Act, 1989. It is a 'deemed licensee' pursuant to the provisions of the Act, 2003. He has explained the provisions of licence in the Act, 2003 and exemptions given under the Act, 2003 in sections 173 and 174. He has referred to orders passed by the Central Electricity Regulatory Commission and the Hon'ble Appellate Tribunal for Electricity in support of the case for deemed distribution and open access. He also referred to the judgment of the Hon'ble Supreme Court in the matter of Northern Railways against U.P.

Power Corporation, wherein an analysis of the Railways Act has been made. The Hon'ble ATE held that the railways is entitled to as 'deemed licensee' status as also open access while considering the order passed by the Maharashtra Electricity Regulatory Commission.

The counsel for petitioner stated that they have been making request for open access since 2016. After dodging the issue for quite some time, the licensee has required them to install ABT compliant meters for allowing open access. Thereafter, the Discoms have informed that the railways are liable to pay the wheeling charges and cross subsidy surcharge. When it was pointed out by the railways that it is not liable to pay the same, it was informed that they are treating railways as an ordinary consumer. It is his case that railways is not liable to pay wheeling charges and cross subsidy surcharge as the power is not being drawn at 33 kV but it is availed at 132 kV. The relevant provision for this purpose is section 39 and not section 42 of the Act, 2003. Section 39 of the Act, 2003 involves non-discriminatory open access in transmission and as such, they are liable to pay transmission charge only, such drawl does not attract cross subsidy surcharge levied under section 42 of the Act, 2003. Therefore, the counsel for petitioner sought declaration of the railways as 'deemed licensee' and to allow open access. The representative of the respondents sought time to make submissions in this matter. He also requested that all the orders and judgments referred by the petitioner be made available to the respondents for arguing the matter.”

Record of proceedings dated 25.08.2021:

“... .. The counsel for petitioner stated that the matter is coming up for the arguments of the respondents. The representative of the respondents stated that the petitioner is seeking two fold prayers, namely, declaration of 'deemed licensee' status and permission to avail open access on long term basis. The petitioner is liable to pay cross subsidy surcharge and additional surcharge as a consumer of the licensees. It cannot be both 'deemed licensee' as well as consumer of the licensee. It has to choose either of them. In case of petitioner being declared deemed distribution licensee as submitted by them, power purchase agreement has to be entered. As at present, they are drawing power at the traction substations for a total demand of 83 MVA and they are likely to enhance to 248 MVA with addition of 165 MVA. In addition to that

they have got a share of 50 MW from Ratnagiri power project. It is his case that in either situation, the petitioner is bound to pay the cross subsidy surcharge and additional surcharge, though it is claimed as 'deemed licensee' under the Electricity Act, 2003 along with the Railways Act, 1989. The open access quantities cannot be greater than the CMD that is being availed by the petitioner, if it is treated as a consumer of the licensee.

The counsel for petitioner agreed with the submissions that the petitioner cannot step into two shoes that is being deemed distribution licensee and simultaneously being a consumer. For the present, it is seeking the prayer as stated in the petition, however, as has been held by the Hon'ble ATE, the petitioner is not liable to pay any charges for open access. He sought directions to treat it as deemed distribution licensee and to allow it to avail open access."

9. The Petitioner sought for rectification of the Record of Proceedings (RoP) dated 25.08.2021 by deletion of the sentence "It is his case that in either situation, the petitioner is bound to pay the cross subsidy surcharge and additional surcharge, though it is claimed as 'deemed licensee' under the Electricity Act, 2003 along with the Railways Act, 1989." stating that the Respondents have specifically stated that in case the Petitioner avails open access in its status as a Deemed Distribution Licensee, it shall not be liable to pay cross subsidy surcharge/ additional surcharge. The Petitioner has not pointed out any factual error in the content of RoP. Addition or deletion in RoP cannot be made at a later date. The Commission has taken note of the Petitioner's submission.

10. The statutory provisions under the Railway Act, 1989, the Electricity Act, 2003 and Regulatory provisions for grant of 'deemed licensee' under TSERC (Distribution Licence) Regulation No.4 of 2016 (made by TSERC in exercise of the powers conferred under Section 181(2) read with Sections 15, 16 and 18 of the Electricity Act, 2003 and all power enabling it in that behalf), on which the parties are relied and are most relevant in this case are extracted below for the sake of convenience:

Sections 11(1)(g), 11(1)(h) and 12(1) of the Railways Act, 1989

11. Power of railway administrations to execute all necessary works:

(1) a railway administration may, for the purposes of constructing or maintaining a railway –

... ..

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and

(h) do all other acts necessary for making, maintaining, altering or repairing and using the railway.

12. Power to alter the position of pipe, electric supply line, drain or sewer, etc:

(1) A railway administration may, for the purposes of exercising the powers conferred on it by this Act, alter the position of any electric supply line,

Section 12, 14, 16, 42(2), 42(4) 173, 174 and 175 of the Electricity Act, 2003

shall “12. Authorised persons to transmit, supply, etc., electricity:- No person

(a) transmit electricity; or

(b) distribute electricity; or

(c) undertake trading in electricity, unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.

... ..

14. Grant of Licence:- The Appropriate Commission may, on application made to it under section 15, grant any person licence to any person –

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area which may be specified in the licence:

... ..

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:

16 Conditions of Licence: The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.

42 Duties of distribution licensees and open access:

... ..

(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 ¹[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.

... ..

- (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 maybe specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”

173 Inconsistency in laws – Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect is so far as it is inconsistent with any other provisions of the Railways Act, 1989 (24 of 1989).

174 Act to have overriding effect – Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

175 Provisions of this Act to be in addition to and not in derogation of other laws – The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.

Relevant clauses under TSERC Distribution License Regulation No. 4 of 2016

1.

- (ii) This Regulation shall apply to a Distribution Licensee including a ‘deemed licensee’ in the State

... ..

2. Definitions

- (4) “Applicant” means a person who has made an application to the Commission for grant of a Distribution Licence or a Deemed Licence;

- (10) “deemed licensee” means a person authorised under the first, second, third and fifth provisos to section 14 of the Act to operate and maintain a distribution system for supply of electricity to the consumers in his / its area of supply
- (14) “Specific Conditions” means the conditions, which are in addition to the General Conditions and not in derogation thereof, which the Commission may lay down specifically for a Distribution Licensee or class of Licensees or a ‘deemed licensee’ or class of ‘deemed licensee’s;

... ..

11. The ‘deemed licensee’ shall make an application in the form specified in Schedule-2 to the Commission to get identified as the ‘deemed licensee’.
12. Authorised persons to transmit, supply, etc., electricity:- No person shall
- (a) transmit electricity; or
 - (b) distribute electricity; or
 - (c) undertake trading in electricity, unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.
13. ‘deemed licensee’ and application of Capital Adequacy Rules: A person who makes an application to get identified as a ‘deemed licensee’ in the form specified in Schedule-2 under sub-section (b) of Section 14 shall also comply with the “Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005” issued by the Central Government other than the ‘explanation’ to Rule 3 of such Rules.
14. Commencement and Duration of the Distribution Licence: The Distribution Licence including a deemed licence shall commence from such date as the Commission may specify and shall be valid for a period of twenty-five (25) years from the date of its

commencement, unless it is duly suspended or revoked by the Commission.

... ..

16. Deposit of copies of Distribution Licence:

16.1 Every person who is granted a Distribution Licence/a deemed licence shall within thirty days of the grant thereof:

... ..

c) arrange to exhibit a copy of such Distribution Licence / Deemed Licence and maps for public inspection during the work hours at its head office, its local office/s (if any) and at the office of every local authority within the Area of Licence.

16.2 Every Distribution Licensee including a 'deemed licensee' shall, within the aforesaid period of thirty days, supply free of charge, one copy of the Distribution Licence and the relevant maps to every local authority, as may be specified by the Commission in this regard within the Area of Licence and shall also make necessary arrangements for the sale of printed copies of the Distribution Licence to all persons applying for the same, at a price not exceeding normal and reasonable photocopying charges per copy.

... ..

49. Provisions applicable to 'deemed licensee's The General conditions of Chapter IV and other provisions of this Regulation, other than specifically excluded Rules shall apply to a 'deemed licensee' under sub-Section (b) of Section 14 and also under the first, third and fifth proviso of Section 14 of the Act.

11. In the present case, the petitioner viz., Indian Railways represented by one of its Zone being South Central Railway, at present is a consumer of respective respondents No. 2 and 3 and is availing power supply at its twenty (20) traction substations situated in the Telangana State for a total demand of 83 MVA (likely to enhance to 248 MVA) at 132 kV voltage level through the transmission network of Respondent No. 1. The petitioner, as per policy decision of the Ministry of Railways

is seeking to avail open access for use of the transmission lines or associated facilities with such line on the inter-State transmission system to draw power supply from a third party viz., M/s Ratnagiri Gas and Power Private Limited, located in the State of Maharashtra, of its share of 50 MW. Such Open Access transaction is an inter-State (Bilateral Transaction) and is regulated as per the provisions under Central Electricity Regulatory Commission (CERC) (Open Access in inter-State Transmission) Regulations, 2008 as amended from time to time. As per the terms of the said regulation the Nodal Agency is SRLDC and the concurrence of TSSLDC is required in advance for submitting the application to the Nodal Agency. While processing the application the TSSLDC shall verify through the distribution licensees for the existence of applicant's infrastructure required for energy metering and time block wise accounting [i.e., existence of ABT metering with associated equipment and Data Acquisition System (DAS)] in accordance with the provisions of the grid code in force and availability of required transmission capacity in the State network.

12. However, in the instant case, the petitioner is not merely claiming open access permission but wants it to be treated as 'deemed licensee' under the Act, 2003 and to allow the same. The petitioner also requires the Commission to direct the licensee to issue 'concurrence' or 'no objection certificate' for grant and facilitation of open access by providing ABT meters and DAS treating it as a 'deemed licensee' and consequently to declare that it is not liable to make payment towards cross subsidy surcharge and additional surcharge on the power procured through open access in its status as a 'deemed licensee'.

13. It is clear that main issue, which is interrelated to all other issues, is in the matter of petitioner's status of 'deemed licensee'. Therefore, it is primarily for consideration before the Commission - What is the jurisdiction of the Commission with regards to treating the status of the petitioner as a 'deemed licensee'? and Whether the petitioner is required to comply with the provisions of the TSERC Distribution Licensee Regulation No. 4 of 2016 as a prerequisite for commencement of operations as a 'deemed licensee'?

14. The Commission views that the 'deemed licence', is confined to section 14 of the Act, 2003 which deals with the grant of licence by the Appropriate Commission to any person for distribution of electricity and it has not curtailed the power of State

Commission so far as the applicability of other provisions is concerned. The interpretation of various relevant terms was necessary prior to grant of 'deemed licence' by the Commission. Also, section 16 of the Act, 2003 provides that -

"The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act."

15. In exercise of the powers under section 181(2) read with sections 15, 16 and 18 of the Act, 2003 the Commission notified Distribution Licence Regulation No. 4 of 2016. This regulation shall apply to a distribution licensee including a 'deemed licensee' in the State and in respect of all applications for distribution licence. As per the said Regulation the petitioner, has to apply before the Commission, to be identified as 'deemed licensee' and shall abide by all the general terms and conditions and other provisions of the regulation as required under chapter IV of the regulation. Thus, the jurisdiction of the State Commission to scrutinise the 'deemed licensee' status of the petitioner is well established under the provisions of Regulation No. 4 of 2016.

16. The contention of the petitioner is that as per the provisions of the Railways Act, 1989 it is empowered to undertake distribution of electricity for the purpose of Railway administration and is recognized notwithstanding anything contrary in the Act, 2003. The Commission notices that it is required to dwell into two central enactments, namely, the Railways Act, 1989 and the Electricity Act, 2003 and the provisions made therein. The Commission noticed that section 11 and 12 of the Railways Act, 1989 has been considered by the petitioner along with other provisions of the said enactment. While the respondents principally relied on the provisions of the Act, 2003 along with rules and regulations applicable thereof. Application of sections 11 and 12 of the Railways Act, 1989 cannot be read in isolation and they have to be read harmoniously with that of the Act, 2003. On plain

reading of the Sections 11 and 12 of the Railways Act, 1989 it is clear that it is intended for the purpose of constructing or maintaining a railway and it empowers railway administration to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway, whereas it is not empowered to distribute electricity as is understood in the electricity law. The Railways Act, 1989 does not refer to operational part of the power supply, which is provided in the Act, 2003. The definition of the term 'distribution licensee' under section 2 (17) of the Act, 2003 emphasizes to operate and maintain a distribution system for supplying electricity to the consumers. Further, Section 2 (19) of the Act, 2003 stresses that the distribution system means the point of connection to the installation of the consumers. Further the term 'supply' in relation to electricity under Section 2 (70) of the Act, 2003, means sale of electricity to consumers. By merely being authorized to construct and maintain a distribution installation under the provisions of the Railway Act, 1989, would not confer the status of 'distribution licensee' to any person. An entity which utilized the entire quantum of electricity for its own consumption and does not have any other consumers, cannot be 'deemed licensee', even by a legal fiction. Section 173 of the Act, 2003 specifically refers to the Railways Act, 1989, but however, it provides that any consistency in the Act, 2003 will give way to the Railways Act, 1989. Further, sections 174 and 175 of the Act, 2003 makes it clear that the Act, 2003 is having overriding effect and also will be in addition to and not in derogation of other laws subsisting for the time being. Thus, the contention of the petitioner that it has attained the status of 'deemed licensee' under the provisions of the Railway Act, 1989 is of no consequence and petitioner has to comply with the provisions of the Act, 2003 and the regulations made thereof.

17. The petitioner has relied on the judgment of the Hon'ble Supreme Court in the matter of General Manager, Northern Railways represented by Union of India Vs. Chairman, Uttar Pradesh State Electricity Board and Others, 2012 (3) SCC 329 as extracted elsewhere in this order. The Hon'ble Supreme Court held that the petitioner is empowered to establish and operate transmission and distribution network, which may be appropriate to allow usage of a system developed by the petitioner for drawing power and using it for its own purposes. At the same time, it cannot be said that it amounts to attaining the status of 'deemed licensee' as

licensee is required to be granted by the Appropriate Commission and in this case, this Commission itself. therefore, the contention of the petitioner is misplaced.

18. Petitioner's further contention is that the status as a 'deemed licensee' is statutorily provided to the petitioner under third proviso to section 14 of the Act, 2003 as is being a department and part of the Central Government under the Ministry of Railways and said proviso itself provides that it need not required to obtain any licence for the purposes of distribution of electricity and hence it is not required to file an application before the Commission. The Commission views that the respondents have rightly pointed out that the petitioner who is eligible to the status of a 'deemed licensee', is bound to follow the Regulation No. 4 of 2016 to attain the status of the 'deemed licensee' in the Telangana State. Hence, at the first instance, the petitioner has to make an application before the Commission in accordance with Schedule-2 of the above said regulation and need to get itself identified as 'deemed licensee' in the Telangana State even though the petitioner has been covered under third proviso of section 14 of the Act, 2003. Therefore, the contention of the petitioner that it is a 'deemed licensee' under third proviso to section 14 of the Act, 2003 cannot be acknowledged unless the petitioner files application before the Commission in accordance with the Regulation No. 4 of 2016. The petitioner is claiming to be a 'deemed licensee' by virtue of the provision in the Act, 2003, without even being so declared by the Commission. Neither the Act, 2003 nor the regulations made by this Commission stipulate that any entity or individual can directly claim to be a 'deemed licensee'. In fact, the provisions as provided in the Act, 2003 require filing of an application for license qua which is also applicable to a 'deemed licensee'. The Regulation No. 4 of 2016 provides the same to give effect to that intention of the Act, 2003. The regulation does exempt certain aspects which are required to be followed an applicant for deemed licence, but otherwise in all other respects, the said regulation has to be complied with. As such, the contention of the petitioner that it is not required to file an application, is nothing short of misapplication of the provisions of the Act, 2003 and regulations thereof.

19. The petitioner placed reliance on the communication dated 06.05.2014 of the MoP clarifying that Railways is a 'deemed licensee'. At the cost of repetition, the said letter is extracted below:

“ I am directed to refer to the Ministry of Railways (Railway Board) letter No. 2002 / Elecl (G) / 161 / 21 Vol-II dated 13th March, 2014 and No. 2004 / Elecl (G) / 152 / 3 Pt-1 dated 27th March, 2014 seeking clarification for ‘deemed licensee’ status to Indian Railways.

2. The issue of granting ‘deemed licensee’ status to Railways under the Electricity Act, 2003 has been examined by this Ministry in consultation with the Deptt. of Legal Affairs, Ministry of Law and Justice. It is clarified that Railways is a ‘deemed licensee’ under the third proviso to section 14 of the Electricity Act, 2003.

3. This clarification may be read with other applicable provisions of the Electricity Act, 2003 and policies made thereunder.

... ..’

20. It is clear that the MoP while clarifying that Railways is a ‘deemed licensee’ under the third proviso to section 14 of the Act, 2003 also stated that the same may be read with other applicable provisions of the Act, 2003 and policies thereunder. This leads to the interpretation of third proviso of section 14 of the Act, 2003, which has been extracted elsewhere in this order. To appreciate this provision as to its applicability or otherwise, the relevant provisions of sections 12 and 14 of the Act, 2003 require consideration, the same are extracted elsewhere in this order. These provisions amply make it clear that no person shall undertake transmission, distribution or trading in electricity except with the prior consent of the Commission. The third proviso has to be read in terms of the above understanding. In fact, section 12 of the Act, 2003 starts with the words ‘no person shall’ which is a non obstante clause. This is a clear indication that unless recognized by the Commission, even ‘deemed licensee’ cannot claim its status. Moreover, section 14 of the Act, 2003 provides for making an application for grant of licence and the third proviso merely does away with making of an application for ‘deemed licence’. It in itself does not constitute completion of ‘deemed licensee’, unless it is recognized by the Appropriate Commission. The petitioner has not filed any application to satisfy the rigours of law that it should be identified as such by the Appropriate Commission and in this case, this Commission itself. In the absence of the above act of the petitioner, this Commission is constrained to hold that it cannot acknowledge the status of a

'deemed licensee' under third proviso of section 14 of the Act, 2003. Thus, no emphasis can be laid by the petitioner in support of its claim for 'deemed licensee'.

21. Parties have referred to section 16 of the Act, 2003 regarding general conditions of license. The said provision is reproduced elsewhere in this order. The said regulation provided for all the conditions including the condition applicable to the 'deemed licensee'. It is also relevant to mention that clause 49 of the said regulation, as extracted elsewhere in this order, specifically mentions of the third proviso of section 14 of the Act, 2003. As such, the petitioner cannot wish away the application of the regulation and the requirement of making application to the Commission for being recognized as a 'deemed licensee'. Also, it is pertinent to mention here that section 16 as extracted above itself mentions about the third proviso, as such the petitioner cannot have objection or grievance that it is not required be declared as 'deemed licensee'. Hence the contention fails.

22. Further contention of the petitioner is that the conditions of distribution licensee as existing will have no relevance however it shall duly comply with the requirements relating to connectivity, grid security and stability as well as conditions of open access. It is stated that clause 49 of Regulation No.4 of 2016 specifies that the general condition of chapter IV and other provisions of this Regulation, other than specifically excluded rules, shall apply to a 'deemed license' under subsection (b) of section 14 and first, third and fifth provisions of section 14 of the Act. Therefore, the petitioner has to follow the provisions of the Regulation No.4 of 2016 unless it is exempted specifically by the Commission and there is no exception to it and hence the contention of the petitioner that the general conditions of licence is not applicable to them as is a 'deemed licensee', is against to the provisions under Regulation No.4 of 2016 and contravene the provisions of the Act and consequently deserves no consideration.

23. The petitioner has made reference to the order of the Central Commission (CERC) dated 05.11.2015 in Petition No. 197 / MP / 2015 recognizing the Railways as a 'deemed licensee' under third proviso to section 14 of the Act, 2003 and no separate declaration to that effect is required from the Appropriate Commission. This contention of the petitioner is a direct contravention that the CERC, then again, in continuity in para 52 (b) in the said order held that –

“The petitioner is a deemed licensee under third proviso to Section 14 of the Electricity Act and no separate declaration to that effect is required from the Appropriate Commission. The petitioner as a deemed licensee shall be bound by the terms and conditions of licence specified or to be specified by the Appropriate Commission under proviso to Section 16 of the Electricity Act.”

Moreover, the said order is subject matter of appeal before the Hon’ble ATE in Appeal No. 276 of 2015, which is pending consideration till date. The said appeal also deals with the issue of status of ‘deemed licensee’ to the petitioner and has not attained finality. Thus, the order of the Central Commission is not binding on this Commission.

24. The petitioner relied on the interim order passed by the Hon’ble ATE in the appeal referred above. At any rate the said order passed by the Hon’ble ATE, though explains and considers the petitioner as ‘deemed licensee’, is only an interim order, is no binding nature on this Commission as it being not a party to the said proceedings. As such, in the absence of a final law being made, any observations would be of the nature of obiter dicta and cannot be treated as a binding ruling. Thus, the interim order in the said appeal of the Hon’ble ATE cannot be accepted in favour of the petitioner.

25. The next issue that is required to be consideration is in issue of concurrence or ‘No Objection certificate’ by respondent No.1 for allowing open access to the petitioner as ‘deemed licensee’ in terms of the Act, 2003. In this regard, the parties have relied on the definitions as provided under clauses 17 and 70 of the Act, 2003 and the same are extracted below:

“(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;

... ..

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;”

26. Both the definitions amply demonstrate that the entities, who wish to undertake supply of power are required to be authorized to carry on the distribution of power supply and undertake the sale of energy. Authorization or sale would arise

only when the competent authority, empowered under the Act, 2003, has recognized the same in terms of regulations thereof. The purpose of such establishment is for supply of power to consumers. Mere fact that the petitioner claims to be a 'deemed licensee' is of no consequence at all since admittedly, the entire power purchased by the petitioner is for its own use and consumption and not for the purpose of distribution and supply/ sale to consumers. At this stage, it is also relevant to notice the definition of open access in the Act, 2003, which is extracted below:

“(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.”

27. Insofar as transmission activities are concerned, the provisions of the Act, 2003 require the existing licensee to provide non-discriminatory open access, however, the distribution licensee can provide open access as per the provisions and subject to terms and conditions as laid down in the Open Access Regulation No.2 of 2005 notified by the Commission. The action of the petitioner appears to be that it is presuming to be a 'deemed licensee' ipso facto claiming open access by the subsisting licensee. The petitioner as stated supra has not even got notified as a 'deemed licensee' and in the absence of the same, it cannot lay claim for open access as 'deemed licensee'. Such a claim hinges on the petitioner proceeding to make proper application for declaring it as a 'deemed licensee' and thereafter seek open access. Thus, the contention of the respondents that it is not competent to issue concurrence or 'No Objection certificate' for grant of open access to the petitioner as a 'deemed licensee' is appropriate and cannot be refused and contention of the petitioner that it has the right to seek open access as a 'deemed licensee', in the absence of the same being recognized by the Commission, is untenable,

28. In support of the claim, the petitioner has stated that several other Commissions have allowed open access to the petitioner. From the material available on record, the Commission notices that nothing is placed on record to support the contention of the petitioner. It is not clear from the submission of the

petitioner, whether such permission was accorded upon obtaining the orders of deemed licence or otherwise and in those States whether there existed a regulation for the petitioner to be recognized as a 'deemed licensee'. Even assuming that all the above parameters are available, the orders of the other Commissions are not binding on this Commission. Therefore, the contention of the petitioner to allow it to avail open access, as 'deemed licensee', does not survive, fails and is not being considered.

29. The petitioner alleged that despite payment of amounts, the licensees are not completed the task of installing the ABT meters and DAS required for undertaking open access. More on the inconsistent stand taken by the transmission licensee, at one stage, the transmission licensee required the petitioner to make payments towards ABT meters and DAS and on the other hand stated that unless the petitioner acquires declaration from the Commission as to its licensee status, it would not allow open access. Suffice it to state that the Commission is in agreement with the submissions of the licensee in the absence of the petitioner being declared as a 'deemed licensee', there appears no action that is required by them to be undertaken. As long as the petitioner is consumer of the licensees, it shall be appropriate for the licensee to consider open access subject to the provisions of the Act, 2003 and the regulations made thereof by this Commission. Even otherwise, it is not for this Commission to grant or refuse open access and it is for the licensees to decide in terms of the regulations as to its feasibility or otherwise. Therefore, this contention would not survive.

30. The petitioner claimed that it is not liable to pay wheeling charge, cross subsidy and additional surcharge being a 'deemed licensee'. The Commission is required to undertake making of regulations under section 181 of the Act, 2003. Clause (2) of the said section enables the Commission to make regulations in sub-clauses (i) to (n) for determination relating to transmission charges, cross subsidy and additional surcharges. Also, sub-clauses (p) and (q) allow the Commission to determine cross subsidy and additional surcharge on charges of wheeling of electricity. The wheeling charges itself are to be determined under section 62 (1) (c) of the Act, 2003. It cannot be said that the petitioner is straight away exempted from payment of wheeling and transmission charges or for that matter, the cross subsidy

and additional surcharge as determined under the relevant provisions. There is no specific exemption provision under the Act, 2003 for the charges except surcharges relating to captive generation. Therefore, even if the petitioner is declared as 'deemed licensee', it is bound to pay the same as the same are governed by the regulations of the Commission.

31. Reference has been made to the Hon'ble Supreme Court judgment dated 25.04.2014 in Civil Appeal No. 5479 of 2013 in the matter of M/s Sesa Sterlite Limited vs Orissa Electricity Regulatory Commission in the order of the CERC and the Hon'ble ATE. The relevant portion is extracted below.

"... ..

41. No doubt vide Notification dated 3rd March, 2010 Central Government has added an additional proviso to Clause (b) of Section 14 of the Electricity Act viz. the Appellant shall be deemed to be licensee for the purpose of the said clause w.e.f. the date of notification of such SEZ. It is on this basis, the argument of the Appellant is that as it is already a deemed Distribution Licensee it need not apply for this license to the said Commission before entering into the PPA and the State Government is bound to grant the License. This contention is negated by the Appellate Tribunal on two grounds which are as follows:

- (i) There has to be a harmonious construction of SEZ Act and Electricity Act to give effect to the provisions of both the acts so long as they are not consistent with each other in the opinion of the Tribunal. The provisions of Section 51 of SEZ Act, 2005 are to be considered along with the provisions of Section 49 of the said Act. Accordingly, in view of the provision of the SEZ Act, 2005 and consequent notification by the Ministry of Commerce and Industry, the deemed distribution licensee status as claimed by the Appellant should also be tested through other provisions of the Electricity Act, 2003 and Electricity Rules, 2005, for certifying its validity and converting it into a formal distribution licensee. In fact, the Appellant has submitted to the jurisdiction of the State Commission, by filing a petition before the State Commission seeking for approval of the PPA and also for grant

of distribution licence. The Appellate Tribunal, thus queried as to how could the Appellant now question the jurisdiction?

- (ii) The Appellate Tribunal pointed out that there are none provisos to Section 14 (b) of the Electricity Act and another is added in respect of the Appellant vide Notification dated 3rd March, 2010. A reading of these provisos would indicate that some of them confer status of deemed distribution licensee on certain specified entities who are not required to take separate licence from the State Commission under this Act whereas some other provisos merely declare the party as 'deemed licensee' and nothing specified as to whether they are required to obtain the licence or not. However when it is specially provided in proviso 4 and proviso 8 and 2 that the Damodar Valley Corporation and State Government are not required to obtain licence, and other provisos do not confer such privilege, they would be required to obtain licence.

42. Further discussion on this aspect by the Appellate Tribunal is as under:
"42. Keeping this in mind, the statute makers by the notification dated 3.03.2010 have inserted the additional proviso to Section 14(b) of the Electricity Act. Admittedly, the development and operation of the SEZ are two distinct activities. Thus, the jurisdiction of the State Commission to scrutinise the deemed distribution status of the Appellant is well established in view of the Section 49(1) of SEZ, Act, 2005 and the notification of the Central Government dated 21.03.2012. Therefore, the contention of the Appellant that the State Commission dealt with the matter relating to the grant of distribution licence by going beyond its jurisdiction is misplaced.
43. It is noticed that the Ministry of Commerce and Industry (Department of SEZ Section) has accorded SEZ status to the Appellant for development and operation and maintenance of sector specific Special Economic Zone for manufacture and export of aluminium on the condition that the Appellant should establish captive generating plant as stipulated in the approval

letter of Ministry of Commerce and Industry but it is pointed out the still the plant has not been established for various reasons. If Captive generating plant of 1215 MW had been established as per the condition inside the SEZ area, the question of power purchase from Sterlite Energy Limited under the pretext of distribution licensee status would not have arisen. That apart, the State Commission has framed Orissa Electricity Regulatory Commission (conduct of business) Regulation, 2004 under the powers conferred under Section 181 of the Electricity Act, 2003. The distribution of electricity Licence (Additional requirement of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005 framed by the Central Government also would apply to the Appellant for distribution licence in addition to the requirements of State Commission's Regulations.

45. Section 174 of the Electricity Act provides that the provisions of the Electricity Act shall have to overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than Electricity Act. That apart, Section 175 also provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force.
47. The perusal of the notification dated 03.03.2010 would make it evident that the legislation's intention for declaring the developer in SEZ area as deemed distribution licence, is confined only to clause-b of Section 14 of Electricity Act, which deals with the grant of license by the appropriate State Commission to any person for distribution of electricity. The said notification has not curtailed the power of State Commission so far as the applicability of other provisions is concerned. The interpretation of various relevant terms was necessary prior to grant of deemed distribution licence by the State Commission. Therefore, the State Commission rightly acted upon those provisions. As a matter of fact, by the said amendment by

inserting another proviso to Section 14 (b), the context has not been changed as claimed by the Appellant.

49. As correctly indicated by the State Commission, the definition of term "distribution licensee" as enumerated under Section 2 (17) of Electricity Act, 2003, emphasizes upon the distribution licensee to operate and maintain a distribution system and supply of power to the consumers. Considering the definition of 'supply' in Section 2(70), the supply here means sale of electricity to consumers. By merely being authorized to operate and maintain a distribution system as a 'deemed licensee', would not confer the status of distribution licensee to any person. The purpose of such establishment is for supply of power to consumers. Mere fact that the Appellant claims to be a deemed distribution licensee is of no consequence at all since admittedly, the entire power purchased by the Appellant is for its own use and consumption and not for the purpose of distribution and supply/sale to consumers.
50. An entity which utilizes the entire quantum of electricity for its own consumption and does not have any other consumers, cannot, by such a notification, be deemed to be distribution licensee, even by a legal fiction. By virtue of the legal fiction created by the notification dated 3.03.2010, the Developer of SEZ notified under the SEZ Act, who distributes electricity can be deemed to be a distribution licensee. Thus, this legal fiction cannot go further and make a person who does not distribute electricity to the consumers as to distribution licensee. Therefore there is no merit in the contention of the Appellant.
43. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, in the present case no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Act. In order to avail further benefits

under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. We have to keep in mind the object and scheme of SEZ Act which envisages several units being set up in a SEZ area. This is evident from a collective reading of the various provisions of the SEZ Act viz. Section 2 (g) (j) (za) (zc), Section 3, 4, 11, 12, 13 and 15. There can be a Sector Specific SEZ with Several Units i.e. for IT, Mineral Based Industries etc. but instances of single unit SEZ like in the present case of the Appellant may be rare. The Notification dated 03.03.2010 providing for the "Developer" of SEZ being deemed as a "Distribution Licensee" was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a Developer like the Appellant who has established the SEZ only for itself.

44. Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the Appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this Appeal which is accordingly dismissed."

32. It is clear from this judgment of the Hon'ble Supreme Court that the petitioner herein also despite there being any other consumer, is required to apply and get a declaration under the regulations of the Commission as to its status as a 'deemed licensee'. Further, the Hon'ble Supreme Court also clarified that the petitioner is bound to pay such charges as are applicable and determined by the Commission, whether it undertakes supply of power to any other consumers or not. Thus, the petitioner cannot claim open access ipso facto but has to comply with the Act, 2003 and the regulations thereof before being declared as a 'deemed licensee'.

33. Lastly, the petitioner sought prayer in the petition as if it had already been granted licence albeit deemed by invoking the provisions of the Railway Act, 1989 and the Act, 2003. The petitioner having not been recognized as such by this Commission, this Commission cannot proceed to grant such a relief in view of the discussion set out in the earlier paragraphs. It is also noticed that the prayers through interrelated cannot happen unless the petitioner has at first instance complied with the Act, 2003 and the regulations thereof. As such, the Commission is constrained not to accept the reasoning set out by the petitioner and would lean towards the submissions of the respondents. The petitioner is supposed to follow the procedures laid down in the Regulation No.4 of 2016 to get itself identified as deemed distribution licensee. Therefore, the petitioner has no case to get any relief.

34. Upon thorough examination and detailed consideration of the provisions under the Railway Act, 1989, the Act, 2003 and the applicable regulations thereof, considering the reasoning given by this Commission in the earlier paragraphs, the petition cannot succeed and is accordingly dismissed. In the circumstances, the parties shall bear their own cost.

This order is corrected and signed on this the 14th day of March, 2022.

Sd/-
(BANDARU KRISHNAIAH)
MEMBER

Sd/-
(M.D.MANO HAR RAJU)
MEMBER

Sd/-
(T.SRIRANGA RAO)
CHAIRMAN

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