TELANGANA STATE ELECTRICITY REGULATORY COMMISSION

5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 47 of 2022

Dated 31.07.2023

Present

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

Between

M/s. J. K. Fenner (India) Limited,
Plot No.4 & 22, Phase IV, I D A, Patancheru,
Sanga Reddy District 502 319. … Petitioner

AND

1. Southern Power Distribution Company of Telangana Limited,
   Corporate Office. # 6-1-50, Mint Compound,
   Hyderabad 500 063.

2. Transmission Corporation of Telangana Limited,
   Vidyut Soudha, Hyderabad 500 082.

… Respondents

This petition came up for hearing on 18.08.2022, 05.09.2022, 22.09.2022, 17.10.2022 and 21.11.2022. Sri. P. Srinivasa Rao, Advocate for the petitioner appeared on 18.08.2022 and 21.11.2022 and Sri. P. Sampath Kumar, Advocate representing Sri. P. Srinivasa Rao, counsel for petitioner appeared on 05.09.2022 and 22.09.2022 and there is no representation for petitioner appeared on 17.10.2022. Sri. Mohammad Bande Ali, Law Attaché for respondents appeared on 18.08.2022, 05.09.2022, 22.09.2022, 17.10.2022 and 21.11.2022. The petition having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s. J. K. Fenner (India) Limited (petitioner) has filed a petition under Sections 9, 61 and 86(1)(a), (b) and (e) of the Electricity Act, 2003 (Act, 2003) read with

Regulation No. 2 of 2005 and Regulation No. 1 of 2017 seeking directions to the respondents to grant open access and credit the energy injected into the grid towards captive consumption. The averments of the petition are extracted below:

a. It is stated that the Government of India (GoI) had recognized the solar energy as one of the important sources of energy for the future and has launched the National Solar Mission on 14.11.2009 under the name "*Solar India*" with an objective to maximise generation of solar power. The erstwhile state of Andhra Pradesh has framed certain guidelines and a policy called as A.P. Solar Policy 2012 (Solar Policy 2012) and Government Orders were notified in G. O. Ms. No. 39 dated 26.09.2012. The objective of this policy is to promote the generation of power from solar sources, since it is one of the important renewable energy sources. The policy aims to encourage, develop and promote solar power generation in the State with a view to meet the growing demand of power in an environmentally and economically sustainable manner, to attract investments in the State for the establishment of solar power plants, to promote investments for setting up manufacturing facilities in the state, which can generate considerable local employment and also to encourage decentralised, distribution, generation system in the State to reduce T&D losses. These are some of the objectives and the purposes sought to be achieved under the said policy.

b. It is stated that post the bifurcation of the State, the newly carved State of Telangana had issued a solar policy in the year 2015 valid for a period of five (5) years. It has provisions aiming at creating an enabling environment for prospective solar power developers to harness substantial quantum of solar power in the best possible way. These aims are in turn expected to meet the objectives of the Government of Telangana (GoTS) to provide competitive and reliable power supply to its consumers and also to ensure a sustainable fuel mix in the long run. The policy further intends to promote solar parks, promote public and private investment in generation, to promote grid connections and off-grid solar applications and effective energy conservation measures. This policy encourages the developers of solar power particularly to reduce the existing gap between demand and supply of power. It is relevant to state that, the policy was further made applicable to the projects set up within the State and it provides a facility of grid connectivity based on both photo voltaic (PV) as

well as solar thermal technologies of the projects set up for sale of power to TSDISCOMs and as a matter of right under the statute the 100% captive use of power to its own industry situated at a distance from the power plant.

c. It is stated that the State Government also brought a new industrial policy popularly known as ‘single window’ to encourage establishment of companies, entrepreneurs, plants, etc.

d. It is stated that after detailed study and deliberations on the solar policy of the GoTS and on-going development in solar generation in light of the said solar policy, the petitioner, which is a public limited company was established under the provisions of the Companies Act, 1956 having corporate identity number: U24231TN1992PLC062306, has setup a solar power plant at Hyderabad where its manufacturing facility is situated. In this pursuit, the petitioner has identified the required land at Gajawada village and installed 2.5 MW solar power plant out of 5 MW, approved by the authorities for captive consumption.

e. It is stated that the Board of Directors of the petitioner have decided to establish a power plant for production of energy as the petitioner has established an industry manufacturing V-belt and oil seals, situated at Plot No.4 and 22 at I.D.A., Patancheru, Sanga Reddy (formerly Medak) District, wherein the industry functions continuously in perennial shifts making the consumption of electricity essential round the clock. Therefore, the petitioner has attracted more fully the growth in solar power plants in the State of Telangana as per policy. The GoTS has announced the said policy with its will and wisdom and invited the interested persons and entrepreneurs to set up their plants. After its announcement by the State, it was entrusted to follow the guidelines set out in its policy in 2015. Attracted with the policy announced by the State of Telangana, the petitioner has identified a suitable land and has acquired it to construct necessary plant for generation and operation situated at Gajwada Village, Regode Mandal, Medak District, Telangana**.** The sole object of installing the solar plant by the petitioner is to develop the solar power for its captive use to utilise the development opportunities available subsequent to the reforms introduced in the electricity sector by giving more thrust for generation of power through non-conventional sources.

f. It is stated that upon acquisition, the petitioner has developed the same in the required dimensions and has applied with all required documents to the

respondents on 03.02.2016 for the sanction of technical approval about the feasibility by placing a detailed project report for consideration and sought for sanction to the proposed captive power plant.

g. It is stated that after careful examination of the project report of the petitioner, the respondents vide letter No. CGM (Comml & RAC) / SE (IPC) / F. JK. Fenner/ D. No. 2023 / 15, dated 22.03.2016 have granted technical approval to the proposed solar power plant to connect it at 33 kV voltage level through a 33 kV line from the site proposed to set up the plant. Also, the petitioner had obtained the other permissions from the concerned departments, such as industries, roads and buildings, revenue and the local body i.e., Gram Panchayat.

h. It is stated that the respondent No.2 has also informed to the petitioner stating that it had issued a sanction vide Lr. No. CE (SLDC) / SE (SLDC) / DE (SCADA) / F. J. K. Fenner / D. No.128 / 18, dated 11.04.2018 as SLDC clearance to synchronisation of 3 MW solar power plant of petitioner, subject to fulfilment of all the procedures and requirements, as per TSTRANSCO solar guidelines as the REMC becomes operational, and the related data as applicable will have to be provided mandatorily to SLDC. In pursuance of the respondent No.2 order above, the 1st respondent has issued a memo. No. CGM (IPC & RA) / SE (IPC) / F. JK Fenner / D. No. 53 / 18, dated 13.04.2018 to synchronize for 2.5 MW out of 5 MW solar power project of the petitioner under ERC mechanism for captive use and the SE / OP / Medak was requested to synchronise and further directed to follow up the actions indicated.

i. It is stated that after issuance of above directives Superintending Engineer of respondent No.1 has forwarded a copy of commissioning of the power plant vide in Lr. No. SE / OP / MDK / Coml / F. No. / D. No. 209 / 18-19, dated 28.04.2018 addressed to the CGM (IPC & RA) stating that the plant has commenced operation in the presence of the officials of respondents No. 1 and 2 and the petitioners on 13.04.2018. Subsequently, the Divisional Engineer, Operations, Medak of respondent No.1 showing the joint meter readings for June, 2018 at 33/11 kV substation duly issued bills, showing statement for the month with its parameters. The power generated from the plant has been duly injected into the grid of the respondent and the units are recorded since the date of its synchronisation to till date. The respondent No.1 did not pay any tariff for the electricity received from the plant operation source. However, the same

was supplied to its registered consumers and collected money from them, which includes the petitioner Industry, such other registered consumers within the licensee area.

j. It is stated that the petitioner had set up the plant for the purpose of their captive use and have made an application dated 26.03.2019 to the respondents No. 1 and 2 seeking grant of long-term open access (intra state). As the plant is setup for 100% captive consumption, the petitioner has invested heavily by borrowing loans from various banks. However, due to non-generation of any revenue from the solar power plant, the petitioner is put into severe hardships in repaying the loan borrowed for the said power plant. Similar request was made under representation dated 06.05.2019 to the Secretary for Industries and Commerce, GoTS. The petitioner has made another representation dated 20.01.2020 to the respondents No.1 and 2 to accord sanction for open access and adjust the meter readings for captive consumption. The petitioner have made yet another representation dated 11.02.2020 to the Hon'ble Minster for Energy, which remained unattended. Another letter dated 02.03.2020 to the respondents Nos. 1 and 2 showing the particulars of units generated and exported to the grid readings are sent to them, requesting to provide the open access at the earliest so as to enable them to avail the benefit and minimise the losses.

k. It is stated that as per letter dated 18.06.2020 to the Energy Secretary, the petitioner pointed out the hardships being faced by the petitioner due to COVID-19 pandemic. Further letters dated 19.10.2020 were sent to the 1st and 2nd respondents showing the details of units received by them from the petitioner plant and to sanction the open access and also at last to the respondent No. 3 duly enclosing a brief note on the issue to consider and do need full. Nonetheless, there is no response from their end till date and on account of it the sole purpose and the object sought to be achieved by setting up a plant could not be fructified and the entire exercise became futile, though plant is set up and intended for 100% captive purpose for its own use.

l. It is stated that under the relevant statutory provisions that are applicable/ relevant for the present case such as provisions of the Act, 2003 as well the TSERC regulation in force including circulars, policy guidelines of Union of India as well the State Government, 2015 for consideration for approval of open

access for captive power plant would emerges as and are applicable for this case are as follows:

a. *Section 2(8) of the Act defines Captive Generating Plant ("CGP") to mean a power plant set up by any person to generate electricity primarily for his own use.*

b. *Section 2(49) of the Act defines Person to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.*

c. *Section 9(2) of the Act vests a statutory right in the hands of a captive generator to get open access to the grid for carrying electricity to its captive user.*

d. *The 4th proviso to Sections 39(2)(D)(II), 40(c)(ii) and 42(2) of the Act, 2003 mandate that no CSS is payable for availing open access on such captive consumption. Rule 3 of Electricity Rules, 2005 stipulates requirements to be fulfilled by a power plant to qualify as CGP as also a group captive. In terms of* Rules:-

   (i) *A CGP has to fulfil the twin tests regarding ownership (at least 26%) of equity and consumption (at least 51 %) of power consumption.*

   (ii) *In case of a generating station owned by a Special Purpose Vehicle ("SPV"), specific unit(s) of such generating station may be identified for captive use, provided that the twin criteria of ownership and consumption is satisfied only with respect to such Unit and not the entire generating station.*

m. It is stated that the National Electricity Policy (NEP) at para Nos.5.2.24-5.2.26 and the Tariff Policy under clauses 5.12 and 6.3 issued by the GoI under Section 3 of the Act also promote captive generation. As per Section 9 of the Act, 2003 it is imperative to contend that open access for captive use is a matter of right provided under the statute and the respondents cannot be permitted under law to circumvent such right by creating hindrances beyond the ambit of the Act and Regulations**.** The petitioner was acting on the Solar Power Policy, 2015 of State of Telangana and they had set up Industry for smooth and continuous operations of the plants, also established captive power plants, the unit was synchronized with the grid at given point of time by 2018. The plant has been set up with sophisticated machinery both automatic and electronically operated equipment along with computer monitoring as per the rules and norms prescribed and are in force. The industry of petitioner, situated at IDA Patancheru being continuous and requiring steady, smooth and uninterrupted electricity supply of high tension and considerable quantity, it is intolerable for the plant and machinery and for the process of manufacture to suffer breakdowns, power cuts, load shedding, tripping, fluctuations and surge in

power supply. In such breakdowns the industry does not just face the loss of production time but there is a potential of deterioration of raw material and the electronically operated plant and machinery being damaged permanently. The documents as required under open access regulations, 2005 and the amended Regulation, 2017 for banking were submitted to the nodal agency while applying for open access and the said documents would suffice the purpose of granting open access for captive use.

n. It is further stated that, under clause 11(m) of the Telangana Solar Power Policy, 2015, the respondent No.2 is mandated to convey its consent to an open access applicant within a period of 21 working days where existence of necessary infrastructure and availability of capacity in the distribution network has been established. Further as per the said regulations, if the respondents fail to communicate any deficiency or defect in the application of the open access to the applicant within 21 working days from the date of receipt of the application, then in such a scenario the requisite consent of respondent No.2 will be deemed to have been granted. Further it is pertinent to note that the status of captive generating plant and captive users in under rule 3 of the Rules, 2005, has to be determined at the end of every financial year. It is borne on record that the petitioner have applied as early as on 28.04.2018 by now four financial years have been lapsed and COVID-19 pandemic took a huge toll upon the fate of the industry as well the financial condition of power plant. As such the entire action of the respondents No.1 and 2 by not considering the application of the petitioner is in derogation of the said rule. The open access has to be provided without any discrimination under two different categories, viz., captive open access and non-captive open access and for both the categories, the non-discriminatory use of transmission lines have been mandated. Under Section 42 of the Act, 2003 the distribution open access is subject to regulation of the Commission. Wheeling is allowed subject to reasonable restrictions and charges. Yet the case of the petitioner is with reference to intra state intra DISCOM open access which is denied and the petitioner is put to severe hardship and unsavoury situation, whereby it is a situation where it can neither recover the investment made nor is getting benefit out of such investment. This puts the petitioner into severe financial hardship.

The petitioner is in the midst of scissor like a nut for being cracked between the financial institutions and the respondents on either side.

o. It is stated that the open access regulations issued by the Commission postulates that the open access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act, 2003 and in these regulations. Upon fulfilment of the aforesaid conditions determined on an annual basis, the power plant qualifies as a captive generating plant. It is also clear that the Rules, 2005 issued by Union of India provide for determination of the status of the CGP on an annual basis at the end of the financial year. Rule 3 itself recognizes that the status of a power plant is dynamic that is a power plant can be a CGP in a particular year but can lose such status in any subsequent year if the twin-conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year. If the distribution licensee delays or denies open access, in a manner to defeat the concept of captive generation and consumption under the above rules will have no meaning and purpose and it is nothing but open access facility was wrongfully denied or delayed, by the respondent No. 2.

p. It is stated that, the procedure for long term access under the regulations of the Commission which are in force*:*

Regulation No.2 of 2005, i.e., Terms and Conditions of Open Access Regulation, 2005.

2(f) "Open Access Agreement" means an agreement entered into between a license and the application to avail open access to the licensee's network for transmission and/or wheeling of electricity.

Clause 5.1 For all long term open access transactions, the Nodal agency for receiving and processing applications shall be the State Transmission Utility (STU)."

Clause 10:- Procedure of application for long term open access:-

"10.1 xxxxx

10.2 xxxxx

10.3 xxxxx

10.4 xxxxx

10.5 All applications received within a calendar month e.g., during 1st April to 30th April, shall be considered to have been filed simultaneously. This window of a calendar month shall keep rolling over i.e., after the expiry of a monthly window, another window of the duration of the next calendar month shall commence.

10.6 Based on system studies conducted in consultation with other agencies involved including other licensees, if it is determined that long–term open

access sought can be allowed without further system-strengthening, the Nodal Agency shall, within 30 days of closure of a window, intimate the applicant(s) of the same.

12. Open Access Agreement:-

Clause 12.1. Based upon the intimation by the Nodal Agency to the open access applicant, the applicant shall execute an open access agreement with the concerned Licensee(s), which shall broadly set out the information as given in Annexure-2 to this Regulation. The Licensees shall draft a standard open access agreement format and get the same approved by the Commission within 30 days of coming into effect of this Regulation.

12.2 xxxxxxx:

12.3 It is submitted that, subject to the capacity being available, the Licensee(s) shall, after the applicant for long-term open access has completed all the pre-requisite formalities, including the execution of open access agreement, make arrangements to provide access to the applicant within the time period specified in the Andhra Pradesh Electricity Regulatory Commission (Licensees) duty to supply of Electricity on Request) Regulation, 2004, (No.3 of 2004):"

The APERC (Interim Balancing & Settlement Code) Regulation No.2 of 2006 as are adopted by the Commission. As per Clause 2(h)

> *"Open Access Agreement" means an agreement entered into between the Transmission and/or Distribution Licensees and the persons availing Open Access facility under clause 12 of the Open Access Regulation.*

2(f) "Open Access Regulation" means the A.P. Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation, 2005 (Regulation No.2 of 2005).

… …

2(k) "Open Access Generation" means a generating Company using or intending to use the transmission system and/or the distribution system of the Licensees in the state for supply of electricity to a scheduled consumer or OA Consumer under the Open Access Regulation."

Banking As amended by Regulation No.1 of 2017

Appendix 3 as amended by Regulation No.1 of 2017.

q. It is stated that in terms of Section 9(2) a captive user has the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use. The liberal provision in the Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost-effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry that encourages captive power plants to be connected to the grid.

r. It is stated that the copy of order issued by the Ministry of Power (MoP), GoI is relied upon. Though it was addressed to a particular individual company, it aims and emanates the purpose of provisions of Act, 2003 and different kinds of

considerations shall be envisaged as per the provisions of Act, 2003, as it is not inconsistent and the same can be used for general public as well under the sector. It is crystal clear by referring the above clarification of the GoI, that the moment an application is made by the captive generating plant for its own use as in the case of the petitioner, it is mandated on part of the respondents Nos. 1 and 2 to accord sanction for the same. However, the same could not be chosen to act upon despite of several representations and reminders are submitted by the petitioner.

s. It is stated that the GoI has issued clarification regarding provisions of Act, 2003 on a letter of one of the industry. It was stated as follows:

> ***"****Section 9(2) of the Electricity Act, 2003 gives a right to open access to a person who has constructed a captive generating plant and maintains and operates such plant (as defined under Electricity Act,2003 and Rules made there under) for the purpose of carrying electricity from the captive generating plant to the destination of his use. The provision is distinct from the open access which is to be introduced in phases by State Electricity Commission (SERC) under Section 42 for consumers other than captive users on payment of cross subsidy surcharge, if any.*
> *Therefore, the right to open access for captive generating plants flows from Section 9(2) and not from Section 42, 42(4) and hence is not dependent upon introduction of open access by SERC under Section 42 of Act.*
> *However, supply of surplus power from a captive generating plant to non-captive consumers will be covered by the provisions of Section 42 of the Act****".***

t. It is further stated that the GoI has also issued clarification on the annual basis as defined in Explanation (1)a to Rule 3 of Rules, 2005. In any power purchase agreement (PPAs), the first year is counted from the date of commercial operation dated (COD) of the plant to the last date of that financial year and subsequent full financial year that is from 1st April, to 31st March is considered full year. As such, the requirement of consumption for qualifying as '*captive use'* may be considered on pro-rata basis for the initial year (that is for partial year) and on '*Annual Basis'* for subsequent year as mentioned in Rules, 2005. The above was notified and amended on 26.10.2006.

u. It is stated that the petitioner's plant commenced its operations and produced power from the date of its synchronisation done on 13.04.2018. By now, lakhs of units were received by the respondent No.1 and the same were supplied to its registered consumers by collecting tariff price as determined by the Commission. However, till date, the petitioner did not receive any returns from

the respondents, though the power produced by the petitioner is continuously fed into the grid. As stated in the aforementioned paragraphs, the petitioner plant has been set up by incurring heavy investment of funds raised from banks/ financial institutions and interest is being paid to the Institutions by the petitioner. Even the Commission has determined that power purchase from the solar generators to be paid by the respondent No.1 as per tariff orders at the rate of unit for each financial year. Right from the date of synchronisation that is 13.04.2018 to March, 2022, the particulars of units of electricity fed into the grid of the respondents as per statement of billing units recorded at meter reading submitted to the respondent No.2 nodal agency are as follows:

a. From 13.04.2018 to March, 2019 - 4124930 units.
b. From April, 2019 to March, 2020 - 4530510 units.
c. From April, 2020 to March, 2021 - 4399790 units.
d. From April, 2021 to February, 2022 - 3909060 units.

v. It is stated that despite repeated requests from the petitioner, the licensees are not approving the agreement and not giving effect to the provisions of Act, 2003 and the regulations, due to which. the petitioner has been put into severe hardships in repaying the loans borrowed from banks. Since non-payment of loans to the banks and financial institutions will lead them to declare it as non-performing asset along with initiation of proceedings under SARFESI Act, the petitioner, has been paying EMIs regularly on the borrowed funds with great difficulties even though no revenue is being generated out of this solar plant. If the licensee further delays the approval, it would push the petitioner into deep trouble and may seem not encouraging to the industries, which they may not come forward to put up plants in the State of Telangana and this could also jeopardise industrial development in the State. It is the bound duty on the part of the respondents to implement the policy of the State Government in letter and spirit. The reluctance/delaying by the respondents in not allowing open access is nothing short of disobeying and totally against the policy of the State Government.

w. It is stated that in view of the said facts and circumstances, particularly when there is no source of revenue being received by payment of bills for the energy banked into the grid of the respondents, the petitioner finds it difficult to repay the loan amount to the bank availed for this project and to meet its obligation of payment of salaries, wages, allowances etc to the employees and workers

which are met through other sources by the petitioner. As stated supra, the petitioner has borrowed money from the banks/financial institutions and the instalments payments are being made as per the terms of the loan even though not getting any return from the respondent for the power produced by the petitioner and fed into the grid of the respondent. The power produced by the petitioner has been fed into the grid of the respondents since the date of synchronisation that is 13.04.2018. However, till date no payment has been received from the respondents for the units fed into the grid of the respondents. Further delay from the respondents will put the petitioner into huge financial difficulty, without any fault on its part. Unless the approval of open access is accorded which is necessary to enable the energy generated by the petitioner for its captive use, the whole purpose for establishing the unit is defeated and without any return from it the investment made remains unsuccessful**.** The banks/financial institutions which sanctioned loan to the petitioner plant are not ready to take cognisance of the fact of pending receipt of revenue from the power transferred to respondents and are consistently insisting on payment of EMI strictly as per terms of the loan granted to the said solar power project of the petitioner. Despite having been brought to the notice of all these practical difficulties to all the respondents repeatedly and requested for grant of open access, the issue did not see any progress and stands still, as on date and the petitioner is unable to secure the approval of open access from the respondents in spite of all the statutory requirements such as fee etc., are full filled and the plant has commenced its operation and synchronised to the respondents grid and the power generated from the plant was received and sold it to the consumers of the respondents.

x. It is stated that, this action on part of the respondents are highly unjust and untenable. In as much as the objectives of the Solar Policy, 2015, issued by the State of Telangana, the policy postulates granting of approval for open access as per the Act, 2003 as well regulations of the Commission are mandated the respondents to accord approval for it on the moment the application is submitted by the generator plant. It is an admitted fact that the plant COD as 13.04.2018 by now four years have passed away and it is not in dispute that the power generated by the plant is very much essential for captive use and without any fault of the petitioner all the requisite norms are fulfilled the

respondents are not inclined to sanction the same for the reasons best known to them. Moreover, the petitioner is not seeking any third-party sale or trade of energy or commercial usage, but it is a case only for its captive use for their own Industry which requires continuous power supply around the clock and plant as well the Industry are situated within the Respondents licensee area. The Act, 2003 which was considered by the Hon'ble Apex Court Section 42 mandates to consider the application of open access as a matter of right. It is not in dispute that the commercial operation date is on 13.04.2018 and it is an admitted fact that the petitioner had filed the application as early as on 28.04.2018 and paid requisite fee of Rs.11,800/- seeking approval of open access for its captive use. There is no justification in whatsoever manner for the respondents in prolonging the sanction for open access as per the procedure envisaged under the Regulations in force framed by the Commission.

y. It is stated that, the State has prepared certain measures for improving ease of doing business in the State of Telangana. The benefits for developers, entrepreneurs etc., were provided including exemption of wheeling, transmission and generating utilities of the State have to take necessary steps as and when it is required to do so. However, the request of the petitioner was kept on hold and remains unattended for no fault of the petitioner though the petitioner is entitled for the same under the Act, 2003. Regulations of the Commission, as well the Policy, 2015 of the State Government. However, the respondents denied this facility to the petitioner which is illegal and unjust being a State instrumentality. It is relevant to mention here that the State after issuing the above Policy, 2015 has provided a mechanism known as "*single window mechanism"* for solar power projects. However, this has not been implemented in letter and spirit.

z. It is stated that the petitioner has been repeatedly bringing it to the notice of respondents about approval of open access applied and has already been placed on record with them in line with the existing Solar Policy, 2015 issued by the State of Telangana and espousing its case for according approval of the Commission as well. However, the respondents have unilaterally declined to grant approval for captive use of power and admittedly, as on date no amount has been paid to the petitioner though the power generated by it has been duly drawn by the respondents and sold it to their consumers and cashed it. The

petitioner has been deprived of the legitimate benefits for which indisputably the petitioner is entitled to under the Solar Policy, 2015.

aa. It is stated that it is not in dispute that the State, in its domain and in a larger interest to develop the electricity sector provided certain incentives and facilities to the solar power developers such as petitioner and it is an admitted fact that the same is in force and operating the field. The petitioner has set up the generating plant by raising funds borrowing from the banks, financial institutions basing upon the Solar Power Policy 2015, of the State of Telangana wherein various incentives, opted facilities are provided. It is not the case of the Petitioner seeking any of those benefits and other incentives that are provided under the State solar power policy but a mere request to allow the open access for its own use as a captive power plant. The petitioner had applied for open access during the policy of 2015 of the State Government is subsisting and in force which was in force till 2020. Till date there is no action by the respondents on the application of petitioner on open access without any just and reasonable cause and the policy has expired. Further, the Commission has also framed necessary regulations for continuing the benefits under the same set of guidelines to achieve the objective of promotion of power generation through non-conventional sources more particularly solar plants. However, the same have been ignored by the respondents and in *de horse* to the policy, not providing the open access facility and not according to the approval for use of the power generated from the petitioner plant. The policy is issued to encourage development of solar power and not for curtailing the incentives. At any rate the present policy of 2015, of the State is also in furtherance of such objectives. It is stated that, the petitioner has put in its best efforts in implementing solar power plant, purely motivated with the benefits and incentives announced in the Solar Policy, 2015. However, all the sincere efforts put in by the petitioner have become futile with the acts of the respondents culminated with the harsh conditions specified in the letter No:CGM(IPC)/SE(IPC)/F.JK Fenner/D.No. 913/21, dated 28.10.2021 of respondent No.1 for according approval for open access. This is nothing but usurping the right of property of the petitioner on the power generated and fed into the grid and getting the benefits out of it by selling to other consumers and collecting the tariff at the rate as determined by the Commission.

ab. It is stated that, the Commission has also got ample power to promote generation of electricity from renewable sources under Section 86(1)(e) of the Act, 2003. Therefore, the generating plants using renewable sources of energy are required to be viewed as separate generating system for local area consumption as and when connected to the grid under the Act, 2003. The energy is consumed primarily in the respective local area leading to reduction in T&D losses. The respondents have not chosen to allow the petitioner for captive use for the reasons best known to them and is wholly unjust, irrational and contrary to the above solar policy, Act, 2003 and other regulations in force framed by the Commission as have been extracted above. It is important on the part of the respondents to ensure compliance of the policy in total once the scheme is framed under a policy and entrusted to the agency for implementation. Therefore, the sole purpose of captive use benefit emanated from the statute as a right of the petitioner, and not allowing the same, is absolutely unjust, untenable and the same is hit by doctrine of promissory estoppel. The State has evolved a solar policy in 2015 and the petitioner, based on the solar policy, made an application seeking open access while the policy was in force. On account of delay in considering and sanctioning open access by the respondents, the policy tenure got lapsed in 2020. At any rate, the petitioner is not claiming any other benefits enumerated under the State solar policy, 2015. At this juncture, since the power plant is established for captive use may be allowed on par with the other captive generators. Hence, there is no hindrance or any other operational constraints to accord approval for open access. More so when the plant is already synchronised to the grid of the respondents.

ac. It is stated that on account of the above position, the petitioner has been put into severe hardships in meeting its financial obligations in the prevailing COVID-19 pandemic situation particularly due to non-generation of any revenue out of this solar project which has been implemented in pursuance of the solar policy, 2015 as well under the provisions of the Act, 2003 and Rules, 2005. More so the request of the petitioner open access application is exclusively for the captive use is within the respondents licensee area. Unless, the Commission intervenes in the matter and grants necessary direction to the respondent to allow the petitioner for captive use by providing open access

facility as per law, the petitioner, will be pushed into further difficulties and hardships and thereby the entire objectives sought to be achieved by the petitioner's plant will get jeopardised and the entire exercise will become futile and ultimately no benefit or purpose will be achieved for which the plant was installed. Hence, the entire action of the respondents suffers from incurable legal impediments and is liable to be set aside under the circumstances for the following among other grounds:

i. It is stated that the respondent should have seen that the policy decision issued by the State Government providing the option to use the power for its own use being captive plant.

ii. It is stated that the petitioner even waited for a long period after the COD and it commenced generation and has injected into the respondents grid, till date there is no amount paid as per tariff determined by the Commission, despite repeated requests. Several representations made to the respondents remained which qualifies to get the approval of open access as per the scheme of Act, 2003, Regulations that are in force and applicable unattended for no fault of the petitioner.

iii. It is stated that the petitioner intends to avail only the facility to use the power as captive power plant, the same ought to have been allowed by the respondents without any demur, or without reference to any objection as it is statutory right of the petitioner coupled with regulations in force to provide the facility.

iv. It is stated that the respondents No.1 and 2 are not allowing the petitioner to achieve the objectives of use of power as captive plant purpose at destination of Industry and there is no revenue generation even to meet the regular salaries, wages, other allowances to be paid to the workers in the plant.

v. It is stated that the respondents ought to have chosen to examine the representations of the petitioner for open access as per Section 9 of Act, 2003 which is different from general category under Section 42 of Act, 2003. Hence, there is no other alternative to the petitioner except to approach this Commission for redressal of its grievances urged above and the entire action on part of the respondents is against the principles of legitimate expectation.

vi. It is stated that the respondent ought to have seen that once the policy involving public interest has been issued by the State Government, the same shall be implemented by the respondents and put it into practice since they being State Government owned instrumentalities. But denying the benefit of open access for captive use which was provided by the State in the larger interest of electricity sector to promote solar power, the denial by the respondents are wholly illegal, unjust and untenable and consequently the Commission may further direct to implement it in its letter and spirit.

ad. It is stated that the fact is that the respondents did not allow implementation of the solar policy of the State which is contrary to the Act, 2003 and the regulations. Further no prejudice or harm would be caused to the respondents

by implementing the regulations above which are in force by allowing the petitioner unit as captive generating plant in letter and spirit as the respondents are owned and controlled by the State. Since the principal owner directed its subordinate or agent to do something, it is the duty of the respondents to oblige it and put in practice. Per contra, grave injustice and prejudice would be caused to the petitioner as they would suffer on account of curtailing the benefits envisaged under the policy to draw the energy generated for its own use by treating the power plant as captive power plant. It will lead to severe financial crisis apart from hardship as the petitioner's unit will be forced to procure power instead of the power that is generated by the petitioner at a high cost from the generator that would cause severe loss to the petitioner and the dependents on the industry.

ae. It is stated that this action of disallowing open access for captive use is nothing but a high-handed action of the respondents against the petitioner contrary to the existing provision of the Act, 2003, regulation, policies and orders in force as it would be forced to close down its plant if the same is not allowed to function in accordance with the applicable law. Further, it would be very difficult to bear the burden of carrying the operation of production of energy without any recovery of investment made, despite the energy is injected into the respondent's grid connectivity. All those dependent on the industry, including workers and their families and those indirectly dependent would be affected due to non-recovery of revenue and disallowing the open access as captive power generation for its own use of 100% power generated, within the respondent's jurisdiction.

2. The petitioner has sought the following prayer in the petition.

"(i) to direct the respondents to grant open access approval to the petitioner solar power plant as per the application dated 28.04.2018.

(ii) To declare that the action of respondents in disallowing the petitioner for use the power generated from captive power plant by providing all facilities as required under the Electricity Act, 2003, Regulations etc., as illegal, contrary to the Telangana State Solar Policy, 2015 which came into effect from 01.06.2015 passed by the Commission.

(iii) To direct the 1st respondent to account for the units consumed by the petitioner's industry as per the meter reading for the service connection bearing No.SGR 034 situated at Plot No.4 and 22 Phase-IV IDA, Patancheru Sanga Reddy District by adjusting the units generated and

fed into the grid from the petitioner's captive power plant located at Gajawada Village, Regode Mandal, Medak District.

(iv) To pay for the additional units generated and pumped into the grid even after adjusting the consumption of above service connection that is SGR-034."

3. The respondent No.1 has filed counter affidavit praying to dismiss the petition with costs in the interest of justice, `the averments thereof are extracted as below:

a. It is stated that the petitioner approached this office with a proposal to setup 5 MW Solar power plant at Gajawada (V), Regode Mandal, Sangareddy District, Telangana on 03.02.2016. The technical feasibility was accorded vide letter dated 22.03.2016 to solar power plant of the petitioner at 33 kV level.

b. Accordingly, orders were issued by the office of this respondent vide letter dated 13.04.2018 to synchronize 2.5 MW solar plant of the petitioner out of 5 MW solar Power project of the petitioner to 33/11 kV Gajawada SS at 33 kV level under REC mechanism as per the compliance report received from SE/Operation/Medak and the same was synchronized to grid on 13.04.2018.

c. It is stated that the contention of the petitioner that *"the power generated from the plant has been duly injected into the grid of the respondent and the respondent No.1 didn't pay any tariff for the electricity received from the plant operation source. However, the same was supplied to its registered consumers and collected money from them, which includes the petitioner Industry, such other registered consumers within the licensee area*" is false and baseless as the respondent No.1 is a non-profit organization working on no loss and no profit basis. Moreover, due to the injection of such unscheduled/variable power from solar plants such as the plant of the petitioner, the schedules of the DISCOM are being deviated. As a result of which the DISCOM is being penalized by way of deviation charges. Due to injection of power from solar generators such as the petitioner, the long-term conventional generators with whom the respondent No.1 has PPA's are being backed down to maintain grid stability. But this respondent has to pay fixed charges to long term and short-term generators (coal-based generators) who entered PPAs with the respondent No.1 which is causing additional burden and financial stress to respondent No.1.

d. It is stated that as per clause 5 of Regulation 2 of 2005 (Terms and Conditions of Open Access to Intra-State Transmission and Distribution Networks), the

nodal agency for processing the LTOA applications is state transmission utility (STU) and for processing STOA applications is State Load Dispatch Center (SLDC). The relevant clause is reproduced below:

"5. Nodal Agency:

5.1 For all long-term open access transactions, the Nodal Agency for receiving and processing applications shall be the State Transmission Utility (STU)."

5.2 For short-term open access transactions, the Nodal Agency for receiving and processing applications shall be the State Load Dispatch Centre (SLDC). The SLDC shall, however, allow short-term open access transactions only after consulting the concerned transmission and/or distribution licensee(s) whose network(s) would be used for such transactions"

e. It is stated that the petitioner has applied for intra state long term open access on 11.09.2018 after the lapse of 5 months from the date of synchronization. It is stated that any open access application shall be processed duly verifying the feasibility at various stages viz., line/feeder capacity, transmission and distribution capacity, substation feasibility, availability of metering provisions as per CEA norms and TSERC proceeding orders at the proposed consumer end to avail open access power, compatibility check of the installed ABT meters with the EBC software etc. The process also involves verification of design margins and margins available for spare transmission or distribution network where information of the whole transmission or distribution network is to be gathered at various levels.

f. It is stated that the State has become rich in solar power generation. Large number of solar power developers came forward and established their power plants and they have been injecting the solar based energy into the grid which has brought down the per unit cost of solar power resulting in overloading of grid, causing disturbance to grid stability and financial stress to this respondent company as stated above in this counter affidavit.

g. It is stated that in such view of the matter that is due to fully loaded grid constraints, a committee was constituted with the officials of TSSPDCL, TSNPDCL and TSTRANSCO to carryout detailed feasibility system study for taking decision in respect of financial impact on this respondent No.1 and maintenance of grid stability for the purpose of allowing open access to the new open access users. The committee after carrying out detailed study approved the list of open access applicants including the petitioner's solar plant that have

synchronized their generating plants and waiting for open access facility and directed to carry out the settlement of the energy injected into the grid from the date of open access agreement only. Accordingly, the petitioner was requested vide letter dated 24.12.2020 to furnish an undertaking to the effect that, we will not claim any charges for the inadvertent power up to the date of open access agreement. But the petitioner did not respond to the same.

h. It is stated that as per Section 108 of Act 2003, the State Commission is required to be guided by directions of the State Government in the matters of policy involving public interest. Consequently, TSSPDCL being a distribution licensee shall be directed by the Commission for implementation of any State Government policy matters. The same is extracted as below:

> "Section 108. (Directions by State Government):- (1) In the discharge *of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.*
>
> *(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."*

i. It is true that, the petitioner has applied for LTOA on 11.09.2018. But the processing of LTOA is very lengthy process as stated at para's 6 to 8 of the affidavit and this respondent has communicated to furnish the undertaking as per the decision of committee after conducting the feasibility study which is not provided by the petitioner till date.

j. It is stated that the contention of the petitioner that the action of the respondents in not considering the application of the petitioner is in derogation of the rules is untenable and baseless. In fact, this respondent has allowed non-discriminatory open access to many solar developers similar to the petitioner to wheel their generated solar power to their scheduled consumers under captive/third party sale. It is further stated that the reasons for delay detailed in this affidavit has no relation with that of the captive status as contended by the petitioner.

k. It is stated that the averments of paragraph 17, 18, 19, 20 & 21 of the affidavit under reply being substances of clause 2(f), 5.1, 10, 12 of the Regulation 2 of 2005 (terms and conditions for availing open access) , clauses 2(h), 2(f) and 2(k) of Regulation 2 of 2006 (interim balancing and settlement code) and its

subsequent amendments, Section 9(2) of Act 2003 and it's directives and clause 3(1)(a) Rules 2005, do not call for reply.

l. It is stated that as per Regulation 2 of 2014 (2nd amendment to Regulation 2 of 2006) which came into effect from 01.04.2014, banking facility can be availed by the wind/mini hydel/solar power developers subject to certain terms and conditions for drawl of banked energy. As per the said condition the developers are required to communicate the block wise drawl from banked energy and the same shall be wheeled to their consumer accordingly. For that matter solar power developer should have open access agreement with the DISCOM. Regulation 2 of 2014 also clearly postulates that the unutilized energy which remained with the grid has to be purchased by the DISCOM at 50% of average pooled power purchase Cost (APPC). Regulation 2 of 2014 defines the word 'banking*'*. The same is extracted below:

> *"c(2) "Banking" means a facility through which the unutilized portion of energy (underutilization or excess generation over and above scheduled wheeling) from any of the three renewable generation sources namely Wind, Solar and Mini-hydel, during a billing month is kept in a separate account and such energy accrued shall be treated in accordance with the conditions laid down in Appendix-3 of the Regulation.".*

m. It is stated that after issuance of solar power policy-2015 on 01.06.2015, the concept of deemed banked energy was introduced vide clause 11 (e) of TSPP as a promotional measure. The same is extracted below:

> *"For captive/third party sale, energy injected into the grid from date of synchronization to open access approval date will be considered as deemed energy banked"*

n. It is further stated that as per the powers vested under Section 108 of the Act, 2003, the State Commission shall be guided by such directions in the matters of policy involving public interest as the State Government may give it in writing to the State Commission. The Commission on receipt of such written directions regarding any policy from the Government, after conducting public hearing and after obtaining the comments from the stakeholders adopts the recommendation of the Government and directs the licensee to implement the same.

o. It is stated that any policy issued by the State Government has to be adopted by the DISCOM as per the terms and conditions or regulations formulated by the appropriate Commission that is in State level it is the State 'ERC'. No specific orders/regulations are issued by the Commission relating to the

deemed banking facility. Therefore, TSSPDCL has acted as per the existing regulation which doesn't speak about settlement of deemed banked energy for the period from the date of synchronization.

p. It is stated that, the Commission has issued Regulation 1 of 2017 that is 3rd Amendment to (Interim Balancing and Settlement Code for Open Access Transactions) Regulation 2 of 2006 on 25.03.2017, wherein, the Commission has amended the Appendix-3 of principal regulation and the relevant banking clauses of the said amendment are reproduced below:

"6. For captive generator, the energy injected into the grid from date of synchronization shall be considered as deemed banked energy.

7. For third party sale, the energy injected into the grid from the date of synchronization till the date prior to captive consumption to open access approval date will be considered as deemed banked energy.

8. The unutilized banked energy shall be considered as deemed purchase by DISCOM(s) at the average pooled power purchase cost as determined by TSERC for the relevant year."

q. It is stated that clause 2 of Regulation 1 of 2017 clearly postulates that the 3rd Amendment to (Interim Balancing and Settlement Code for Open Access Transactions) Regulation 2 of 2006, (Regulation 1 of 2017) shall apply to a generating company having captive consumption who has no open access agreement with the licensees but having connection agreement only which is extracted below:

"3. Extent of Application
The amendment to the Interim Balancing & Settlement code set out in this regulation shall apply to a generating company (having captive consumption) who has no open access agreement with the licensee and having connection agreement only."

r. It is stated that as the petitioner neither have open access agreement nor have banking agreement as provided under Regulation No.1 of 2017, the petitioner cannot contend that, it has not received payment towards the unscheduled energy injected into the grid. There is no law or regulation providing settlement of energy in the absence of open access agreement or banking agreement with the licensee. The petitioner is required to enter into open access agreement or should have banking agreement to invoke Regulation No.1 of 2017.

s. It is stated that the averments and allegations made in the petition that are not specifically dealt with herein may be deemed to have been denied by this respondent. The petitioner may be put to strict proof of the same.

4. The respondent No. 2 has filed counter affidavit and the averments stated there in are extracted as below:

a. It is stated that the respondent No.2 is the nodal agency for the processing of intra-state long term open transactions. As per clause 10.6 of the APERC intra-state open access Regulation No.2 of 2005, which was adopted by TSERC,

> *"Based on system studies conducted in consultation with other agencies involved including other Licensees, if it is determined that Long-Term open access sought can be allowed without further system-strengthening, the Nodal Agency shall, within 30 days of closure of a window, intimate the applicant(s) of the same."*

From the above clause, it is clear that the nodal agency can process the long-term open access application only in consultation with the other licensees involved and issue open access approval only after it is determined that the open access can be allowed. In the present case, the application of the petitioner for long term open access transaction involving both generator and consumer, is connected to the distribution network of the respondent No.1. In view of clause 10.6 of the Regulation 2 of 2005, respondent No.2 being the nodal agency can process the long-term open access (LTOA) application only after the receipt of technical feasibility from TSSPDCL.

b. It is stated that the petitioner had filed a LTOA application for transmission of 2.5 MW under captive use on 07.05.2018. As the EBC compatibility reports of interface ABT meters were not enclosed with the LTOA application, the petitioner was addressed vide letter dated 11.05.2018 to furnish the same. The petitioner had furnished the same on 24.05.2018.

c. It is stated that as per the clause 13.1 of Regulation No.2 of 2005

> *"All Long-Term and Short-Term open access users shall provide special energy meters capable of measuring active energy, reactive energy, average frequency and Demand integration in each 15-minute time block, with a built-in calendar and clock and conforming to BIS/CBIP Technical Report/IEC standards at all entry and exit points."*

Further as per clause 14.1 of this regulation

> *"The licensees shall carry out load flow studies, system impact studies, etc., taking into account the existing capacity commitments and future projections of capacity requirements for open access users, load growth as projected by distribution licensees, growth of generation, network topology and consumption pattern, network investments, Repairs and Maintenance programs, etc., to determine the capacity available to accommodate open access transactions."*

Hence, in order to confirm the above conditions, the LTOA application of the petitioner was forwarded to the licensee involved in the transaction that is respondent No.1 on 11.09.2018 for furnishing the technical feasibility and to confirm the availability of open access metering.

d. It is further stated that, as per clause 10.6 of the Regulation No. 2 of 2005, The LTOA sought can be allowed in case the system studies conducted in consultation with other agencies involved including other licensees, determine that LTOA sought can be allowed without further system-strengthening. Clause 10.6 of the Regulation No.2 of 2005 is already extracted above.

e. It is stated that the application of the petitioner for long term open access transaction is involving both generator and consumer connected to the distribution network of respondent No.1. Hence, the feasibility report of respondent No. 1 is essential for processing of open access application. In view of clause 10.6 of the Regulation No.2 of 2005, the respondent No. 2 being the nodal agency can process the LTOA application only after the receipt of technical feasibility from respondent No. 1.

f. It is stated that for issue of LTOA, the time period allowed by the Regulation No. 2 of 2005 is 30 days from the closure of the application window of a month. In this regard, it is stated that the processing of open access application involves availability of technical feasibility from other licensees involved in the transaction, availability of open access metering at both the generator & consumers ends as per CEA norms and Commission proceedings along compatibility of the installed ABT meters with the EBC software for settlement of energy which have to be ensured before granting approval which takes time. Also, if there is no open access metering, the same has to be installed which also takes considerable time. Further, the deemed open access is not possible if there are no special energy meters at both generator and consumer ends. It is stated that without receiving any information from the other licensee, the nodal agency can neither reject nor return the application of the petitioner.

g. It is stated that the Section 9(2) of the Act, 2003 reads as follows.

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

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

From the above, it is clear that open access cannot be granted to the petitioner only on the basis of the fact that it is a captive generator as the Act, 2003 itself specifies that open access can be provided subject to availability of adequate transmission facility which is to be ascertained by all the licensees involved in the transaction. In the present case, as both the generator and consumer of the open access transaction are connected to the distribution system of the respondent No. 1, the LTOA application of the petitioner can be processed only after the feasibility report is received from TSSPDCL.

h. It is stated that the respondent No. 2 being a nodal agency for LTOA will process the open access application for approval if the concerned DISCOM that is the respondent No. 1 (in the present case) issues technical feasibility. This respondent, therefore, stated that the request of the petitioner for grant of approval of open access of its 2.5 MW solar plant under captive use can be processed by this respondent only after receipt of technical feasibility from respondent No.1.

i. It is stated that in the circumstances mentioned above, petitioner cannot question the action of this respondent No.2. The petitioner does not have any case much less prima facie case and the balance of convenience does not lie in favour of the petitioner.

Hence, it is prayed that the Commission may be pleased to dismiss the petition.

6. The petitioner has filed a rejoinder to the counter of the respondent No.1 and the averments of it are extracted below:

a. It is stated that the petitioner has gone through the counter filed by respondent/DISCOM and the allegations which are not admitted herein under are deemed to have denied by this petitioner.

b. It is stated that it is absolutely incorrect to state that the respondent was a non-profit organization and the respondent is put to strict proof of it as the Hon'ble Apex Court said that an organization like respondent are running their business affairs on commercial basis and are State owned companies. As such they are bound by the policies, guidelines issued by the State Government. As far as

this petitioner is concerned, at no point of time, it has deviated the lines of injection since the date of synchronization of plant with the grid. Hence, the respondent cannot allege such deviation have caused inconvenience to the grid stability and thereby to the entire sector problem and the same cannot be a reason for non-granting of sanction for captive use of the petitioner. The requirement of system study for taking decision in respect of maintenance of grid stability for the purpose of allowing open access to new users and till such time the open access applications including this petitioner have to wait is absolutely incorrect and contrary to existing regulations. It is stated that there are instances that the respondent(s) have allowed so many users to avail open access. Moreover, the petitioner application is for grant of approval for captive use which is distinguished from the other open access for third party sale. It is the case of the respondent that despite so many system problems they have allowed several developers to avail open access and captive consumption. In view of the admitted facts the petitioner's case be considered on par with those who have been allowed open access including open access users undertaking third party sales.

c. It is stated that the contention of the respondent about the captive status of the petitioner is also incorrect and contrary to the facts on record, as the object and purpose of setting up of the plant is for the utilization of the power generated for captive consumption only but not for sale to any third party. It is stated that it is true the respondent has issued letter dated 24.12.2020. The contents of the said letter are nothing, but harsh conditions and this petitioner was forced to accept the power injected into the grid of the respondent has treated as inadvertent but not in pursuance of the synchronization of the plant with the grid and the generated power all through this without any payment as was determined by the Commission. This contention of the respondent is contrary to the facts born on record, which was clearly recorded the units of the power generated by the petitioner plant and fed into the grid as meter reading noted by the nodal agency, which is a statutory body as mentioned in the above original petition. Hence, the contention of the respondents in this para are incorrect and cannot be countenanced for the purpose of adjudication of the issue raised in the present petition.

d. It is stated that the statement of billing units as recorded at meter reading was submitted to the nodal agency from time to time and it has been clearly explained in the original petition, hence not repeated here as the same forms part of this rejoinder.

e. It is further stated that the respondent that in line with the State Solar Power Policy, 2015 dated 01.06.2015 deemed banked energy was introduced in clause 11(e). However, the same is not provided in the regulation as framed by the Commission is contrary to the said policy. Inasmuch as Regulation No.1 of 2017, it has been framed as amendment to the original Regulation No.2 of 2006 to give effect to the provisions of the said policy only. In the clauses set out by the respondent in its counter, it has misinterpreted and projected the same as per their convenience.

f. It is stated that it says there is no law or regulation providing settlement of energy in absence of open access agreement or banking agreement with licensee, which is contrary to regulatory decision taken by the Commission and is absolutely false. It is in contravention of the clause 6 of the Regulation No.1 of 2017, which was so extracted in the counter affidavit of the respondent. Moreover, the petitioner has connection agreement and the transmission of power generated from the plant and it is evident that the same is being utilized within the area of the licensee. Viewed from any angle, there is absolutely no justification in whatsoever manner to deny the relief sought for in the petition by the petitioner as per catena of decisions of the Commission as well by the Hon'ble High Court.

g. It is stated that it is therefore prayed that the Commission may be pleased to allow the petition.

7. The respondent No.1 has filed the written submissions on behalf of respondents, which are extracted below:

a. It is stated that the learned counsel for the petitioner in the above case relied on the order in W.A.No.80 of 2019 of M/s Mahalaxmi Profiles Private Limited (MDK-735), but the said order is not applicable to the facts and circumstances of the present case.

b. It is stated that the alternate submission made by the learned counsel for the petitioners is with reference to Section 70 of the Contract Act 1872.

i. It is stated that Section 70 of the Contract Act 1872 reads as follows:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

ii. It is stated that to attract the ingredients of Section 70 of the contract Act, doing of or delivery of a thing by a person for another person is required.

iii. In the present case, the petitioner did not do anything nor delivered anything for the benefit of the respondent. The petitioner established 2.5 MW Solar plant for it's own consumption. The petitioner happened to inject the unsolicited energy to the grid, which was neither accepted nor enjoyed by the respondents. Therefore, the petitioner is not entitled to claim compensation for such energy which is thrusted upon the respondents without their consent.

c. It is stated that the respondents rely upon the order in O.P.No.32/2014 passed by the Karnataka Electricity Regulatory Commission (KERC) on 26.11.2015 in "*Lalpur Wind Energy Private Limited Vs. Karnataka Power Transmission Corporation Limited & Others"* wherein, similar question fell for consideration. The KERC extracted the commentary under Section 70 of the contract Act by the Learned Authors, Pollack & Mulla, 14th Edition, Volume II and the same reads as follows:

"… … A claim on the basis of something done against the express provisions of statute cannot be claimed under this Section. …"
"… … Where the Defendant informed the Plaintiff that he did not want the work done, the work was not done lawfully. …"
"… … The voluntary acceptance of the benefit of the work done or under delivery is the foundation of the claim under Section 70. The person on whom the benefit is conferred, enjoys the benefit voluntarily. It means that the benefit must not have been thrust upon him without his having the option of refusing it. Nobody has a right to forcing the benefit upon another. …"

i. It is stated that the KERC having extracted the said commentary of Section 70 observed as follows in para 9(e) at page 21(6 line from downwards) and the same reads as follows:

"Further, it can be noted that the electrical energy injected into the Grid cannot be stored and it would be consumed instantly and there would be no option for the Respondents, either to accept or reject the said energy. Therefore, it is not a case of enjoying the benefit voluntarily by the Utilities, but it amounts to thrusting it upon them, without having the option of refusing it"

ii. It is stated that it thus become very much clear from the aforementioned decision of KERC that the petitioners cannot take aid of Section 70 of the contract Act to claim compensation in respect of the energy thrusted upon by them to the grid of the respondents without their consent and knowledge.

iii. It is stated that the aforementioned order of the KERC in O.P.No.32/2014 was challenged before the Hon'ble Appellant Tribunal for Electricity (APTEL). The Hon'ble APTEL by order dated 8th February, 2019 in Appeal No. 37 of 2016, upheld the order of Hon'ble KERC in O. P. No. 32/2014.

d. It is stated that as per applicable regulations in force, the energy generated by renewable power developers, which was under drawn by the scheduled consumers and fed into the grid was earlier considered to be inadvertent energy and the same was free of cost as per clause 10.3 of the Regulation No. 2 of 2006.

e. It is stated that banking facility was later extended to Solar developers vide Regulation No. 1 of 2013. The concept of deemed banked energy was not introduced as a promotional measure of renewable source.

f. It is stated that the terms and conditions for drawl of banked energy were amended by way of Regulation No. 2 of 2014 which precisely formulated that the developers need to communicate the block wise drawl from banked energy and the same shall be wheeled to their consumer accordingly as per regulations in force. As per Regulation No. 2 of 2014 banking facility was provided to the solar power developers who have open access agreement. Regulation No. 2 of 2014 further provides that the unutilized banked energy is deemed to have been purchased by DISCOM at 50% APPC.

g. It is stated that the Telangana Solar Power Policy 2015 (which came into effect from 01.06.2015) cannot be applied to the present case without there being any direction or guideline of the Commission as per Section 108 of the Act, 2003.

h. It is stated that in the circumstances mentioned above, these respondents state that the Commission may be pleased to appreciate the fact that the petitioner is not entitled to the facility without having valid open access agreement or banking agreement.

i. It is stated that the Commission while issuing Regulation 1 of 2017 clearly stated that the said regulation was mainly intended to facilitate the accounting of energy for banking by a generating company (having captive consumption),

who has no open access agreement with the licensees and having connection agreement only, by entering a separate agreement.

j. It is stated that the respondents alternatively state as follows:-

Clause 2(d) & (f) of Appendix 3 of Regulation 2 of 2014 reads thus:-

"(d) The energy banked between the period from 1st April to end of 31st January of each financial year which remains unutilized as on 31st January, shall be purchased by the Discoms, as per the wheeling schedule.

(f) The purchase price payable by the DISCOMs for unutilized banked energy will be equivalent to 50% of the Pooled Cost of Power Purchase, applicable for that financial year, as determined by the Commission under RPPO/REC Regulation (1 of2012)."

k. It is stated that the Commission may be pleased to appreciate the fact that the unscheduled energy injected by the petitioner from the date of synchronization is without any agreement relating to banking of energy with TSSPDCL. More so, there was no regulatory framework for applying the Government policy in respect of energy injected for that particular period.

l. Hence it is prayed that the Commission may be pleased to pass appropriate orders.

8. The Commission has heard the parties and also considered the material available to it. The submissions made by the parties on various dates are extracted for ready reference.

Record of proceedings dated 18.08.2022:

"… … The counsel for the petitioner stated that it appears the respondents have filed their counter affidavit in the matter, however, the same has not been received by him. He made an enquiry with the office of the Commission and it was informed that the counter affidavits have been filed by the respondents separately. As such, he had collected copies of the same from the office of the Commission only the other day. Therefore, time may be granted for filing rejoinder, if any. The representative of the respondents stated that the counter affidavits have been filed with the Commission long back and copies of the same were also sent to the petitioner. This statement of the representative of the respondents is denied by the counsel for petitioner. In the circumstances, the Commission construed it appropriate to accede to the request of the counsel for petitioner and accordingly, the matter is adjourned."

Record of proceedings dated 05.09.2022:

"… … The counsel for the petitioner stated that the petitioner has received the counter affidavit and he needs further time to file rejoinder in the matter. The rejoinder is already sent for signature of the petitioner. The representative of the respondents has no objection. Accordingly the matter is adjourned."

Record of proceedings dated 22.09.2022:

"… … The counsel for the petitioner stated that the counter affidavit had been filed and he is now filing rejoinder in the matter. Since similar matters are

reserved for orders and he would submit arguments on the next date of hearing. The representative of the respondents has no objection. Considering the submissions of the parties, the matter is adjourned."

Record of proceedings dated 17.10.2022:

"… … As there is no representation on behalf of the petitioner, the matter is adjourned."

Record of proceedings dated 21.11.2022:

"… … The counsel for petitioner stated that the petition involves grant of open access for captive consumption. The project was conceived for 5 MW, however, it had been established to the extent of 2.5 MW. The petitioner has sought to utilise the said capacity for captive consumption only and therefore, sought open access for transmitting the energy to its unit. The project was synchronized by the licensee in the year 2018 itself, but open access was not granted till date. In the year 2020, a letter had been addressed by the licensee imposing certain conditions for considering open access. The conditions imposed as enumerated would entail causing burden and also would amount to causing injury to the project. The petitioner has been generating power and injecting the same into the grid. Now one of the conditions for granting open access is that the petitioner is sought to be restrained from claiming any amount towards the power injected into the grid by treating it as infirm power. This is opposed to the principles laid down in Section 23 of the Indian Contract Act, which speaks of void contract. The actions of the licensee constitute one part of the contract though not written down and the agreement so treated is not a void contract. But any conditions which cause injury to the other party would constitute violation of the provision of the Contract Act.

The counsel for petitioner has stated and highlighted the fact that the Commission had occasion to hear similar matters as was brought to his notice. Substantially similar argument rests in this matter also and therefore is not reiterating the same. Also, reference has been made to Section 70 of the Contract Act, but this case would not suffice with the said Section, therefore, Section 23 is also referred to. The Government of India as well as this Commission had followed the principles with reference to captive generation under Section 9 of the Act, 2003 and also benevolent in ensuring the implementation of Section 42 of the Act, 2003. Under Section 9 the policy notified by GoI had specific condition that the shareholding in the captive unit should be more than 26% and such consumer should consume more than 51% of the captive generation.

In the particular case the counsel for petitioner would seek to demonstrate that the petitioner's unit is meant for 100% captive utilization by its manufacturing unit. The purpose of encouraging captive generation is to make available reliable power and also provide employment. Denying open access would amount to denying both these aspects. Even the Hon'ble Supreme Court had quoted with the approval the captive power policy in its recent judgment. The petitioner is seeking to utilize the generation for its own use and therefore seeking open access, which has been refused and the same is uncalled for.

The counsel for petitioner would emphasize that having synchronized the project and drawn the energy injected by the petitioner into the grid, the licensee cannot advert to the said power as infirm power. It has already consumed the said power by selling the same to its consumers and realised the tariff. As such, it cannot be allowed to take benefit of the energy injected into the grid. The

Commission had already in the year 2017 notified the regulation relating to banking by amending the original regulation of 2006 duly providing for banking of energy from a project seeking open access or else to procure such energy by the licensee at pooled cost, where the energy is injected before grant of such open access. The actions of the licensee now appear to be one of getting unjustly enriched.

The counsel for petitioner also stated that the respondent has contended in the counter affidavit that it is studying the feasibility aspect of granting open access and making the petitioner wait for four years. It has been repeatedly taking similar stand in several cases and in one case in the year 2020, this Commission had already repelled such a contention, which was argued by the counsel for petitioner. This aspect fell for consideration before the Hon'ble High Court, which had refused to accept the contention and rejected the appeal filed by the licensee as was held in Writ Appeal No.80 of 2019. The other respondent being TSTRANCO has simply stated that its actions are dependent on the feasibility report given by the licensee and it has no case against the petitioner. Therefore, the petition may be allowed as prayed for.

The representative of the respondents stated that the petitioner had never come forward with the required material as was intimated to it, therefore, the respondent could not send its recommendations in the matter. The regulation cited by the petitioner would not be of no avail unless and until an agreement is signed between the parties. As at present, no agreement subsists between the parties, therefore, the petitioner cannot be given any benefit of the regulation. Also, the contention that Section 23 of the Contract Act is applicable, cannot be appreciated. The regulation relied by the petitioner itself provides that unless agreement is entered into, the petitioner cannot claim the benefit of amendment regulation of 2017. The petitioner ought to have complied with the regulations for obtaining open access, but it has not chosen to do. No relief can be granted to the petitioner at this stage unless the licensee conveys its feasibility to the SLDC.

The counsel for petitioner stated that for a capacity of 2.5 MW the licensee is making the petition to run around. The said capacity would not make any dent on the grid in case of a higher capacity of 100 MW. The contentions of the licensee would be reasonable but not in this case. The representative of the licensee stated that there are several projects of this capacity which would add up to make a dent on the grid. Therefore, the licensee has to examine each and every project and its feasibility for grant open access. The Commission may consider in the context of the grid stability and efficient utilization. The counsel for petitioner pleaded for early resolution of the issue as the petitioner is not able to have the benefit of captive power plant for the last four years. The Commission have noted the rival contentions and also noticed the judgment referred by the counsel for petitioner. Having heard the submissions of the parties, the matter is reserved for orders."

9. Subsequently, the counsel for the petitioner has filed a memo duly enclosing the decisions rendered by the Hon'ble Apex Court on Captive Power Plant and Open Access in i) "*Chhattisgarh State Power Distribution Company Limited Vs. Chhattisgarh State Electricity Regulatory Commission and Anr."* and ii) "*Maharashtra State*

Electricity Distribution Company Limited Vs. JSW Steel Limited & Others" praying that the same may be taken on record and pass appropriate orders.

10. At the cost of repetition, the provisions quoted and relied upon for filing the present petition are reproduced below:

Section 9 of the Act, 2003

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

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

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

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

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

Sec 86(1)(e)

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

(a) … …

… …

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

11. From the provisions extracted above, it is clear that the captive generation is permitted and that the same is allowable for open access using the transmission system. In this case as seen from the pleadings there is no involvement of transmission system as the petitioner use the distribution system only, as both the generator and consumer (entry and exit points) located within the distribution network of the license operating in the area. Thus, there cannot be an issue of transmission corridor.

12. The question that arises for consideration in the given facts and circumstances of the case is, whether the petitioner is entitled to any payment for the unutilized energy injected into the grid from its 2.5 MW captive solar plant, as also for allowing LTOA?

13. The relevant provisions in the Telangana Solar Power Policy-2015 at the cost of repetition are reproduced below:

> *"11. Ease of Business – Enabling Provisions*
>
> *… …*
>
> *d) <u>Transmission and Distribution charges for wheeling of power</u>*
>
> *The wheeling and transmission charges are exempted for captive use within the State. They will be charges as applicable for third party sale. The transmission and distribution losses however is fully applicable for both third party within the State as well as captive use within the State.*
>
> *e) <u>Power scheduling and Energy Banking</u>*
>
> *All SPPs shall be awarded must-run status that is injection from solar power projects shall be considered as deemed to be scheduled.*
>
> *Banking of 100% of energy shall be permitted for all Captive and Open Access/Scheduled consumers during all 12 months of the year. Banking charges shall be adjusted in kind @ 2% of the energy delivered at the point of drawl.*
>
> *The banking year shall be from April to March. Banked units cannot be consumed/redeemed in the peak months (Feb to June) and in the peak hours (6 pm to 10 pm). The provisions on banking pertaining to drawal restrictions shall be reviewed based on the power supply position of the State.*
>
> *For captive/third party sale, energy injected into the grid from date of synchronization to open access approval date will be considered as deemed energy banked.*
>
> *The unutilized banked energy shall be considered as deemed purchase by DISCOM(s) at average pooled power purchase cost as determined by TSERC for the year.*
>
> *For Sale to DISCOMs, Energy injected into the grid from date of synchronization to Commercial Operation Date (COD) will be purchased by the DISCOMs at the first year tariff of the project, as per the provisions of the PPA with DISCOMs.""*

14. Thus, the Telangana Solar Power Policy-2015, which came into effect from 01.06.2015, announced by the Government of Telangana provided several incentives and benefits to the solar projects set-up within the Telangana State. The policy envisaged concessions like tax exemption of the State Government, facilitation of infrastructure, exemption of wheeling and transmission charges for captive use within the State, banking of energy generated by the solar projects, etc.

15. The Hon'ble Supreme Court in the matter of M/s Energy Watchdog had observed as below:

> *"… … Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. …"*

Thus, whatever is provided in the Government Policy of the Government of Telangana viz., "The Telangana Solar Power Policy-2015" would have to be given effect to as it is treated as law.

16. It is appropriate to state that the respondents being owned by the Government, they are bound to implement the decision taken by the Government as it is in consonance with the provision of the Act, 2003. The respondents being the instrumentalities of the State are also bound to give effect to such policy as communicated to them by the Government.

17. Consequent upon the promulgation of the Telangana Solar Power Policy-2015, the Commission has given effect to the policy of the Government on 25.03.2017 through notification of Regulation No.1 of 2017 i.e., third amendment to the "*Interim Balancing and Settlement Code for Open Access Transactions, Regulation No.2 of 2006*" to facilitate the accounting of energy for banking by a generating company, having captive consumption, who has no open access agreement with the licensees and having connection agreement only, a separate banking agreement has to enter by the distribution and retail supply licensee with such generating companies. The terms & conditions for banking facility, most relevant to the present case, which are specified in the above-mentioned third amendment regulation are reproduced below:

> *6. For captive generator, the energy injected into the grid from date of synchronization shall be considered as deemed banked energy.*
>
> *… …*
>
> *8. The unutilized banked energy shall be considered as deemed purchase by DISCOM(s) at the average pooled power purchase cost as determined by TSERC for the relevant year.*

18. The undisputed facts of this case are –

a) The petitioner attracted by the "*Telangana Solar Power Policy 2015*" has applied on 03.02.2016 to respondent No.1 for grant of connectivity for its proposed 5 MW captive solar power plant located within the jurisdiction of respondent No.1 (distribution licensee/TSSPDCL) located at Gajawada Village, Regode Mandal, Sangareddy District for its captive use at HTSCNo.SGR-034, Plot No.4 and 22, Phase-IV IDA, Patancheru,

Sangareddy District, both generator and consumer are connected to the distribution network of respondent No.1.

b) The respondent No.1 has communicated the technical feasibility report to the petitioner vide letter dated 22.03.2016 for the proposed 5 MW solar power plant for captive use, connectivity at 33 kV voltage level with interconnection point at 33/11 kV Gajawada substation.

c) The solar power plant though it was conceived for 5 MW the petitioner has been established to the extent of 2.5 MW only.

d) Subsequently, respondent No.2 has given clearance on 11.04.2018 for synchronization of the plant subject on fulfilment of all the procedures and requirements as per respondent No.2 guidelines. In pursuance of respondent No.2 clearance, the respondent No.1 has also given clearance on 13.04.2018 for synchronisation of 2.5 MW out of 5 MW solar power plant for captive use.

d) Accordingly, the petitioner's 2.5 MW captive solar power plant has been synchronized to the grid at 33 kV side of 33/11 kV Gajawada substation (in the presence of officials of respondent Nos.1 & 2 and the petitioner) and commissioned on 13.04.2018 as per the guidelines of respondent No.1. Since then, the plant has been injecting energy into the grid and monthly joint meter readings (JMR) are being taken.

e) Afterwards, the petitioner applied on 07.05.2018 to the nodal agency (respondent No.2 or TSTRANSCO or STU) and to respondent No.1 for intrastate long-term open access (LTOA) in terms of Regulation No.2 of 2005. On 11.05.2018 the nodal agency has made aware the applicant of the material alternation in the information contained in the applicant viz., non-attachment of EBC compatibility reports of interface ABT meters. The petitioner has notified the said alteration to the nodal agency on 24.05.2018. Whereas in terms of provision under clause 10.4 of Regulation No.2 of 2005 the application shall be treated as received by the nodal agency on 24.05.2018.

f) The LTOA application of the petitioner was forwarded by the nodal agency vide letter dated 11.09.2018 to respondent No.1 to examine the technical feasibility and to confirm the availability of open access metering.

g) Since then the petitioner has made correspondence with the respondents seeking to accord sanction for LTOA for captive use and adjust meter reading for captive consumption. Till date the respondents not sanctioned LTOA to the petitioner.

19. In terms of clause 5 of Regulation No.2 of 2005 "*Terms and Conditions of Open Access*", the Nodal Agency for receiving and processing applications for all long-term open access transactions is State Transmission Utility (STU) viz., TSTRANSCO or respondent No. 2 Further, clauses 10.5, 10.6 and 10.7 of Regulation No.2 of 2005 stipulates the following with regard to procedure of application for long-term open access.

10. Procedure of application for Long Term open access

… …

10.4 If after submission of the open access application, the applicant becomes aware of any material alteration in the information contained in the application, the applicant shall promptly notify the Nodal Agency of the same:

Provided that in case the Nodal Agency is made aware of the material alteration in the information contained in the application already submitted under clause 10.2 above, the Nodal Agency shall treat the application as if the same was received on the date the applicant notifies it of the said alteration.

10.5 All applications received within a calendar month e.g., during 1st April to 30th April, shall be considered to have been filed simultaneously. This window of a calendar month shall keep rolling over i.e., after the expiry of a monthly window, another window of the duration of the next calendar month shall commence.

10.6 Based on system studies conducted in consultation with other agencies involved including other Licensees, it is determined that long-term open access sought can be allowed without further system-strengthening, the Nodal Agency shall, within 30 days of closure of a window, intimate the applicant(s) of the same.

10.7 If, on the basis of the results of system studies, the Nodal Agency is of the opinion that the long-term open access sought cannot be allowed without further system-strengthening, the Nodal Agency shall notify the applicant of the same within 30 days of closure of a window.

20. The clause 10.6 of Regulation No. 2 of 2005 relating to grant of LTOA is clear and emphatic that the nodal agency shall within 30 days from the date of closure of window, intimate the applicant for open access that the same is being granted or otherwise for the reasons thereof. Admittedly, in this case the petitioner applied for long term open access on 24.05.2018, i.e., in the calendar month of May 2018 and the window closed on 31.05.2018. Respondent No. 2 being the nodal agency belatedly had undertaken correspondence with respondent No. 1 on 11.09.2018 to ascertain the feasibility aspect. From the dates and events as recorded in the pleadings one stark issue that the Commission notices is that considerable delay had occurred in respect of the LTOA application made by the petitioner for its captive consumption.

21. The respondent No. 2 contended that it is following the procedure for processing the LTOA application in consultation with the other licensees involved and issuing open access approval only after it is determined that the open access can be allowed. The contention of the respondent No. 2 that its action is of no prima facie case or balance of convenience in favour of the petitioner is untenable. It is appropriate to state that the nodal agency and the concerned distribution licensee should act in a

cohesive manner and ensure the compliance of the regulation duly adhering to the timelines specified in the regulation. Onus rests on the nodal agency to ensure compliance of the Act, 2003 and regulations thereof. The nodal agency has just sent the LTOA application of the petitioner to the respondent No.1 and was at laxity in getting the appropriate information within the timelines as specified in the regulation and has abdicated its responsibility to intimate/notify its decision either granting or refusing LTOA within the time period as specified in the regulation, in effect it did not comply with the regulation and thereby causing irreparable financial loss to the petitioner. In accordance with the provisions of the Act, 2003 respondents are bound to allow the open access within the time lines set out in the Regulation No.2 of 2005.

22. From the pleadings of both the parties, it is noticed that the technical feasibility report for allowing open access had not been issued by the respondents till date and they have not adhered to the timelines as provided in the open access regulation and it shows that the lapses are resting with the respondent No. 1. They cannot now advert that they had to do lot of exercise/procedure for allowing such open access. The inactions on the part of respondent No.1 would lead to a conclusion that they were responsible for the delay in processing the LTOA application of the petitioner. Needless to say, that the ultimate delay was caused by respondent No. 1 by not giving its technical feasibility report till date.

23. As noted from the pleadings, the petitioner from the date of synchronisation has been generating power from a renewable source and such source cannot be disregarded. The contention which has been raised by the respondent No.1 that such energy injected into the grid has impacted their sales, revenues and would burden the end consumer subsequently in true-up exercise of the respondents is the result of acts done by the respondents themselves without examining the implications of allowing injection of energy from the petitioner's plant into the grid. They cannot now turn around and state that it is impacting their functioning. The respondents ought to have allowed open access in a timely manner according to the terms of regulation. Thus, the contention of respondent No.1 cannot be sustained, and the petitioner is entitled to avail LTOA.

24. An objection has also been raised to oppose the petition by the distribution licensee by relying on the findings of Karnataka Electricity Regulatory Commission

(KERC) in the petition vide O. P. No. 32 of 2014, as also consequent appeal. The said findings, though run through similar situation did not appreciate the status of the parties on either side. While the distribution licensee is required to communicate about synchronizing the plant and allowing open access, failing to do so with regard to allowing open access and at the same time allowing the generator to generate power, by no stretch of imagination would constitute a voluntary act. The generator did not inject energy into the grid gratuitously but in the fond hope that it will be allowed open access in a timely manner according to the applicable regulations.

25. The contention of the respondent No. 1 that the energy injected by the petitioner should be treated as inadvertent free power is invalid and it is against to the terms of Regulation No. 2 of 2005. The provision under Section 70 of the Contract Act, 1872, postulates that a person doing or providing any goods or services not gratuitously is entitled to be compensated by the person, who is getting benefit out of it. Further, the Section 70 of the Contract Act envisages that one should perform to derive benefit of non-gratuitous act and the other party enjoys the same. In this case, the generator had generated power and the respondents utilized and also gained out of it. It is the respondent No. 1, which has practically benefited in all respects since the captive consumption of the consumer has been served by respondent No. 1, as such the loss or compensation have to be borne by the respondent No.1 alone and none else.

26. The petitioner has relied on the Judgement of Hon'ble High Court for the State of Telangana in W. A. No. 80 of 2019 in the matter of M/s Mahalaxmi Profiles Private Limited (MDK-735) Vs. TSTRANSCO (Respondent No. 2). The Hon'ble High Court while confirming the order of the Single Judge of the Hon'ble High Court in W. P. No. 25144 of 2017 held that "*13. … … As rightly held by the learned Single Judge, when the respondents are allowing the open access to other factories and companies, the said facility cannot be denied to the petitioner on legally untenable grounds, and it cannot be discriminated.*" Though the judgement referred by the petitioner directly does not fit into the facts and circumstances of the present case, it can be deciphered that the respondents have to give effect to the provisions of the Act, 2003 and the regulations made thereunder in so far as providing open access.

27. Respondent No. 1 have also contended that the Regulation No. 1 of 2017 was intended to facilitate the accounting of energy for banking who has no open access

agreement with the licensees and having connection agreement only. It is further contended that since the petitioner neither have open access agreement nor have banking agreement as per Regulation No. 1 of 2017, the petitioner is not entitled to make any claim for the energy injected prior to entering into open access agreement for the reason that Regulation No. 1 of 2017 does not apply to the petitioner. The Commission opines that any rules, regulations or guidelines where any action or restraint is provided for, have to be disseminated to the petitioner and the absence of the same, the petitioner cannot be faulted for non-compliance of the same.

28. The other contention of respondent No. 1 for the delay in reporting technical feasibility to the petitioner's 2.5 MW solar power plant is that the Telangana State has become rich in solar power generation, huge number of solar power developers came forward and established their power plants and in view of huge supply of solar power the grid is overloaded, as such a Committee is constituted with the officials of respondents to carry out the study of feasibility system with reference to allowing open access to the new open access applicants in a colossal scenario under the fully loaded grid constraints and for taking necessary decision and that Committee has approved a list of open access applicants including the petitioner who synchronized their generating plants and waiting for open access facility subject to condition that the settlement of the injected energy into the grid shall be from the date of open access agreement only. Accordingly, the respondent No.1 sought an undertaking vide letter dated 24.12.2020 from the petitioner on par with other solar developers. But, the petitioner did not respond to the same.

29. The petitioner contended that the respondents illegally and unlawfully coerced the petitioner to execute such an undertaking threatening not to execute LTOA unless it gives such an undertaking. The Commission views that seeking an undertaking by the respondent No. 1 from the petitioner before according LTOA approval was neither as per the provisions of the Telangana Solar Power Policy-2015 nor in terms of applicable regulation.

30. It is the case of the petitioner that in terms of the Telangana Solar Power Policy-2015 and also in terms of the Regulation No. 1 of 2017, energy fed into the grid from the petitioner's captive generating plant of 2.5 MW installed capacity from the date of synchronisation should be treated as deemed banked energy. The Commission finds

that the action of the respondents in not notifying the applicant/petitioner as regards providing of open access or otherwise for a period of more than 4 years is uncalled for and such act is neither appreciable nor to be supported. The nodal agency as well as the respondent No. 1 have to give effect to the provisions of Act, 2003 and the regulations made thereunder in so far as providing open access. Hence, as per the Government Policy and as per the terms of Regulation No. 1 of 2017 the petitioner is entitled to the relief of banking. Accordingly the energy injected into the grid from date of synchronization can be considered for the purpose of banking and the loss sustained by the petitioner has to be made good by the respondent No.1 as it alone has benefited out of the energy so injected into the grid for the said period by the generator.

31. The reliance placed on the both judgments of the Hon'ble Supreme Court, which has been placed by the counsel for the petitioner are not applicable to the facts and circumstances of the present case, which is related to grant of LTOA permission to the captive user, as given below:

a) The Judgment the Hon'ble Supreme Court in the matter of "*Chhattisgarh State Power Distribution Company Limited Vs. Chhattisgarh State Electricity Regulatory Commission & Anr.,"* reported in AIR 2022 SC 2904 is related to treatment of supply of electricity from captive generation plant to its sister concern company as 'own consumption' within the ambit of Section 9 read with Section 2(8) of the Electricity Act, 2003. The facts and circumstances of this case is no way connected to the facts of the present case and hence is not applicable to the present case.

b) The Judgement of Hon'ble Supreme Court in the matter of "*Maharashtra State Electricity Distribution Company Limited Vs. JSW Steel Limited & Ors.,"* reported in 2022 (2) SCC 742 involves the interpretation of Section 42(4) of the Act, 2003 and basically on application of levy of additional surcharge on captive consumers/captive users. This decision is also no way connected to the facts of the present case and hence this decision is also not applicable to the present case.

32. The Commission, having been satisfied that the petitioner is entitled to captive generation and consequent to open access, is inclined to accept the contentions of the petitioner. It is relevant to state that the banked energy has to be consumed within the financial year only which was already lapsed. Therefore, as a specific instance and one time measure only, the energy injected into the grid by the petitioner (i.e., from its captive solar power plant of 2.5 MW installed capacity) for the period from date of synchronization is to be considered as deemed energy banked and the same should

be treated as unutilized banked energy in terms of Regulation No.1 of 2017 and further same shall be considered as deemed purchase by Respondent No.1 at the average pooled power purchase cost as determined by the Commission for the relevant year.

33. In view of the foregoing discussion, to meet the ends of justice there shall be a direction to the Nodal Agency as well as the distribution licensee that they should ensure that the petitioner is provided with LTOA immediately and take consequential steps in terms and conditions of Regulation No. 1 of 2017 (third amendment to Regulation No. 2 of 2006) and to make payments to the petitioner i.e., the petitioner is entitled to be compensated for the energy injected into the grid from the date of synchronization. Further, it may be appropriate to direct the respondent No. 1 to pay for the same at the average pooled power purchase cost as determined by the Commission for the relevant year. However, the Respondent No. 1 can set off the energy so paid for, against their renewable power purchase obligation for the relevant financial year.

34. This order shall be complied within eight weeks from the date of receipt of this order. Accordingly, the petition is disposed of, but in the circumstances, the parties shall bear their own costs.

This order is corrected and signed on this the 31st day of July, 2023.

Sd/-	**Sd/-**	**Sd/-**
(BANDARU KRISHNAIAH)	(M. D. MANOHAR RAJU)	(T. SRIRANGA RAO)
MEMBER	MEMBER	CHAIRMAN

//CERTIFIED COPY//