

2008 (4) GLR 3408

**GUJARAT HIGH COURT**

**Hon'ble Judges:C.K.Buch, J.**

Hindalco Industries Limited Versus Gujarat Energy Transmission Corporation  
Limited

SPECIAL CIVIL APPLICATION No. 14742 of 2004 ;  
SPECIAL CIVIL APPLICATION No. 23308 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 14743 of 2004 ;  
SPECIAL CIVIL APPLICATION No. 23310 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 23312 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 26358 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 26376 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 3429 of 2007 ;  
SPECIAL CIVIL APPLICATION No. 4316 of 2007 ;  
SPECIAL CIVIL APPLICATION No. 4606 of 2007 ;  
SPECIAL CIVIL APPLICATION No. 4608 of 2007 ;  
CIVIL APPLICATION No. 11222 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 14742 of 2004 ;  
CIVIL APPLICATION No. 11220 of 2006 ;  
SPECIAL CIVIL APPLICATION No. 14743 of 2004 ; \*J.Date :- OCTOBER 21,  
2008

- [CONSTITUTION OF INDIA](#) Article - [226](#) , [227](#)
- [ELECTRICITY ACT, 2003](#) Section - [86](#)
- [GUJARAT ELECTRICITY INDUSTRY \(RE-ORGANISATION AND REGULATION\) ACT, 2003](#) Section - [17](#)
- [ELECTRICITY REGULATORY COMMISSIONS ACT, 1998](#) Section - [29](#)

**Constitution of India - Art. 226, 227 - Electricity Act, 2003 - S. 86 - Gujarat Electricity Industry Reorganisation and Regulation) Act, 2003 - S. 17 - Electricity Regulatory Commissions Act, 1998 - S. 29 - whether transmission utility can levy grid support charge from captive power plants operating parceled with grid synchronized with it - whether Regulation 62 of Regulations in so far as it empowers commission to determine levy of grid support charge - held, directions given to Commission to decide de novo factual as well as legal issues with respect to demand of grid support charge made by Commission - question as to challenge to vires of Regulation 62 of Regulations of 2003 kept open - petitions partly allowed.**

**Imp.Para:** [ [66](#) ] [ [67](#) ] [ [70](#) ] [ [72](#) ] [ [73](#) ] [ [74](#) ] [ [88](#) ]

**Cases Referred To :**

1. A.P. Cooperative Central Land Market Bank Ltd And Others V/s. Chittur Primary cooperative And Market Bank Ltd And Others, 1974 1 SCC 608
2. A.V. D costa, Divisional Engineer, G.I.P. Railway V/s. B.C. Patel And Another, AIR 1955 SC 412
3. Banarasi And Others V/s. Ram Phal, AIR 2003 SC 1989
4. Calcutta Discount Co. Ltd., V/s. Income-tax Officer Companies District I, calcutta, AIR 1961 SC 372
5. Cellular Operators Association And Others V/s. Union Of India, 2003 3 SCC 186
6. Central Power Distribution Company And Others V/s. Central Electricity Regulatory commission, 2007 8 SCC 197
7. Ganga Retreat & Towers Ltd And Another V/s. State Of Rajasthan And Others, 2003 12 SCC 91
8. Gangabai V/s. Vijaykumar & Others, AIR 1974 SC 1126
9. General Officer Commanding In Chief And Another V/s. Dr. Subhash Chandra Yadav And another, 1988 2 SCC 351
10. [Girdharlal Ganpatlal V/s. Ahmedabad Municipal Corporation, 1 GLR 223 : 1960 GLHEL HC 203670](#)
11. Indian Aluminum Company V/s. State Of Kerala, 1996 7 SCC 737
12. Kavalappara Kottarathil Kochunni V/s. State Of Madras, AIR 1959 SC 725
13. L.Hirday Narain V/s. Income-tax Officer, 1970 2 SCC 355
14. L.K. Verma V/s. Hmt Ltd. And Another, 2006 2 SCC 269
15. M.V. "vali Pero" V/s. Fernando Lopez And Others, 1989 4 SCC 671
16. M:s. Filterco And Another V/s. Commissioner Of Sales Tax, Madhya Pradesh And Another, 1986 2 SCC 103
17. M:s. Onkarlal Nandlal V/s. State Of Rajasthan And Another, 1985 4 SCC 404
18. Orissa State Electricity Board V/s. Ipi Stell Ltd., AIR 1955 SC 1553
19. Prem Chand V/s. Union Of India And Others, AIR 1981 SC 613
20. State Of Andhra Pradesh V/s. Ntpc, 2000 2 SCC 203
21. State Of Andhra Pradesh V/s. Ntpc, 2002 5 SCC 203
22. Vishnu Cement Limited V/s. Central Power Distribution Company, Andhra Pradesh And Others, 2003 4 ALD 405
23. Whirlpool Corporation V/s. Registrar Of Trade Marks, 1998 8 SCC 1

**Equivalent Citation(s):**

**JUDGMENT :-**

**1** These writ petitions are preferred by Public Limited Companies, invoking jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, whereby the petitioners have prayed for issuance of appropriate writ, order or directions, more particularly, writ of mandamus quashing and setting the order dated 25th June, 2004 passed by the Gujarat Electricity Regulatory Commission [Ahmedabad] [hereafter referred to as "the Commission"] in Case No. 256 of 2003. It is further prayed that this Court should declare Regulation-62 of Gujarat Electricity Regulatory Commission [Terms and Conditions of Tariff] Regulations, 2005 [hereafter to be referred to as "Regulations of 2005"], to the extent that "in addition the Commission may also determine the charges on account of service rendered by the Utility to the consumers, e.g. Grid Support Charges" as ultra vires the Act, null and void.

**2** One ancillary relief has been prayed in all the petitions and it is submitted that pending the hearing and disposal of the petitions, operation, execution and implementation of the order under challenge dated 25th June, 2004 passed by the Commission may be stayed. Here, it will be relevant to note that Gujarat Electricity Board [hereafter referred to as "the GEB"] was the petitioner before the Commission and while dealing with the said petition, the impugned order is passed. Pending this group petitions, proceedings have been invoked to get quantum of Parallel Operation Charge [hereafter referred to as "POC"] so that Commission can determine POC as charge under the head of "Grid Support Charge". The Commission, of course, has adjourned the hearing and process of determination of the points submitted by the State Transmission Licensee [hereafter referred to as "Utility" or "Licensee"], more particularly on account of pendency of the present petitions and the nature of reliefs prayed for by the petitioner Companies. The first petition being Special Civil Application No. 14742 or 2004 came to be filed by Hindalco Industries Limited against the GEB, a company incorporated under the Companies Act, 1956. Other petitioners also have the same status, i.e. a company incorporated under the Companies Act, 1956. It is contended by the petitioners that the order under challenge passed by the Commission is contrary to law and the same is also not valid being an order passed devoid of authority/jurisdiction. The order is challenged on various grounds, but on plain reading of the petitions preferred, it is possible to note that the petitioners have raised mainly certain questions of law and have challenged the propriety of the order also on merit. However, counsel for the petitioners have not addressed the Court on merit the factual matrix, more particularly in the background of one significant situation, i.e. pendency of the subsequent proceedings initiated by the Licensee/Utility before the Commission. But while responding to the submissions made by the contesting respondents [Transmission Utility] and the counsel appearing for the Commission, the petitioners have tried to explain the factual contingency and have submitted that on facts also, the petitioners can ably dislodge

entitlement of the GEB to recover any such charge or charges like POC from the petitioners. In nutshell, the questions emerging from the grounds of challenge are as under:-

i Whether the Commission was justified in holding the petition of GEB for determination of POC to be legally maintainable despite holding that GEB had not established whether any Grid Support had at all been made available for Parallel Operation or that any costs had been incurred by GEB for the purpose.

ii Whether the Commission had jurisdiction under the law to issue a declaration that POC were leviable by GEB for determination of such charges in the absence of data evidencing service rendered or costs incurred by GEB for Parallel Operation.

iii Whether the Commission was justified in granting liberty to GEB to file a fresh petition on POC in the facts and circumstances of the case.

iv Whether non-filing of appeal against the observations made in the order under challenge would not affect adversely the merits of the say of the present petitioners and whether accepting the application substantively preferred by GEB has resulted into denial of justice?

v Whether Regulation-62 framed in the year 2005 is either ultra vires or inconsistent to the relevant statutory provisions?

**3** All the petitioners are having their captive power plants [hereafter to be referred to as "CPP"]. Therefore, on facts, all the petitioners have placed similar case on similar facts. Therefore, the facts leading to the present petitions can be stated in brief in one set.

**4** In 1991, Government of India determined and notified a Policy to allow private sector companies to participate in full generation of electricity in the background of various facts and circumstances including deficit in electricity power supply and deterioration of health of State Electricity Board. In 1995, the government laid down a Policy in furtherance of the Policy notified in the year 1991 and decided to permit private sector participants in generating electricity power through Captive Power Generation/Co-Generation. Government of Gujarat, adopting the Policy of the Government of India, announced its own Power Policy in the year 1995 so that private sector companies can participate in generation, transmission and distribution of power. The State Government decided to facilitate setting up of CPPs by industrial units with a hope to support such industries by providing them power supply in case of need and also to make surplus power available to the State Grid. A Resolution came to be passed on 22nd December, 1997 laying down terms. Thereafter, the said Resolution was followed by the Resolution

dated 9th November, 1998. Earlier Resolution was mainly in reference to wheeling of power and maintenance of contract payment with State Electricity Board and fees and charges including POC. In the Resolution, the State Government has decided to charge Rs. 5/- per KVA per month from the industrial units generating power through captive power plants. The State Government, by the subsequent Notification of 1998 liberalized the Policy and the private sector operators were tempted and permitted to set up Captive Power Plants of industry and also to supply surplus power so produced to its group companies on payment of certain charges and levy as applicable. The petitioners mainly rely upon certain clauses of the Notification dated 9th November, 1998, whereby the contract demand as well as fees and charges are explained. Here, it would be relevant to reproduce the portion of Notification of 1998 relied upon by the petitioners from relevant Clauses 8 and 9.

#### "8. Contract Demand

The industries on commissioning of CPP will be allowed to reduce their existing contract demand up to a level of 25% of their original contract demand [e.g. if the contract demand is 1000 KVA it can be reduced to any level up to 250 KVA depending upon the need of the consumer] when they intend to have parallel operation with the Grid. However, no contract demand would be necessary/would be insisted upon if the industry with the captive power plant intends to operate on stand alone basis.

In case of new connections, the contract demand for parallel operation may be fixed as per the requirement of the consumer.

Drawl of power from the State Grid by the industrial unit would be subjected to applicable tariff of GEB/Licensee."

#### 9. Fees and charges

a) While granting the consent for installation of Captive Power Plant, the fees shall be charged as decided by GEB/Licensee.

B) Parallel Operation charges shall be charged at the rate fixed by GEB/Licensee with the approval of the Govt."

**5** The State Electricity Board issued Commercial Circular No. 687 of 21st December, 1998 to recover POC and made POC leviable at the rate of 7.5% of the demand charges in accordance with the applicable tariffs. On 26th January, 2000, GEB decided to revise POC specified in Clause 19 of the Commercial Circular dated 21st December, 1998, from 1st April, 1999, that is, by giving retrospective effect to the Circular issued in January, 2000. This Circular, again provides certain terms and conditions. Copy of this Circular is available in Annexure:H [collectively]. Both these Commercial Circulars have

been referred and considered by the Commission while passing the impugned order. The Gujarat State Electricity Board, thereafter issued a Commercial Circular in reference to Clause 19 of Commercial Circular No. 687 for POC and decided different rates and those rates were given effect from 1st April, 1999.

**6** The Commission issued a notice suo motu and registered Case No. 24/2000 and called Commercial Circular No. 706 issued on 28th January, 2000 determining the rates under Clause-19 of the Commercial Circular No. 687 for review and so also the conditions imposed by the said Circular. The Commission, vide its order dated 31st August, 2000 quashed and set aside the said Commercial Circular, i.e. Circular of 28th January, 2000, however, granted liberty to the Gujarat Electricity Board to approach the Commission with proper application under Section 29 of the Electricity Regulatory Commission Act, 1998 [hereafter referred to as "the ERC Act"]. Grievance of the petitioner is that though in the said case, the Commission was only required to decide the validity of the Commercial Circular impugned therein, the Commission made certain observations on the leviability and efficacy of POC and one day, the Gujarat Electricity Board approached the Commission for approval of levy of POC to the tune of 50% of the contract demand charges from the industries specified. Copy of the order passed by the Commission in Case No. 24/2000 is part of Annexure:H.

**7** Undisputedly, all the petitioners are operating their respective CPPs on receipt of permission to operate such plants. Dates as to grant of such permissions are different, but it is also not a matter of dispute that all the petitioners are running their CPPs in parallel with Grid subject to the terms and conditions mentioned in the letter of permission. One of the conditions of granting permission is that the unit shall pay parallel operation charges as may be applicable from time to time. All the petitioners have entered into agreement. The petitioner of Special Civil Application No. 14742 of 2004 entered into an agreement with the Gujarat Electricity Board on 30th August, 2003 for HT power supply agreement of 375000 KVA to its unit at Dahej. Agreement was forwarded to the GEB by letter dated 6th September, 2003. The petitioners rely upon the contents of the agreement entered into by them. It is the say of the petitioners that contents of the agreement entered into may be read as part of the petition while hearing the petitioners. The respondent GEB thereafter filed a formal application with the Commission on 8.9.2003 for approval so that the GEB can recover special levy of 50% of the demand charge on the capacity of CPP in terms of MVA. Approval was sought mainly to compensate qua the net worth costs on GEB infrastructure in the Grid System styled as POC, and the Commission, ultimately, on receipt of the application registered it as Case No. 256 of 2003, copy of the petition submitted to the Commission is on record. Say of the petitioners is that the demand, thus, would come to Rs. 16,83,00,000/- for the petitioner of Special Civil Application No. 14742 of 2004.

**8** It is contended further by the petitioners that the Commission adopted proposal/petition submitted by the GEB mechanically, more particularly in the background of adoption of such proposal by A.P. State Electricity Regulatory Commission. In the State of Andhra Pradesh, A.P. Electricity Board had made such proposal and the same was adopted by the A.P. State Electricity Regulatory Commission. The decision of the A.P. State Electricity Regulatory Commission was assailed in the High Court of Andhra Pradesh invoking jurisdiction of the High Court under Articles 226 and 227 of the Constitution. The High Court ultimately reversed the decision of the A.P. State Electricity Regulatory Commission. According to the petitioners, though decision of A.P. High Court dated 8th February, 2002 was available with the Commission, the Commission passed the impugned order in the form of declaration simplicitor. Special Leave Petition filed before the Apex Court by the licensee of the State of Andhra Pradesh against the said judgment of Andhra Pradesh High Court is pending before the Apex Court. The Court is informed that the Apex Court has not granted any formal stay against the order of the Andhra Pradesh High Court.

**9** On receipt of the petition and registration of Case No. 256 of 2003, a public notice was issued in the newspapers and the petitioners ultimately submitted their objections to the said notice and objections, if are encapsuled, the same are as under:-

[i] That the application of respondent Electricity Board is not maintainable at law.

[ii] Levy of POC by the respondent was unauthorized under the law.

[iii] Levy of such charge would amount to profiteering and the same was otherwise unreasonable for the reasons set out in the objections submitted.

[iv] Substantial question of law and jurisdiction of maintainability of the application may be heard and decided.

[v] There is no justification even in asking for special levy of 50% of the demand charge of the capacity of the CPP.

**10** After hearing the concerned parties, the Commission passed order on 25th June, 2004, that is, order impugned herein holding inter alia that; [i] Application submitted is maintainable in law and [ii] POC can be levied under the provisions of Gujarat Electricity Industry [Reorganization and Regulation] Act, 2003 and Indian Electricity Act, 2003. The Commission ultimately did not accept the proposal but permitted special levy of 50% for want of sufficiency of data. The applicant was directed to conduct the study for the purpose and to provide that Data and approach the Commission against that fresh order. Here,

it would be relevant to reproduce the exact portion of the impugned order which is at page 355. The same reads as under:-

"The Commission holds that this petition [256/2003] filed by the GEB is legally maintainable. The Commission further holds that POC can be levied under the Central Act and the Gujarat Act.

The Commission is of the view that, the support extended by the grid, to the CPPs synchronized with it, has to be identified and quantified. GEB also has to furnish the estimate of cost being incurred by it for providing these services to the CPPs. GEB is accordingly directed to conduct the necessary study covering these aspects.

GEB is further directed to file the findings of the study with the Commission. GEB is at liberty to file a fresh petition on charges incorporating the findings of the study."

**11** It is the say of the petitioners that there is no authority or jurisdiction vested in the Commission to issue such declaration at all. Functions of the said Commission are set out in Section 86 of the Central Act i.e. Electricity Act, 2003 and Section 17 of Gujarat Electricity Industry [Reorganization and Regulation] Act, 2003 [hereafter referred to as the "State Act"] contemplate determination of tariff on electricity in accordance with the provisions thereof and parallel operation charge does not fall in the category of any of the tariff. Here, it would be relevant to reproduce both the above Sections of Central Act and the State Act. These sections have been read over to the Court time and again by the counsel for the parties and it is asserted that these two parallel provisions are relevant for the purpose of the present group of petitions.

"86. Functions of State Commission.-

[1] The State Commission shall discharge the following functions, namely:-

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

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

[b] regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from generating companies or licensees or from other sources through

agreements for purchase of power for distribution and supply within the State;

[c] facilitate intra-State transmission and wheeling of electricity;

[d] issue licenses to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to the operations within the State;

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

[f] adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

[g] levy fee for the purposes of this Act;

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

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

[j] fix the trading margin in the intra-State trading of electricity, if considered, necessary;

[k] discharge such other functions as may be assigned to it under this Act.

[2] The State Commission shall advise the State Government on all or any of the following matters, namely:-

[i] promotion of competition, efficiency and economy in activities of the electricity industry;

[ii] promotion of investment in electricity industry;

[iii] reorganisation and restructuring of electricity industry in the State;

[iv] matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government;

[3] The State Commission shall ensure transparency while exercising its powers and discharging its functions.

[4] In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3."

"17. Subject to the provisions of this Act, the Commission shall perform the following functions, namely:-

[a] to regulate purchase, transmission, distribution, supply and utilisation of electricity, the quality of service and the tariff and charges payable for the transmission, distribution or supply of electricity having regard to the interest of both the consumers and other persons availing the services and the utilities;

[b] to regulate the procedure-

[i] for purchase and procurement of electricity from any source for transmission, sale, distribution and supply thereof in the State; and

[ii] for the determination of the price for such purchase or procurement;

[c] to promote efficiency, economy and safety in the use of the electricity in the State;

[d] to determine the tariff for electricity; wholesale, bulk, grid or retail in accordance with the provisions of this Act;

[e] to determine the tariff payable for the use of the intra-State transmission facilities in accordance with the provisions of this Act;

[f] to issue licenses in accordance with the provisions of this Act and determine the conditions to be included in the licenses;

[g] to levy fees, charges and fines in accordance with the provisions of this Act and retain the same for its expenses;

[h] to regulate the working of the licensees and to enable that the working of licensees is efficient, economical and equitable;

[i] to require licensees to formulate prospective plans and schemes in co-ordination with the other persons for the promotion of generation, transmission, distribution, supply and use of electricity;

[j] to require the licensees to collect data and forecast the demand for use of electricity;

[k] to set and enforce standards for the electricity industry in the State including standards relating to safety, equality, continuity and reliability of service;

[l] to promote competitiveness in the electricity industry in the State;

[m] to formulate standards, codes and practices for operation of the State Grid and the power system;

[n] to promote efficient utilisation and conservation of electricity, reduction of wastes and losses in the use of electricity;

[o] to give such advice to the State Government, as the Commission deems appropriate on matters concerning generation, transmission, distribution, supply and utilisation of electricity in the State;

[p] to refer, if the Commission deems appropriate, matters to other agencies and bodies dealing with consumer disputes, restrictive and unfair trade practices and management and administration of the affairs of the licensees;

[q] to adjudicate upon the disputes and differences between the licensees and to refer matters for arbitration, if considered necessary in accordance with the provisions of this Act; and

[r] to undertake all accidental or ancillary functions that the Commission may consider appropriate."

**12** It is contended that none of the above two provisions authorize levy of POC and therefore, Licensee/Utility cannot levy any charges that are not contemplated under the relevant Statute. Tariff contemplated to be determined by the Commission under the Central Act is for supply of electricity by a generating company to a distribution, licensee, transmission of electricity, wheeling of Electricity or retail sale of electricity. So far as the State Act is concerned, tariff means schedule of standard prices for transmission, distribution or supply of electric energy or charges for specified services provided to the recipient of such service. The petitioners have hammered jointly on the contents of the affidavit submitted before the Commission that; "POC was independent to tariff", however, during the course of the oral submissions, statement made on oath was withdrawn by the learned counsel appearing for the applicants and it was contended that POC would be covered in transmission charges. According to the petitioners, it would be wrong to claim that POC would fall under the category of transmission charges since there is

no transmission of electrical energy between CPPs and the Grid except in case of wheeling of power. When Licensee/Utility are charged and otherwise are entitled in case of wheeling of power, question of putting the POC in the category of transmission charges would not be either legal or logical. The applicant was not able to establish the case before the Commission that any service is being rendered to CPP operators who are operating their plants having support of power supply by the Grid.

**13** Gujarat Electricity Board, after filing of the application before the GERC has been unbundled into [i] Generating Companies [Licensee] [ii] Trading Licensee [Gujarat Urja Vij Nigam Limited] [iii] State Transmission Utility, i.e. Respondent no.1 and Distribution Licensee, i.e. respondent nos. 2 to 5. A question is also posed before the Court, whether GERC could have given a declaration simplicitor regarding entitlement to levy POC without first determining as to who is entitled to it, more particularly, in the context that transmission utility has no privity of contract with CPP holders having Grid support. Parallel Operation Charge [POC] is also addressed by the respondents as Grid Support Charge. It is pointed out by Mr. Mihir Joshi, learned counsel appearing for one of the petitioners, that to appreciate and evaluate the order under challenge, the Court may consider the meaning of the words "Grid", "Support" and "Charges" i.e. levy. Status of the State Electricity Board also should be required to be looked into and for this purpose, attention of the Court is drawn to Section 172 of the Indian Electricity Act, read with Section 14, [read with 2nd and 5th proviso]. The word "Grid" is defined in Section 2[32] of the Indian Electricity Act, whereas "Transmission Line" is defined in Section 2[72] of the Act. It is submitted that Section 2[74] is also relevant which defines "transmit". Definition of "Sub Station" [Sec.2[69]], "Distribution System" [Sec.2[19]] and "Generating Station" [Sec.2[30]] have also relevance and the same have not been taken care of while passing under challenge is the say of Mr. Joshi. It is submitted that the stand taken by the applicant GEB, if is considered in reference to various definitions vis-a-vis confusion emerging from the stand taken by the applicant GEB, it gives clear indication that no charge can now be labelled as POC as contemplated under the Act. It is submitted that Generating Plant of CPP being part of transmission line can be said to be a Grid. On the contrary, CPP holders, i.e. petitioners are under obligation to maintain certain standards while operating the plant. It appears that the view of the GERC is perhaps moral only and such order cannot sustain in the eye of law. Section 45 of the Electricity Act, 2003 empowers to recover charges only on supply of electricity. If the definition of "transmit" given in Clause [74] of Section 2 of the Electricity Act, 2003 is considered, then, there is no scope to extend the meaning given in this Clause and there was no scope for other interpretation. It was not possible for GEB to claim POC under the head of "Wheeling Charge" because, the word "Wheeling" is defined in Clause [76] of Section 2 of the Electricity Act, 2003. Wheeling charges are paid and the same have no connection whatsoever with POC. Therefore, only once the GEB took stand that POC is independent to tariff. But thereafter, has taken sharp turn and

submitted, withdrawing the earlier statement made on oath, that POC would fall in the category of "Transmission Charges". Whether it is possible to stretch the concept of Grid Support placed by the applicant GEB to the transmission was the vital question before the GERC. Jurisdiction of GERC as contemplated by Section 86[1][a] of the Electricity Act, 2003 is limited and thus, Electricity Regulatory Commission can determine the tariff or any dispute which centers around the determination of tariff. So, any levy or charge which falls outside the definition of "tariff" would not attract jurisdiction of the Electricity Regulatory Commission. True it is that it was possible for GERC to conclude positively that Grid Support would fall in the category of "Transmission" and therefore, transmission charges can be levied, then, the GERC would not have left vital areas open by postponing the finding on these areas. Therefore, it is submitted that the declaration simplicitor given by the GERC while passing the impugned order cannot sustain as it makes the order without jurisdiction. No finding on facts or data provided is recorded. The nature of order of making declaration has made the order vulnerable and therefore, the same has been challenged before this Court, challenging the jurisdiction after filing of the first petition in the year 2004. GERC has framed Regulation 62 of Gujarat Electricity Regulatory Commission [Terms and Conditions of Tariff] Regulations, 2005 and the said Regulation confers power to determine the charges on account of the service rendered by the Utility to the consumer, e.g. Grid Support Charges and the petitioners, therefore, have prayed that this enactment, being contrary to law be held as ultra vires, null and void. Considering the nature of relief prayed in the petitions, learned counsel appearing for the other side has fairly submitted that the respondent does not press the plea as to jurisdiction of this Court for challenging the impugned order as well as legality and validity of the Regulation and does not insist for an order of dismissal of the petitions observing that the petitioner ought to have approached the appellate authority for challenging the impugned order of the GERC.

**14** The Court is informed that in view of the finding under challenge, GETCO/GEB has filed separate petition and the same is pending with GERC, because, GERC has refused to determine the actual charges payable. It is directed by the GERC to GEB/GETCO to file separate petition after conducting proper study in regard to exact quantum of POC to be determined as payable by the CPPs. It is alleged that GETCO had undertaken detailed study as to quantum and separate petition is filed. So on facts, the study report including its legality, validity, correctness and this impact on quantum would be a matter of battle between the parties and this Court, according to Mr. Mihir Thakore, learned Senior Advocate may not ignore that the applicant GETCO may file second petition and therefore only, the petitioners have not opened their cards on merit on that count. It is submitted that in absence of any data or detail which can establish that there is some quantum of expense met or cost being incurred for providing Grid Support whether was possible even to declare impliedly that the same would fall in the category of "Transmission Charges"

and therefore, it is leviable separately as POC. Undisputedly, Transmission Charges are being paid for the demanded contract load.

**15** Learned counsel appearing for Hindalco, petitioner of Special Civil Application No. 14742 of 2004 has taken me through the frequency to be maintained at around 50 Hz by the CPP holder by referring to the decision of the Apex Court in the case of Central Power Distribution Company and others Vs. Central Electricity Regulatory Commission, [[2007] 8 SCC 197] and has tried to explain various angles which need consideration, i.e. [i] free flow of electricity; [ii] possibility of maintaining generation at constant level; [iii] large volume that is being handled in the Grid to maintain frequency for all the consumers and; [iv] provisions made for imposing penalty for State Utilities, and if they are found making deviation from the Grid frequency, heavy penalty is being recovered by way of un-scheduled interchange charges.

**16** The Court has been shown a technical format/chart by Mr. Joshi, learned counsel for the petitioners as well as by Mr. Ramachandran, learned Sr. Advocate appearing on behalf of the GETCO to explain that after all what is parallel operation and why respondents are claiming charges/levy for alleged parallel operation. The said chart is reproduced herein below.

#### IMAGE

From the above chart, it is crystallized that National Grid-A, State Grid-B and Regional Grid-C are interconnected through sub stations and they transmit electricity through 132 KV feeder line and from the Regional Grid-C, power is being supplied to the industry and before the electricity is stepped down to 11 KV through the transformer, circuit breaker is provided at the point of commencement of supply industry by the Managers of Regional Grid after stepping down to 11 KV is connected by means of feeder lines to Synchronization Bus-[D] in the consumer premises. Likewise, before the power generated by the captive power plant is connected to Synchro-Bus [D] through its feeder line, a circuit breaker is provided. Power drawn from both the sources is pooled at Synchro-Bus and through transformers provided in the consumer premises, power is further stepped down to 415 Watts and fed to the machinery operating in the industry. If any industrial unit is either selling excess power or transferring its power to its other unit situated at a distance generated by it at 11 KV, it should be fed into grid through export feeder line-[E] after stepping up the power to 132 KV through transformers provided in the industrial premises as shown. Thus, it is possible to infer that in the event of some problem in the captive power plant, there is likelihood of drawing more power from the licensee's grid. To prevent or minimize such eventuality, i.e that no excess power is drawn by the industry, circuit breaker is provided at the commencement of supply and it automatically trips off as and when the system tries to

take extra power over and above the Contracted Maximum Demand and the machinery in the industry goes off. This contingency is popularly known as fault condition in the industry.

**17** It is necessary here to mention that parallel operation is not new concept or activity in regulating electricity energy with its desired frequency, because, earlier, i.e. prior to constitution of State Regulatory Authorities under Section 17 of the Electricity Regulatory Commission Act, 1998 [hereafter to be referred to as "the ERC Act"] by issuing Commercial Circular, the GEB was recovering some charge/amount under the head of "Parallel Operation Charges" in respect of captive power plants and by issuing Commercial Circular No. 706 dated 28th January 2000, the GEB had attempted to revise that rate and while evaluating commercial Circular No. 706, the GERC held that charge, if is levied as Parallel Operation Charge, then, the same would fall in the category of "tariff". Therefore, it is very clear that when Parallel Operation Charge is part of industrial tariff in respect of CPP and GEB has no jurisdiction to levy or alter without approval of the Commission, the subject would fall within the domain of State Electricity Regulatory Authority, i.e. GERC. Here, it is relevant to note that the learned counsel appearing for the petitioners have submitted that their idea was to defeat the Commercial Circular No. 407 and as they were successful party before the GERC, there was no scope for them to challenge the finding by way of an appeal that certain observations were against the parties who were resisting and challenging the validity of the Circular on various grounds including the jurisdiction of GERC. Thus, the moment, the CPP lays its claim for parallel operation and infrastructure of generation, transmission and distribution created by GEB, the GEB was to recover some amount as Parallel Operation Charges. Though the Commission, while dealing with Circular No. 706 has observed that: "Commission is of the view that for such claim, the GEB is well within its right to charge POC", is an observation which will have some bearing on the merit of this matter. But the petitioners have hammered that it is their privilege to point out that GERC or State Electricity Regulatory Authorities cannot assume jurisdiction to deal with Parallel Operation Charges unless the GERC is specifically conferred with the jurisdiction.

**18** One of the submissions made by Mr. Mihir Thakore, learned counsel appearing for the petitioners is that GERC itself perhaps was convinced that for want of specific power or authority, it would not make any change or alteration in the rate of POC and therefore only, pending the present petitions, the GERC framed Regulation and conferred power by adding certain words referred to herein above. It is, therefore, relevant to discuss that after all, what is Parallel Operation and whether keeping in mind the totality of facts and circumstances including the fact that India is heavily power deficit country, this Parallel Operation or Grid Support also should be charged and such charge can be termed as tariff within the scope of Section 86[1][a] if the charge is outside the

concept of tariff, then, the GERC would not have jurisdiction to pass any orders irrespective of earlier Commercial Circular issued prior to 1998.

**19** The word "Parallel Operation" means activity undertaken by the Transmission System Controller. GEB, now GETCO owns, operates and maintains transmission system in the State of Gujarat, i.e. Intra-State Transmission System. Transmission lines are high pressure cables and overhead lines transmitting electricity from one generating station to another generating station or Sub Station together with associated facilities. Transmission system forms essential part of power system or the Grid system in the State. Grid system in the State is connected similarly with the National Grid, i.e. National Transmission Lines. So, Intra-State Transmission System has a Grid support of national Grid. Definition of "Grid" says that it is high voltage backbone system of inter-connected transmission line, sub stations and generating plants. Grid system maintained in the State of Gujarat consists of high voltage backbone transmission system. This system gets electricity generated at different generating stations essentially for transmission to the distribution licensees and thereafter, it goes for retail sale and supply to the general body of consumers in the State. The entire quantum of energy, thus, is there in the system which energizes the entire system with high capacity electricity. The system is maintained in readiness for all users and to tap electricity as they would need from time to time. There is no boundary and this energy flows in all directions vertically or horizontally freely on sustainable availability of Grid or wire. Therefore, no consumer can specifically say that he is using power generated in a particular plant or generating stations. Obviously therefore, on occasions, electricity generated by CPPs also would go to transmission system energizing the system, i.e. additional or unused power of CPP. When a person establishes CPP, he has an option of either operating CPP in isolation or operating CPP with connectivity to the Grid system. Mr. Premal Joshi, learned counsel appearing with Mr. Ramchandran for GEB/GETCO has named about 14 CPP holders who are generating electricity energy in isolation. About 14 power plants with contract demand are operating in isolation and therefore, they cannot be subjected to POC. Parallel operation is in case of CPP generating power with connectivity to Grid system. Choice is entirely of CPP and there is no compulsion that CPP should operate in isolation or should operate with connectivity to Grid. It is not legally possible for the respondent, particularly, for GETCO, to ask the petitioners to operate their CPPs in isolation if they do not want to pay Parallel Operation Charges, because, it has statutory obligation to provide electricity energy even to CPP holders. If CPP operates with connectivity to Grid, it would mean that CPP is in Parallel Operation with the Grid. It is possible for the CPP to operate not in parallel with Grid. According to Mr. Thakore, some power plants of petitioner - Reliance Industries Limited, of course, have facility of connectivity to the Grid, they are independent and are not using any power or support of Grid. CPPs which operate not in parallel with the Grid, still have connected load with the Grid. Therefore, CPP holder can take care that it uses power generated by the CPP

itself though it has no parallel operation to the Grid. CPPs operating in parallel with Grid as compared to operating in isolation have significant and manifold advantages and disadvantages. It is also pointed out that industrial house having captive generating plant is entitled to open access. As per Section 9 of the Electricity Act, no surcharge can be levied for generated electricity to the destination for its use. Attention of this Court is also drawn to Section 39 of the Electricity Act. Thus, the petitioner or other consumer, irrespective of having captive power plant does not have privity of contract with respondent no.1. Undisputedly, the status of respondent nos. 2 to 5 is of distribution licensee. The petitioner and other consumers have contact demand only with such distribution licensees. Thus, distribution licensee is supposed to give open access to the petitioner for carrying electricity from generating captive plant to the destination for his use and this distribution licensee cannot recover surcharge. It is not necessary to reproduce relevant Section 42 for the purpose, but the entire scheme facilitates captive power plant operators and consumers.

**20** It is submitted that the respondent no.6 Regulatory Commission constituted under Section 82 of the Act is entrusted and empowered authority and its functions are enumerated in Section 86. The State Electricity Commission is empowered to determine tariff for generation, transmission and/or supply and wheeling of electricity. It may be wholesale, bulk or retail, as the case may be, within the State. The State Commission is constituted while exercising powers vested by Section 86. Therefore, it cannot assume status of adjudicatory authority like Civil Court or High Court, more particularly for want of specific provision in the relevant Act and therefore, the State Commission has no authority or jurisdiction whatsoever to give a declaration either positive or negative as if it decrees the suit, or issues a writ for declaration as to status, power etc. The say of the respondent nos. 1 to 5, more particularly, respondent nos. 2 to 5 is that POC is tariff in reference to transmission of electricity. Tariff is to be determined as per Section 62 of the Electricity Act, 2003, but it is submitted that POC would not fall in the category of "tariff" in view of Sections 61 and 62 of the Electricity Act, 2003. Both these sections are reproduced hereunder:-

"61. Tariff regulations.-- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

[a] the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

[b] the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

[c] the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

[d] safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

[e] the principles rewarding efficiency in performance;

[f] multi-year tariff principles;

[g] that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;

[h] the promotion of co-generation and generation of electricity from renewable sources of energy;

[i] The National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity [Supply] Act, 1948 [54 of 1948], the Electricity Regulatory Commissions Act, 1988 [14 of 1998] and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

"62. Determination of tariff.-

[1] The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for -

[a] supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of agreement, entered into between a generating company and licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

[b] transmission of electricity;

[c] wheeling of electricity;

[d] retail sale of electricity;

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

[2] The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

[3] The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

[4] No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

[5] The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

[6] If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

The petitioners have placed much reliance on the decision of the A.P. High Court in case of Vishnu Cement Limited Vs. Central Power Distribution Company, Andhra Pradesh and others [2003 [4] ALD 405] and the Andhra Pradesh High Court has held that under the said Act, Commission had no power to levy grid supply charges. It is submitted that this decision is based on earlier decision in the case of RCI Power Limited. Conclusion recorded by A.P. High Court in case of Vishnu Cement and the other judgment in RCI Power Limited referred to hereinafter is that:

"... the Commission is asking the industries to pay Grid Support Charges in lakhs of rupees by contending that the Grid is absorbing the excess load over and above the maximum demand as and when the Captive Power Plant is tripped of without there being any statistical data, on

undermined and unmeasured quantity of electricity said to have been made available by the licensee. Further, we do not really understand how the capacity of CPP is relevant and can be a basis for arriving at the conclusion that the CPP is availing instantaneous load, unquantified and unmeasured in excess of oCMD within the integration period. It is not also their case that the entire industry runs to its full capacity throughout, at any rate at least at the time of trip of. If at all the Commission is having such a power, the superior Courts in the country repeatedly held that uncanalised, unbridled or arbitrary exercise of power is ante-thesis to the rule of law. Hence, we hold that the order of the Commission is vitiated by malice in law and arbitrary exercise of the alleged power vested in it."

[emphasis supplied] Other two issues also have been decided by this judgment and it is observed that reasons given by the Regulatory Commission in levying grid charges are not sustainable in law. I have been taken through the relevant paragraphs 43 to 80. A.P. High Court has also discussed the point whether levy of grid charges can be said to be reasonable or intention to levy such charges can be held to be arbitrary. The A.P. High Court has opined that the Commission's order is invited by malice in law and it is arbitrary exercise of alleged power vested in it and the discussion made by the High Court in paragraphs 81 to 83 says that decision was not even on correct and factual premise. So, in the present case on hand, according to the petitioners, there was no scope for GERC to give any declaration without any factual premise or data available as to the nature of alleged grid support and alleged cost incurred in lending such support. The overall ratio of the said judgment is that there was no valid justification for POC and the judgment of the appellate Tribunal also would not go to the root of the issue which is required to be addressed by this Court as the order under challenge is an order of declaration simplicitor.

**21** Before unbundling of the activities of the erstwhile Gujarat Electricity Board, it had approached GERC in the year 2003 and instituted Case No. 256 of 2003 on 8th September, 2003. New Electricity Act, 2003 came into force in Gujarat on 10th December, 2003. Then, the GEB prayed that; "the Hon ble Commission may kindly approve a special levy of 50% of demand charge [as specified in the tariff of HT industrial category from time to time] on the capacity [in terms of MVA] of captive power plant as a compensation for the network costs of GEB infrastructure in the grid system." Thus, the GEB suggested that such CPPs in parallel operation may pay the amount up to 50% on the demand charge. The demand charge is for recovery of fixed costs of the network and GEB wants to exclude portion of demand charge attributable to generation, since CPP holders have set up their own generating plant. It was further say of the GEB that 50% of demand charge on the entire captive power plant capacity is unreasonable measure for compensating the GEB for provision of infrastructure qua parallel operation. The petitioners have alleged that estimated revenue to be generated through the proposals from all the

petitioners would come to Rs. 116.10 crores. As for example, CPPs at 4 different places of Reliance Industries have capacity to generate about 645.01 MVA electricity and therefore, the revenue with 50% demand charge would go to Rs. 116.10 crores. Reliance Industries only has contract demand with GEB for each of its 4 units and is paying contract demand charges to the distribution licensee. Fixed charges for contract demand, irrespective of the fact whether CPP holder draws power from the grid or not, are levied. It is also the duty of CPP holders having grid support to pay like other electricity consumers, irrespective of use or drawal of power, a fixed charge for committing infrastructure like other consumers. The CPPs are also supposed to pay separately for the actual power drawn and if the drawl of power is in excess of contract demand, the CPP holder would attract penalty charges so as to serve as disincentive to understate the contract demand. It is submitted that between contract demand charges and actual energy charges for power actually drawn, all the costs, fixed and variable are recovered by way of tariff as fixed by the respondent no. 6 GERC. When the respondent nos. 1 to 5 decided to continue with the new demand after unbundling of GEB as POC, they were supposed to satisfy the regulatory Commission, that is, respondent no. 6 that, POC falls within the category of any of the charge or tariff falling within the demand of GERC. Significantly, the POC sought to be levied is in the nature of fixed demand charges based on the capacity of CPP and the same is not on the basis of any costs supposedly incurred and relatable to the so-called service provided.

**22** Case No. 256 of 2003 filed by the GEB/GETCO claiming POC from the units having CPPs parallel to the grid on the ground that the connectivity to the grid provides comfort to the units having CPP and the POC are, therefore, in the nature of subscription charges to a system and are essentially for use of the system and for being connected to the system. One of the justifications that was placed by the GEB was that Andhra Pradesh Electricity Regulatory Commission had approved levy of POC on the difference between the total capacity of the CPP in KVA and the contracted maximum demand in KVA with the licensee and all other sources of supply at the rate equal to 50% of the prevailing demand charges to HT consumers. It is pointed out to the Court that the order of A.P. Electricity Regulatory Commission was set aside by the Andhra Pradesh High Court vide judgment dated 2nd May, 2003 in the case of Vishnu Cement Ltd v/s. Central Power Distribution Company of Andhra Pradesh. It is observed by the Andhra Pradesh High Court that reasons assigned by the Electricity Commission in levying grid support charges are not sustainable in law and the levy of grid support charges is unreasonable and arbitrary. I have seen the relevant paras nos. 42 to 83 referred to by the counsel appearing for the petitioners. The decision of the Andhra Pradesh High Court has been assailed before the Apex Court and the Special Leave Petition, at present, is pending before the Supreme Court. The Court is informed that no formal stay has been granted against the operation of the judgment of the Andhra Pradesh High Court. Here, it is important to note that Maharashtra

Electricity Regulatory Commission treats the consumers having CPPs in the category of special class of consumers and applies tariff in excess to normal demand charges. It is submitted that in Maharashtra, there is no levy of POC on the capacity of CPP and what is levied is fixed demand charge for the demand contracted with Board/distribution licensee and other charges are levied practically as charges against stand by requirement as the same is at the rate of Rs. 20/- per KVA. Thus, consumers having CPP and so also the facility of parallel operation, are considered to be a class in the State of Maharashtra and here that was not the case before the GERC.

**23** Quashing of Commercial Circular No. 706 dated 28th January, 2000 had created precarious situation for the petitioners. There, desire of the petitioners was that the impugned Circular goes and is quashed. So, final finding, being finding in favour of the CPP holders, i.e petitioners, the petitioners could not have been held entitled to prefer an appeal against that order. As per the law, successful party is not entitled to prefer an appeal. Though GERC had observed that it is made clear that by quashing of the impugned Commercial Circular, the earlier circular of GEB in respect of Parallel Operation Charges does not automatically become inoperative and it is open for GEB to approach GERC with necessary application under Section 29 of ERC Act, 1998. It is also observed that the GEB, however, may charge fixed demand charges for this purpose as per existing tariff rate. Earlier Circular issued prior to the Circular No. 706 was not challenged by any of the CPP holders. When it was possible for the petitioner to assail levy of POC and if GEB makes such attempt on all available grounds, there was no need for any of the CPP holders to approach the higher forum to get observations made by GERC expunged. It is submitted that considering the contents of the application and the reasons put forth by the original petitioner-GEB, the GERC ought to have held that it has no jurisdiction to fix POC and respondent if entitled may increase the fixed demand charges and pray for fixing separate tariff rate putting the CPP holders in different category. It is also one of the arguments that the observations made by the GERC in the order passed while quashing the Commercial Circular No. 706 dated 28th January, 2000 would not bind the petitioners in the background of scheme of Section 27 of the Electricity Regulatory Commission Act, 1998 as the order was in favour of the CPP holders. Placing reliance on the observations made in para-5 of the Apex Court in its decision in the case of Banarasi Vs/ Ramphal [AIR 2003 SC 1989] and in the case of Smt. Gangabai Vs. Vijaykumar & others, [AIR 1974 SC 1126, paras 16, 17 and 18], it is submitted that the said observations would not bind the petitioners and the petitioners are entitled to question any such observations not only the proceedings as and when occasion arises. It is also submitted that the observation made by GERC in the said order was not based on any established facts and the finding is nothing but extension of some logic.

**24** One more argument advanced by the learned counsel for the petitioner is that no provisions of the Act or the Gujarat Act has been referred to or relied

upon in Case No. 256 of 2003 to justify the claim of POC. It is only being referred to as subscription charges to a system or charges for comfort to CPPs for being connected to the system or charges for use of the system in the style of grid support. The petition is silent as to the nature of service, if any. Of course, no arguments on merits have been advanced keeping all rights reserved to contest the say of respondents after looking to the facts and other details as and when are placed to justify recovery of POC, i.e. costs etc. It is submitted that when GERC itself has reached to a conclusion that GEB had not successfully established its claim by placing specific data and they may approach again with fresh petition with specific details and data. This finding itself indicates that this is nothing but failure on the part of the GEB to claim anything under the guise of POC. This situation, on the contrary, supports the logic placed by the petitioners that POC does not fall in the category of cost, tariff or charge that can be recovered from the CPP holders merely because they remain connected to the grid. On account of getting some support from the grid, GEB may put a particular CPP operator into a different category of consumer, but such CPP operator cannot be subjected to any charge only on the count of its parallel operation.

**25** The order under challenge has been read over to the Court by Mr. Mihir Thakore, Mr. Mihir Joshi, and by Mr. S.N. Soparkar, all Sr. Advocates and also learned Senior Advocate Mr. Ramchandran appearing for the GEB. The order under challenge is annexed with the petition and the same is part of the bounded volume showing date of 25th June, 2004, which is annexed as Annexure:H to the Special Civil Application No. 14742 of 2004. This compilation is entitled as Order Case No. 256/03 in the matter of Gujarat Electricity Board's petition for levy of Parallel Operation Charges for captive power plants runs parallel to GEB grid. The order is divided into 6 major parts; namely, [i] History of Parallel Operation Charges; [ii] Summary of GEB Proposals; [iii] Legal Objections to the maintainability of the petition; [iv] Issues raised by Objectors; [v] Grid Support Service for Parallel Operations [Explanatory Notes on Technical Issues] [vi] Charges for Parallel Operation: Conduct of Study and; [vii] Commission's Order. There are about 13 annexures in this compilation and the same being relevant to the present order, they have been referred also by the learned counsel appearing for the parties. It is necessary to give details in brief of all these 13 annexures that were considered by the GERC while passing Final order. The said annexures, in brief, are as under: "Annexures:

1.1 Standard format of Consent Letter issued by GEB to CPPs.

1.2 GEB Commercial Circular No. 687

1.3 GEB Commercial Circular No. 706

1.4 Commissioner's Order Case No. 24/2000

1.5 List of Newspaper in which Notices were published.

1.6 List of Objectors to GEB's Petition.

1.7 List of Objectors who appeared for Public Hearing.

3.1 Main Features of the Electricity Act, 2003

3.2 GoG Notification for GEB's Transfer Scheme

3.3 Section dealing with Tariff in Gujarat Electricity Industry [Reorganisation and Regulation] Act, 2003

3.4 Notification of the Government of Gujarat to authorise GEB to continue to function as a licensee.

3.5 Sample Letter inviting objectors for public hearing.

5.1 Relevant abstract from CBIP Manual on Transformers for No Load Losses."

The order under challenge says that the petition filed by the GEB is maintainable and POC can be levied under the Central Act and Gujarat Act. Such declaration is given when GEB had ceased to exist and was unbundled into 7 entities. There is no finding as to which entity out of 7 was entitled to have Parallel Operation Charges and which entity can be said to have provided service of grid support. The declaration simplicitor is given by the GERC saying that the support extended by the grid to CPP synchronized with it has to be identified and qualified. The GEB was asked to furnish the estimate of cost being incurred by it for providing purported services to CPPs and directed to conduct necessary study covering these areas. The petitioners are aggrieved by the Commission's declaration that the petition filed by GEB is legally maintainable and also on the finding that POC can be levied. This declaration made by the GERC, according to the petitioners is without jurisdiction. On this count, lengthy arguments have been advanced from the side of the petitioners. However, they can be summarized as under:-

[a] It is not even the function of GERC under Sec.86 or any other provisions of the Act to give declaration that POC can be levied under the Central Act or Gujarat Act without recording and assigning good, proper and/or sound reasons when it was not impossible for GERC that what could be that charge and out of 7 entities who can levy charge.

[b] GERC ought not to have assumed jurisdiction of adjudicatory body, because, statutory limitations are reflected in Section 86 of the Act.

[c] The declaration that the petition is maintainable and POC can be levied can be said to be completely outside the jurisdiction of the State Commission under the Act or Gujarat Act and such order cannot sustain.

[d] Whether Parallel Operation Charges are included in tariff is a question of law and, therefore, the same was beyond the jurisdiction of GERC, which is a statutory Tribunal having limited jurisdiction empowered only to determine the rates as an issue of fact.

While challenging the vires of Regulation-62 framed, the petitioners have placed reliance on the observations made by the Supreme Court in the case of A.V. D'Costa, Divisional Engineer, G.I.P. Railway Vs. B.C. Patel and another [AIR 1955 SC 412]. It would be beneficial to reproduce relevant part of paragraphs -7 and 10 of the judgment, which are reproduced hereunder:-

"The Authority set up under S. 15 of the statute in question is indisputably a tribunal of limited jurisdiction. Its power to hear and determine disputes must necessarily be found in the provisions of the Act. Such a tribunal, it is undoubted, cannot determine any controversy which is not within the ambit of those provisions. On examining the relevant provision of the Act it will be noticed that it aims of regulating the payment of wages to certain classes of persons employed in industry. It applies in the first instance to the payment of wages to persons employed in any factory or employed by a railway administration; but the State Government has the power after giving three months' notice to extend the provisions of the Act or any of them to the payment of wages to any class of persons employed in any class or group of industrial establishments."

xxx xxx xxx

"The authority has the jurisdiction to decide what actually the terms of the contract between the parties were, that is to say, to determine the actual wages; but the authority has no jurisdiction to determine the question of potential wages. The respondent's complaint in the present case comes within the latter illustration, If the respondent's claim to be placed on the scheme of higher wages had been unduly passed over by the appellant, if indeed he had the power to do so, the obvious remedy of the respondent was to approach the higher authorities of the railway administration by way of departmental appeal or revision: but instead of doing that, he has sought his redress by making his claim before the authority under the Act.

The question is, has the authority the power to direct the appellant or his superior officers who may have been responsible for the classification, to

revise the classification so as to upgrade him from the category of a daily wage earner to that of an employee on the monthly wages scheme. If the respondent had been on the cadre of monthly wages and if the appellant had withheld his rise in wages to which he was automatically entitled, without any orders of his superior officers, he might justly have claimed the redress of his grievance from the authority under the Act, as it would have amounted to an underpayment.

But in the present case, on the case as made on behalf of the respondent, orders of the superior officers were necessary to upgrade him from a daily wage earner to a higher cadre. The authority under the Act has not been empowered under S. 15 to make any such direction to those superior officers. The appellant is responsible to pay the respondent only such wages as are shown in the relevant register of wages presumably maintained by the department under the provisions of the Act, but he cannot be directed to pay the respondent higher wages on the determination by the authority that he should have been placed on the monthly wages scheme."

[e] Declaration has been made in absence of factual premise, since the Commission itself has concluded that it is not possible for the Commission to hold that some special chargeable service is being rendered and on the basis of data furnished with the application, it is not possible to say anything qua rate of charge meaning thereby, the GERC was not satisfied with the so-called data or other details provided and in that contingency, declaration simpliciter could not have been given. Here, it would be beneficial to refer to paras 4.60 and 5.2 of the order under challenge, which reads as under:

"4.60 The Commission is of the view that the insurance idea employed by the Board is an analogy to clarify the concept of POC or a description used for explanatory purposes. The real issue is not how best to describe the nature of POC; it is to see whether any service is being rendered, and if so, how to appropriately determine the cost of such service."

xxx xxx xxx xxx

"5.2 This chapter deals with the question of support services that the CPPs receive [from the grid] for their parallel operation. As we saw in the last chapter, the issue is rather contentious. Further any definite formulations will have to await the report of the suggested study. However, the Commission is of the view that discussion on the nature of grid support services to CPPs [synchronized with the grid] needs to be placed in perspective. The ideas expressed in this chapter are exploratory and have to be seen in the above framework."

[f] It emerges clearly from the finding of the GERC that declaration given has no basis. The petitioners have placed reliance on the observations made in certain paragraphs of the order. I would like to refer to some of the paragraphs which are reproduced as under:-

"[a] Parallel Operation Charge of Grid Support Charge is an expenditure incurred by the Board on account of CPPs synchronized with the grid. The classification of such costs - either as fixed or variable or under appropriate tariff categories or other income - is really an accounting issue. The Commission however has necessarily to see whether such a cost is being incurred, and if so, in what measure. As we noted earlier, if such costs are incurred, licensee will be entitled to their recovery.

[b] This argument, as noted earlier, is primarily about classification of the POC among tariff categories. The Commission is of the view that POC will have to be related to the cost being incurred by the Board for supporting the CPPs synchronized with the grid. These aspects are further elaborated later in the order.

[c] The Commission is of the view that POC can be levied under the Central Act and the State Act. Hence it is not necessary to pursue this issue. In any event the order suggests a detailed study for revolving a methodology for determining POC.

[d] As mentioned earlier, the learned Counsel representing the Board, Shri M.G. Ramachandran mentioned that the statement would have to be seen in that particular context only and he withdrew the statement during the course of hearing. The Commission would not like to express any opinion on the nature of the POC. The material question, as already mentioned is whether such costs are being incurred by the Board, and if so, in what measure. It is however of interest to note that in the common judgment of the Hon ble High Court of Andhra Pradesh in CMA No. 1104 of 2004, the POC or grid support charges have been characterized as under:

"Grid charges can be termed as non-tariff income different from the income of the licensee on its principal business i.e. Transmission, distribution and supply of electricity."

[e] The Commission is of the view that the theoretical assertions have to be supported by empirical data. Accordingly, necessary directions have been included later in the order for conducting a study for the purpose. Besides the grid support extended to the CPPs, as the Board claimed, may involve various costs which need to be identified, approximately estimated and allocated. The study will also have to cover these aspects.

[f] In this section, we examine the technical arguments of the objectors against the Board's petition on POC. As will be evident from the later portions of the order, the Commission is of the view that on the technical issues it is necessary to generate data using an appropriate methodology and instrumentation. Without such empirical studies, it may be difficult to evaluate the rival arguments at a purely theoretical level. As the levy of POC has been challenged on several technical and commercial grounds, approximate estimations of costs involved, in providing support to CPPs synchronized with the grid, will be needed. As we shall see, the objectors argued that they hardly derive any benefits [and on the contrary suffer serious handicaps] from the linkage to the grid. The Commission concluded that additional information would have to be generated on the basis of technical studies using appropriate methodology. Accordingly the order returns the petition to the Board with directives for generating the needed additional information and also with liberty for resubmitting the petition in light of such data. At the same time, the Commission deems it appropriate to flag the arguments and counter arguments advanced in the proceedings to place the technical issues in perspective.

[g] As mentioned earlier, the Commission is not passing any order fixing POC. The Commission has enumerated the arguments given by the Board giving a technical explanation of the support which the grid extends to CPPs synchronized with it. During the hearing, some objectors conceded that they receive some benefits from grid connectivity. But their argument additionally was that such benefits have to be quantified and reasonably priced. It seems plausible even otherwise to suppose that economically rational entrepreneurs would not continue to stay on with the grid in the absence of tangible benefits. The Commission however has an open mind on the issue and will be guided by the technical studies. As already outlined, after dealing with the legal issues, the Commission came to the conclusion that grid support charges or POC, can, if need be, levied under the Central Act and the Gujarat Act.

[h] This completes our account of the arguments and counter arguments that were advanced about the proposed POC in the proceedings. As already mentioned, [and elaborated in the subsequent portions of the order], the Commission has decided that for determination of POC, it will be necessary to have additional information specified in the directives given later in the order.

[i] As issues have arisen about the reasonable level of charge, GEB should make a thorough study and bring out the cost being incurred by it for providing grid support to the CPPs under different heads. The study may cover the various costs under the following four heads."

[g] It is hammered by the petitioners that when the GERC was not able to reach to a positive conclusion that whether any service is being rendered by the respondent about the cost of such purported service and under what head of tariff such costs can be assessed and charged, the application ought to have been dismissed.

[h] One of the alternative arguments advanced by Mr. Thakore is that instead of giving two declarations simpliciter that too, devoid of authority and jurisdiction, the GERC ought to have directed the applicant GEB to satisfy the authority factually that particular type of services are provided for which the Board incurs some costs. These costs require to be rationally distributed and the charge under the head of POC can be recovered under a particular head of tariff and the GEB could have been asked to approach the Commission afresh with all data and justification, especially when the view of the Andhra Pradesh High Court is clearly supporting the say of the petitioners.

[i] The impugned order is even otherwise without jurisdiction because it holds that POC is leviable. The logic in reaching this conclusion is that merely because open access right is given to CPP it would not automatically exclude POC as observed.

"4.26 ... The Commission would like to observe that the open access right given to CPPs [subject to availabilities of spare capacities in the transmission and distribution systems], which is subject to payment of wheeling charges, would not automatically exclude POC. ... 4.27... The Commission concludes [1] that POC need to be seen in the framework of CPP's synchronized grid connectivity rather than wheeling of power and [2] that the Central Act does not specifically prohibit POC. ..."

The real issue is thus not addressed by GERC. POC cannot be imposed on the logic that there is no provision in the Act excluding POC. There has to be a specific provision entitling levy and recovery of POC. In absence of such provision, POC can be levied even if parallel operations of CPP result in benefit to the CPP. [j] During the submissions made, the respondent GEB decided to revoke the statement made on oath as to status of POC as of levy. GERC was not able to find any enabling provision in the Indian Electricity Act or Gujarat Act entitling levy of POC. GERC has held that under what head of tariff even POC would fall is an accounting issue. While observing so, GERC ought not to have ignored clear admission made by GEB in the affidavit that POC is not a tariff. Paragraph pointed out by the learned counsel appearing for the petitioners from the affidavit of GEB produced in the proceedings before the GERC reads as under:-

"Since the recovery of the Parallel Operation Charges is different from that of the Wheeling Charges, there is no cognizance of the provisions

under Section 62 of the Electricity Act, 2003 as stated by the Respondents.

The context of the precedents of the other Regulators is given in absolute terms. The Parallel Operation Charges being independent of Tariff, it is not pertinent to rely upon the tariff rates of other States for which the precedents are cited."

Admission has been ignored solely on the basis that the learned counsel representing the Board withdrew the statement and clarified that POC will be covered in transmission charge. Attention of the Court is drawn to para-4.45 of the order impugned. According to the petitioners, GERC has completely erred in reaching to the conclusion recorded in para-4.45 without determining the service being supposedly provided, the costs thereof and without determining that under what tariff head such supposed cost would be leviable. Merely observing that classification of such costs either as fixed or variable or under appropriate tariff categorized or other income is really an accounting issue, would not tilt the balance on merit in favour of the respondent GEB. By placing this hypothesis, the GERC has assumed jurisdiction and passed a declaratory order on theoretical basis. Section 62 of the Electricity Act, 2003 deals with determination of tariff and Clause-[b] of sub-section [1] confers jurisdiction to the appropriate Commission to determine the tariff in accordance with the provisions of the Act qua transmission of electricity. The question, therefore, was a matter of debate before the GERC that how POC would fall in the category of transmission of electricity. It is argued that scheme of Section 39 of the very Act has not been properly considered, because, such transmission utility and the functions contemplated in the Section confers an obligation on the State transmission utility and it has to undertake certain obligations including transmission of electricity through intra-State transmission system, to decide all functions of planning and coordination relating to intra-state transmission system with various agencies like Central Transmission Utility etc. Transmission Utility is bound to provide non-discriminatory open access to the transmission system for use by:- [i] any licensee or generating company on payment of transmission charges or [ii] any consumer as and when such open access is provided by the State Commission under sub-section [2] of Section 42 on payment of transmission charges and a surcharge thereon as may be specified by the State Commission. Thus, Section 39[2][d] only provides for transmission charges as above. Here, it would be beneficial to quote relevant part of Section 39 [2][d] of the Electricity Act, 2003 , which reads as under.

"39. State Transmission Utility and functions.-

[1] xxx xxx xxx

[2] The functions of the State Transmission Utility shall be-

[a] xxx xxx xxx

[b] xxx xxx xxx

[c] xxx xxx xxx

[d] to provide non-discriminatory open access to its transmission system for use by--

[i] any licensee or generating company on payment of the transmission charges; or

[ii] any consumer as and when such open access is provided by the State Commission under sub-section [2] of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission:

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

Section 42 of the Electricity Act, 2003 talks about the duties of distribution licensees and open access. Scheme of Section 42 also confers some different status to CPPs. Mr. Thakore has developed his argument while referring to Section 62, Section 39, 42, 43, 45 and 2[76], and has submitted that the Court should keep one fact in mind that State of Gujarat, though is considered to be one of the developed states of our country, there is power deficit and therefore only, captive generation is being encouraged. It is submitted that the Indian Electricity Act carves out special provision in the background of captive generation [Sec.9] and duties of generating companies [Sec.10] and generating company is permitted to establish, operate and maintain power generating station without obtaining formal license under the Electricity Act, provided that the company is capable of maintaining and is able to comply with technical norms relating to connectivity with the grid referred to in Clause-[b] of Section 73. There was no dispute before the GERC that none of the petitioners is asked to pay grid support charges as they are not capable of complying with technical

norms. One of the petitioners-Reliance Industries Limited, represented by Mr. Mihir Thakore, has 5 CPPs at different locations in the State of Gujarat and one such CPP of this company is situated in Jamnagar district, which is capable of generating 450 MV, i.e. more than required for its Jamnagar Industrial establishment at present. All CPPs are well equipped, recently erected and maintained properly so that each plant can comply with technical norms of connectivity. It was argued by the GEB that while starting CPP, these CPPs are consuming high voltage of electricity and only thereafter, these plants are able to function. This is nothing but grid support by GEB. Similarly, GEB rushes to the rescue on failure of CPP, so GEB has to keep itself ready to supply power as per the load requirement and it has to maintain the connectivity norms. This is also a service. As there is constant grid support flow of electricity between CPP and the power grid, Electricity Board has apprehension to have adverse impact capacity wise and will have to keep equipped themselves up to the total plant, i.e. CPP's capacity. So recovery of POC would be burden reduction policy. Further say of GEB is that there are historical results for encouraging CPPs and their establishments. Encouragement given to establish generating plants or CPPs would not go against the State utility, because, the State utility accepts to help and provide support to such generating plants in case of need. On occasions, State utility may have to carry extra load of CPP and for that, they have to maintain the entire grid, control stations/sub stations. As per Scheme of Section 44 of Electricity [Supply] Act, 1948, there was restriction on establishment of new generating stations or major additions or replacement of plant in generating stations and the State Electricity Boards were given a qualified right to control establishment of new generating stations or extensions of old generating stations irrespective of whether owned by licensee or not. Now, in view of the liberalized policy, CPPs are established, but when such CPPs, being generating plants intend to remain connected with State utility, then, they may pay some charges and those charges have been termed as POC. It is nothing but a charge against grid support or assurance to provide grid support. Say of the petitioners is that all the submissions have been considered in correct legal perspective, because, such grid support cannot be said to be transmission of electricity as defined in Section 2[74] of the Act. It is not a conveyance of electricity by means of transmission lines. POC is nothing but a charge sought to be levied for the network, which, certainly would not fall within the term "tariff for transmission". If scheme of Section 86[1] is considered, then, recovery of network maintenance charge would not fall in the category of any kind of tariff or transmission charges and POC does not fall under any head of the charge leviable under the Act or Gujarat Act. Therefore, declaration that POC leviable is outside the jurisdiction and function of GERC is the gist of the say of the petitioners. As there was nothing before the GERC to hold that POC is part of bundle of rates constituting tariff, it ought not to have declared that GEB can levy POC/grid support charges and such charges can be determined by GERC, if data is available.

**26** The petitioners, after amending the respective petitions filed by them, have prayed for amendment in the petitions and have challenged the sustainability/vires of Regulation framed by the GERC in the year 2002 i.e. Gujarat Electricity Regulatory Commission [Terms and Conditions] Regulations, 2004, more particularly, Regulation 54 of the said Regulations, which reads as under:-

"54. Transmission Charges:- The tariff for transmission of electricity on inter-state transmission system shall comprise of the recovery of annual transmission charges consisting of the following, namely:

- [a] Interest on loan capital;
- [b] Depreciation, including Advance Against Depreciation;
- [c] Return on equity;
- [d] Operation and maintenance expenses; and
- [e] Interest on working capital."

It is argued that transmission charges of the transmission utility are recovered from the consumers by the distribution licensee in the form of fixed demand charge which comprises fixed generating charges, transmitting charges and the distribution charges. Fixed charges are paid by consumers in Gujarat along with variable fuel charges, which results in recovery of fuel transmission charges and all other network charges. In these circumstances, when everything is recovered as is required under the scheme of Section 62 read with Section 61, there cannot be any costs incurred which can be recovered from POC. Smallest exercise is transmitted on the shoulder of each consumer including CPP holders. Whole costs of generating company, distributing licensee and transmission licensee are being recovered under various tariffs already decided and they are fixed qua various categories of consumers contemplated under the Act and therefore, the declaration given by the authority should be held without jurisdiction. This Court can exercise writ jurisdiction and the petitioners should not be relegated to the appellate authority. In the same way, the petitioners have prayed for declaration of Regulation 62 of Gujarat Electricity Regulatory Commission [Terms and Conditions of Tariff] Regulation, 2005 to the extent that; "In addition, the Commission may also determine charges on account of service rendered by the utility to the consumer, e.g. grid support charge, is ultra vires, null and void." It is submitted that after the judgment under challenge, GERC framed these Regulations in the year 2005. If grid support charge was within the scheme of the Statute and four corners of Central and the State Act, there was no need to introduce the words "grid support charges" by framing Regulation 62. On the contrary, POC does not fall in category of any of the tariff or charges leviable

under either Indian Electricity Act or Gujarat Act. GERC could not have introduced these words by framing Regulation 62 so as to extend its jurisdiction beyond the Statute or the prevailing law. This Regulation, on the contrary, shows that GERC itself intends to confer jurisdiction on itself by introducing certain words by framing Regulation 62 though Statute under which GERC has been constituted does not provide such scope. The authority to frame the regulation is one thing and to include new subject or concept beyond the Statute while framing Regulation, is altogether different thing. It is argued that in absence of statutory provisions, more particularly, Regulations framed in the year 2005, the application preferred by GEB ought to have been dismissed. For short, it is submitted that this Court, by invoking jurisdiction vested under Article 226 read with Article 227 of the Constitution may quash and set aside the impugned judgment and so also Regulation 62 by observing that there was no scope for GERC to frame this Regulation 62.

**27** According to the petitioners, the scheme authorizes appropriate Commission to deal with steps covered by this Section and there is no mention or reference of POC. In paragraph 3.17 of the order under challenge, the GERC has referred to counter arguments placed by the Electricity Board, wherein, at one point of time, it was argued by the GEB that substantial powers under the Act can be exercised by the Regulatory Commission even in absence of the terms and conditions and specification of terms and conditions is not a condition precedent in determination of tariff. This would go against the GEB. It is submitted that Condition no.3 of the Agreement ought to have been ignored by the GERC.

**28** According to Mr. Ramachandran, learned Senior Advocate appearing with Mr. Premal Joshi for respondent no.1 GETCO and other respondent electricity companies, who are parties before the Court, all petitions require to be dismissed as the order under challenge is a reasoned and balanced legal order passed by the competent authority. It is submitted that GERC has authority to resolve the issues which are brought before it and when complex question is posed that by giving declaration, GERC can legitimately decide that respondent utility is entitled to levy POC, a question can be left open as to the quantum of such levy or charge and no jurisdictional error can be said to have been committed by GERC, because, certain facts are not in dispute. Undisputedly, the petitioners of all the writ petitions are CPPs and do not fall in the category of CPPs operating in complete isolation. There are about 13 to 14 plants who are consumers with contract demand, but they are operating their CPPs in complete isolation. None of the petitioners fall in that category. The petitioners' CPPs are operating parallel or with support of grid. POC is related to this parallel operation connectivity or parallel operation connection. Facilities available to CPPs from transmission system include grid operated and maintained by Gujarat Energy Transmission Corporation Limited [GETCO]. GETCO is successor to GEB which had initiated action with GERC against the CPPs operating parallel to transmission system. By the impugned order, the

GERC has simply held that POC is payable by CPPs to GETCO, however, there is no determination of actual charges payable and the GERC, for want of details, directed the GEB [now, GETCO] to move fresh petition with exact data so that quantum of POC can be determined and CPPs can be asked to pay that rate. POC, if levied and recovered would go to the coffers of GETCO and would help the entire operation of GETCO. Smallest individual consumer would get benefit of extra income earned and this benefit may be manifold. GETCO is not intending to enrich itself nor is there intention of profiteering which is, otherwise not permissible or warranted by law. CPPs are trying to take disadvantage of one earlier order of GERC, whereby the GERC decided to turn down a Circular issued enhancing POC, otherwise, all the petitioners were paying parallel operation charge as the grid was lending support to them directly or indirectly and the authority of the GEB to levy POC was never challenged prior to the date of Commercial Circular No. 706 dated 28th January, 2000. In a suo motu petition against the GEB, the GERC, in capacity of statutory authority constituted under Section 70 of the Electricity Regulatory Commission Act, 1998 [ERC Act], held that with the revision of POC, no captive power policy is necessary to examine as to what it meant by parallel operation charges and that subject would fall within the domain of GERC. Therefore, GEB had no power or authority to issue such Circular revising the rates of POC under the CPP Policy as the Commission is enjoined with all powers by virtue of Section 22 of ERC Act. It is argued that even while quashing Commercial Circular No. 706, the GERC has observed that quashing of impugned Circular [Commercial Circular No. 706], the earlier Circular of GEB in respect of parallel operation charges, does not automatically become operative and it is open for the GEB to approach the GERC with necessary application under Section 29 of ERC Act, 1998. Therefore, the GEB was directed or asked to approach the GERC for the purpose. Statutory validity of POC for CPPs operating parallel to the grid was neither discussed nor was held to be contrary to the Statute after the policy liberalization. The GEB, however, was asked that it may charge fixed demand charges for this purpose as per the existing tariff rate. Commercial Circular No. 687 dated 21.12.1998 was never quashed. It is submitted that while dealing with the arguments of the petitioners, this Court should consider this aspect. Mr. Ramachandran has demonstrated that how this permission to operate parallel to the grid can be said to be service by itself and what is the justification in deciding to levy POC. GERC constituted under the aforesaid Act, 2003 has jurisdiction to decide and impose levy of POC. Regulatory bodies exercise wide jurisdiction and they are entitled to lay down law. These authorities/bodies can even decide to prosecute the cause. Such bodies may punish and decide number of issues of fixation of price rate, area of operation. While doing so, such authorities can even interfere with the existing rights or crystallize rights of licensee. In support of this logic, Mr. Ramachandran has placed reliance on the decision of the Apex Court in the case of Cellular Operators Association and others Vs. Union of India, reported in 2003 [3] Supreme Court Cases 186. It is submitted that GETCO is entitled to parallel operation charges as it, otherwise, recovers cost and charges for such services.

There cannot be any free service. Apparently, service may look only one service, but on dissection component wise, or on analysis we are able to visualize that in one service, there are many hidden services and all these services jointly merge as one service. That lending support from grid to CPPs and permitting them to run parallel to the grid by itself is distinct service and it has no relation whatsoever with other charges recovered by utility like contract demand charges etc. Mr. Ramchandran has also submitted, while responding to the submissions made by the petitioners that GERC has not done anything wrong in deciding the basic controversy and in passing the impugned order only on the admissibility of POC without taking decision on the quantum of POC. Declaration simplicitor cannot, by itself, become bad merely because, consequent relief is postponed on good sound reasons. GERC may have thought it fit to have some better details so that tariff rate for POC may be scientifically fixed. It is submitted that the question that whether CPPs give any benefit to the State utilities by supplying surplus power generated by CPPs to the grid free of costs and therefore, CPPs are in fact, benefiting State utilities rather than getting benefit themselves from parallel operation, needs no answer. Free flow of power from grid to CPPs and from CPPs to grid is regulated by technical control points installed at various places. The fact remains that CPPs having some support from the grid gets additional service, may be in the nature of some assurance, then too, CPP holders operate in isolation and for that, they are supposed to pay. While turning down Commercial Circular No. 706, the GERC simply had said that the decision as to the legitimacy of POC and its quantum is within the jurisdiction of GERC and the GEB, by issuing Commercial Circular of administrative nature cannot either increase or decrease levy or charge. Permitting CPPs to operate parallel to grid enhances the liability of the State utilities. They have to keep themselves equipped to prevent disaster and power failure in large area including consumer industry having privilege being subscriber for contract demand. It is the duty of the State utility to maintain frequency at around 50 Hz. It is argued that the fundamental and important aspect in electricity is that frequency of the supply of electricity is to be maintained at or near about 50 Hz without any significant variation. If the variation in the frequency is beyond the prescribed limit [either way, namely plus or minus], it will seriously injure the plant and machinery both of the generating station and of the equipments and machines at the consumers end besides affecting the infrastructure of lines, sub stations etc. This aspect has now been judicially recognized and dealt with in the judgment of the Hon ble Apex Court in the case of Central Power Distribution Company and others V/s. Central Electricity Regulation Commission and another, reported in [2007] 8 SCC 197, wherein, in para-5, the Apex Court has observed as under:

"...This led to the Grid Frequency to vasilate from 48.5 Hz to 51.5 Hz, whereas Grid Frequency was required to be maintained ideally at 50 Hz and at the most, it should be within optimum variations. The frequency exceeding the optimum variation was causing grid collapse and

blackouts in the entire region besides affecting the equipments of all generations, other electricity utilities and also the consumers. This has been a serious prejudice to public interest."

**29** The Supreme Court of India, in the above judgment has discussed that issue of variation in grid frequency and its consequences. Fluctuation may lead to serious damages at both the ends, i.e. generation and load ends. It is not possible to quantify and evaluate such damages. It is not possible even to speculate such damage. In parallel operation, there is free flow of electricity. Electricity in grid and facilities connected including CPP flows freely. Use of electricity by every person will have an impact on the maintenance of frequency at 50 Hz. This aspect has been judicially recognized by the Supreme Court in the case of State of Andhra Pradesh Vs. NTPC, reported in [2000] 2 Supreme Court Cases, 203. This decision of the Apex Court refers to one another decision of the Apex Court in the case of Indian Aluminum Company Vs. State of Kerala, reported in [1996] 7 Supreme Court Cases, 737. It would be beneficial to reproduce relevant part relied upon by the learned counsel for the respondent. The same is reproduced hereunder:

"Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases [i.e. sale, supply and consumption] take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously takes place ... as soon as electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place."

According to Mr. Ramachandran, it is possible to prove technically and scientifically that generation and CPP cannot be maintained at constant level and that too at a particular level. There may be 24 hours running CPP but maintenance of power flow constantly at particular level is not found possible. The quantum of generation will vary and as a result of total quantum injected into the system by any particular generating station or unit varies from time to time, this has a direct result impact wise on frequency. Therefore, the State utilities have to handle and maintain appropriate frequency for all under the grid. Transmission distribution companies handle large volume of electricity injected from different generating stations located in different areas. But the grid system is maintained on regional basis having support of national grid. For Example, Gujarat grid is a part of western regional unit comprising Maharashtra, Madhya Pradesh etc and this western region grid, obviously, has

support of national grid. One chart was also tendered to the Court by the learned counsel appearing for the parties, more particularly, Mr. Mihir Thakore and Mr. Ramachandran to show that how electricity is moving freely in all these grids having check-point or control point at various stages. According to Mr. Ramachandran, for this very reason, the State utilities have to make substantial capital investment and has to spend a lot in maintaining the same. Maintaining the grid frequency is a task at or only about 50 Hz. Permission to CPPs to operate parallel to grid makes this task extensive and complicated and therefore only, these utilities are not charging any POC from CPPs who are generating and using power in isolation. To have contract load and other agreements, the State utilities would not put CPPs into the category of normal consumer and merely because the State utilities are bound to supply power on demand, would not make even the authorities disentitled to have special service charge from CPPs operating parallel to the grid when it is possible to demonstrate that some special service is being offered and given to such CPPs. Mr. Ramachandran has also attempted to explain that what is the parallel operation and also by written arguments submitted on behalf of GITCO it has again been demonstrated. It is submitted that when a person establishes CPP, he has an option either to operate CPP in isolation or to operate the CPP with connectivity to the grid system. Choice is entirely of the CPP and there is no compulsion that the CPP should operate in isolation or to operate with connectivity to the grid. If the CPP decides to operate with connectivity to the grid, it would mean that CPP is in parallel operation with the grid. Manufacturing units attached to the CPPs operating in isolation still have connected load with the grid, but there is no parallel operation. Isolator is installed at appropriate place having manufacturing unit along with CPP to ensure that CPPs do not operate in parallel with the grid. The petitioners do not fall in the category of such manufacturers operating in isolation. Isolator installed by the sub stations fixed to avoid disaster or damage should not be considered as isolator installed in the manufacturing units having only contract load and operation of CPP otherwise is in isolation. Industrial units who decide to operate parallel to the grid get valuable services from GETCO and these valuable services can be divided into 6 important parts; first part can be named as start up power. When CPP has to start after being shut down, it requires start up power. Quantum of start up power required for instantaneous start up is of high order as compared to the capacity of CPP. According to Mr. Ramachandran, if CPP has capacity of 1 MV, it generally requires equivalent to 3 to 4 MW power of start up all auxiliaries simultaneously power for for a fraction of minute or for few minutes. This is a distinguished service, which is not available to CPPs operating in isolation. Second part is maintenance of frequency and it is most important for GETCO to see that the frequency is always maintained at or near about 50 Hz without any significant variation. If the CPP is operating in parallel with grid, the grid absorbs variation and enables CPP operating parallel to grid to have constant frequency/voltage level within the admissible range irrespective of voltage generated by CPP itself. CPP is also able to release excess generation from time to time to the grid without

the need to carefully monitor the generation to the exact quantum of use. Absorption of extra power provides lifeline support by the CPP to effectively marginalize frequent variation. Third part of service is that CPPs operating parallel to grid are capable to have control over the voltage dips. It provides strength to sustain fault level to the CPP and the same enhances the capacity for controlling voltage dips due to arcing and drawal of heavy instantaneous load. CPPs operating parallel to grid thus become capable of encountering such situation generally. In case of voltage dips, supply system established by State utility becomes very vital. The period may be very short. Extra energy consumption may be charged with penalty. Even this fact remains that but for the facility of parallel, operation crisis qua voltage can be controlled efficiently. Fourth part is of continuity of supply, because, grid is synchronized and maintained with continuity. So, even in case, one of the systems of CPPs fails, in two or multiple supply system, grid will rush to the rescue and continuous process industry would get uninterrupted power supply. Parallel operation helps in meeting with such critical requirement. Fifth part is avoidance of adverse impact of reactive power. By paralleling the supply system the CPP-holder is able to divert the reactive power requirement on the supply system and use the CPP for generation of active power. Hence the generator efficiency in such cases is generally very high; i.e of the order of 100%. Sixth part is that electric arc furnace, mini steel plants, rolling mills, induction furnace etc. generate lot of harmonics which are diverted and absorbed by the grid. Activity of such industry is nothing but pollution in the supply system. Such pollution results in higher losses and may result in failure of certain equipments. If the CPP is run in isolation, it will be virtually impossible to run their system, because, such heavy pollution due to harmonics, voltage dips and due to negative face sequence current and voltage. Generally, consumers do not install required equipment for controlling such pollution in the supply system such as harmonic filters or compensators. For short, say of Mr. Ramachandran is that CPPs running parallel to the grid receive significant benefit on account of parallel operation. It is submitted that if GETCO/GEB system does not give the petitioner CPPs any support, the petitioners would have isolated CPPs rather than being in parallel with the grid. The very fact that the petitioners had continued with grid clearly shows that they had derived good amount of support from the grid or they are intending to have such support from the grid which is special for them. Similarly, these POCs were being levied from 1995 till 31.8.2000. These charges were being paid by CPPs without any challenge. If there was no service being rendered, the petitioners and other CPP holders would have challenged levy at the relevant point of time. It is important to note that they have attempted to dispute legitimacy of POC. After the decision in suo motu action by GERC, the petitioners or any CPP holder could have challenged that Circular.

**30** While referring to decision of the Andhra Pradesh High Court relied upon by the petitioners, Mr. Ramachandran has submitted that it is possible to distinguish the said judgment. However, his submission is that the judgment

ultimately supports GETCO if it is read and analyzed entirely. This judgment clearly recognizes that CPPs had derived support from grid on account of parallel operation, while the A.P. High Court did not agree with the order of the A.P. State Commission on the quantum of parallel operation charges/grid support charges. There was specific recognition of the fact in the said judgment that services are being rendered. Attention of the Court is drawn to the following part of the said judgment in the case of A.P. High Court in the case of Vishnu Cement [supra]:

"At the same time we are not for a moment holding that at the time of tripping of system in the consumer's premises that no extra load is being taken from the grid and in the event if the Commission is conferred with such a power under the Reform Act, the same has to be exercised reasonably, objectively duly keeping the social objective of ensuring a fair deal to the consumers, if possible by framing the regulations for quantification of extra load the grid is taking in the event of any fault occurring in captive power system industry."

The decision of the A.P. High Court, setting aside the POC levied on the issue of quantum is also in challenge before the Supreme Court. It is submitted that the decision of the Andhra Pradesh High Court dated 8th February, 2002 would not help the petitioners as the Andhra Pradesh High Court held that Andhra Pradesh Regulatory Commission under the Andhra Pradesh Electricity Reforms Act had no jurisdiction to levy POC. One vital reason assigned by the Andhra Pradesh High Court is that the word "transmission" is not included in the functions of the Commission dealing with tariff where the Act as well as Gujarat Act do not have this statutory infirmity. Mr. Ramchandran referred to the Andhra Pradesh High Court decision in RCI Power Limited, more particularly, the conclusion part, which is found at page 39 of the judgment in the said case. So, the ratio of the decision of the Andhra Pradesh High Court, according to Mr. Ramchandran is that grid support charges could have been held leviable by the Andhra Pradesh High Court if the word "transmission" is mentioned in the Andhra Pradesh Electricity Reforms Act. Both, under the Electricity Regulatory Commission Act, 1998 which was in force till 10.7.2003 and thereafter, under the Electricity Act, 2003, the word "transmission" is specifically included. Mr. Ramchandran has drawn attention of the Court to the provisions of Sections 61, 62 and 86 of the Electricity Act, 2003 as well as Sections 22 and 29 of Act of 1998 while dealing with the judgment of the Andhra Pradesh High Court relied on by the petitioners.

**31** One more hammer by Mr. Ramchandran is that earlier decision of the appellate tribunal in the case of Urla Industries Association [Appeal No. 94/06 decided on 12th September, 2006] supports the impugned order whereby it emerges that CPP holders derive benefit out of parallel operation. It is not

necessary to refer to the analysis made by the appellate Tribunal but the say of the learned counsel is that this Court should look to the detailed analysis and the observations made by the Tribunal in paragraphs-11 and 12 of the judgment. The said paragraphs 11 and 12 are reproduced hereunder:

"11. Next we shall take up points C & D together, as the discussions overlap each other. The parallel operation is definitely a service that the second respondent renders to all the CPPs like the appellant. It is the contention of the appellant that no charges could be levied or collected for the said service. As rightly pointed out by the Expert who appeared for the second Respondent, the parallel operation is a service which extend support to the system and at the same time it causes voltage dip in the system, harmonics, injection, additional reactive power requirement etc. By parallel operation the CPP gains more and hence it is liable to pay the charges for the service.

12. The contention that no charges at all is payable for parallel operation or transmission system cannot be sustained and such a claim is contrary to factual position. There is no escape for CPP to pay charges for parallel operation by which parallel operation the CPP gains while the transmission system of the second respondent is affected apart from the admitted fact the transmission grid is strengthened by the power injected by CPP. Hence the contention that no charges at all is payable by CPP to the second respondent for parallel operation is not acceptable nor such a claim be sustained."

The finding recorded by GERC by impugned order is not half-hearted or confused finding. The authority has decided specifically on the admissibility of the parallel operation charges. So, it would be wrong to argue that no specific, good and sound reasons are emerging on reading of the entire order under challenge qua jurisdiction to decide the issue and also as regards the admissibility of the POC. Mr. Ramchandran referred to the following paragraph from the impugned order which reads as under:-

"We have already examined above the nature of parallel operation charges. These charges should not be confused with the demand charges as has been done in many submissions of CPPs. Demand charges are charged for the demand of electricity supply contracted and can also be charged from those CPPs who have not opted for parallel operation. Therefore, those wanting to operate parallel must be necessarily distinguished from those who have not opted for the same. As mentioned earlier, CPPs opt for parallel operation to seek safety, security and comfort of a larger GEB system and the system has to make investment to provide on a portion of infrastructure of generation, transmission and distribution created by the GEB. The Commission is of the view that for

such a claim the GEB is well within its rights to charge parallel operation charges."

Argument is that this part of the order was not challenged by any of the petitioners herein at the relevant point of time before the appellate authority. For short, it is submitted that there is no merit whatsoever in the say of the petitioner on the issue of service of parallel operation that is being provided by GETCO/GEB. It is submitted that the petitioners and other CPP holders are beneficiaries of such service and they are bound to compensate GETCO in any appropriate manner and that is possible only by paying the POC that may be decided by the GERC in the second petition filed by GETCO. While responding to the argument as to the jurisdiction of GERC under the Electricity Act to levy POC, it is submitted that GERC has jurisdiction under the Electricity Act, 2003 to determine POC, because, the same is provided by the transmission utility by allowing electron from its transmission to be transmitted in time of need to CPPs automatically by virtue of connectivity being given from the grid to CPPs of petitioners. When it is not a matter of dispute that CPP and the grid are not intrinsically connected for harmonious operation of CPP, maintaining required frequency, the grid of transmission utility provides support, offering stability and safety then, it can pray for service charges. To permit and provide parallel operation facility results into some obligation and this element of some obligation is nothing but service provided by GETCO. Mr. Ramachandran has referred to one technical book of electronic transmission, namely, by Central Station Engineers of Westinghouse Electronic Corporation, East Pittsburgh, Pennsylvania, which deals with one relevant topic, i.e. purpose of transmission. It is submitted that paragraph-6 needs to be looked into while dealing with the submissions made by the petitioners. The Court would like to reproduce the relevant paragraph pointed out by Mr. Ramachandran. The same is as under:-

"6. Purpose of Transmission Transmission lines are essential for three purposes.

[a] To transmit power from a water-power site to a market. These may be very long and justified because of the subsidy aspect connected with the project.

[b] For bulk supply of power to load centers from outlying steam stations. These are likely to be relatively short.

[c] For interconnection purposes that is, for transfer of energy from one system to another in case of emergency or in response to diversity in system peaks.

Frequent attempts have been made to set up definitions of "transmission lines," "distribution circuits" and "substations". None has proved entirely satisfactory or universally applicable, but for the purposes of accounting the Federal Power

Commission and various state commissions have set up definitions that in essence read: A transmission system includes all land, conversion structures and equipment at a primary source of supply; lines, switching and conversion stations between a generating or receiving point and the entrance to a distribution center or wholesale point, all lines and equipment whose primary purpose is to augment, integrate or tie together sources of power supply." Thus, main object or purpose of transmission is to provide support to meet the diversity in the system peaks and this is nothing but support through grid. Therefore, charges claimed for such support services are part and parcel of the charges for transmission of electricity and it would, therefore, be covered under the provisions of tariff for transmission as provided in Section 62[1][b] and [c] read with Section 86[1][a] of the Electricity Act, 2003. The GERC, obviously, therefore, will have jurisdiction of determination of levy under dispute, i.e. POC.

**32** It is submitted that as per the observations made by the Apex Court, electricity tariff should be within exclusive jurisdiction of Regulatory Commission. He has placed reliance on one decision in the case of BSES Limited V/s. Tata Power Company Limited, reported in [2004] 1 SCC 195, more particularly, when the word "tariff" has not been defined under the Act. It would be beneficial to refer to relevant paragraphs 16 and 17 of the said decision. The same are reproduced hereunder.

"16. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. 'Utility' has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for intra-State transmission of electricity and tariff for supply of electricity, wholesale, bulk or retail in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (a) to (g) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such

tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or any one else to charge a different tariff.

17. There is a sound logic for conferment of such a power on the Electricity Regulatory Commission. Hitherto the supply of electricity was being made by only one body, namely, State Electricity Boards which being an instrumentality of the State and functioning under the control of the State Government were not likely to enhance the tariff in an exorbitant or arbitrary manner. In fact, Electricity Boards of many States in the country were running on huge losses. The Electricity Regulatory Commissions Act, 1998 has been enacted to enhance the generation of electricity and improve efficiency by bringing in private operators. If a licensee (who may be private operator) after getting the license for supply of electricity in a particular area increases the tariff arbitrarily, the consumers will have no option but to pay the same. In order to guard against such an eventuality, provision has been made that while granting a license conditions may be imposed and further no tariff can be implemented unless the same has been approved by the Commission."

**33** By placing reliance on the observations made by the Apex Court in case of *Indu Bhushan V/s. Rama Sundar*, reported in AIR 1970 SC 228, it is submitted that it is well settled that powers and functions to regulate electricity industry which the GERC exercise will include the powers to prescribe the terms and conditions for allowing services from the Electricity Utilities. This is under the regulatory control of GERC. The Apex Court has said thus:-

"The dictionary meaning of the word "regulation" in the Shorter Oxford Dictionary is "the act of regulating" and the word "regulate" is given the meaning "to control, govern or direct by rule or regulation". This entry, thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions under what conditions the construction can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised. All these are ingredients of regulation of house accommodation and we see no reason to hold that this word "regulation" has not been used in this wide sense in this entry."

**34** Other decision relied on is in the case of K. Ramanathan V/s. State of Tamil Nadu, reported in [1985] 2 SCC 116. In paras 18 and 19 of the judgment, the Apex Court has observed as under:

" The word 'regulation' cannot have any rigid or inflexible meaning as to exclude 'prohibition'. The word 'regulate' is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some Courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, vol. 76 at p. 611 : "Regulate" is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations. "Regulate" is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict." See also : Webster's Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd edn., p. 1784. 19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word 'regulate' is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the things subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."

**35** Two other decisions; one in the case of V.S. Rice and Oil Mills V/s. State of Andhra Pradesh, reported in AIR 1964 SC 1781 and in the case Deepak Theatre, Dhuri V/s. State of Punjab, reported in AIR 1992 SC 1519 are referred to and relied upon by Mr. Ramachandran, where, words "regulate" and "regulation" have been interpreted and it is argued that regulatory authority is

supposed to regulate and that includes authority to prescribe reasonable rules, regulations or conditions subject to which business may be conducted. Therefore, there was no limitation on the day on which the impugned order came to be passed by GERC and nothing wrong can be said to have been done by the GERC in making declaration qua privilege and the jurisdiction of the GERC. On the contrary, it is the say of the respondent GETCO that if it is held that POC or parallel operation or grid support are not covered within the scope of transmission tariff and/or otherwise outside the purview of GERC, the petitioners CPPs would be thrown to a precarious position which would be rather worse. If this goes out of jurisdiction and control of the GERC, the GETCO may not have to go to GERC for fixation of such charges. So, any arbitrary decision while fixing such charges by GETCO perhaps would have taken the petitioners to GERC itself with a prayer that unscientific exorbitant charges may be regulated and reduced. In support of this argument, Mr. Ramachandran has drawn attention of the Court to the scheme of Section 41 of the Electricity Act, 2003. Section 41 reads as under:-

"41. Other business of transmission licensee.- A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilisation of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the Appropriate Commission, be utilised for reducing its charges for transmission and wheeling:

Provided further that the transmission licensee shall maintain separate accounts for each such business undertakings to ensure that transmission business neither subsidises in any way such business undertaking nor encumbers its transmission assets in any way to support such business:

Provided also that no transmission licensee shall enter into any contract otherwise engage in the business of trading in electricity."

It is submitted that the role of GERC will be only to the extent of requiring GETCO to contribute such money as the GERC considers appropriate for reducing charges for transmission and wheeling of electricity to others. The price, therefore, can be fixed by GETCO and the GERC will only regulate the quantum of profit that should be utilized for cross-subsidizing the electricity consumers. Therefore, when the CPPs are availing services by operating parallel to grid, they have either to pay charge under regulated tariff or as per the claim of GETCO and the petitioners cannot expect free service.

**36** It is denied by the respondent GETCO that it has a right to recover or is recovering charges for services provided in the form of transmission of electricity. GETCO had already recovered costs and expenses of the system by

various other means including through demand charges, connectivity charges, penalty charges, interest, if leviable under all these charges and, therefore, not entitled to claim any parallel operation charge or grid support charge is the misconceived argument as submitted by Mr. Ramachandran. GETCO is supposed to get revenue requirement full from the tariff and the charges to be collected from various users and beneficiaries but the POC is not in addition to its revenue requirement. It is the duty of GETCO to see that revenue requirements are appropriately apportioned between all users and beneficiaries of the system and CPPs operating parallel to grid are getting something more in the form of service and, therefore, they are required to pay charge in proportion to meet ARR. The Court cannot look into the point whether GETCO is incurring any extra cost or expenses for providing grid support. The entire grid system has been established essentially for the general body of consumers. General body of consumers has paid for actual cost of the system. The petitioners, as CPP should pay for the benefit which they are deriving from the system operating parallel to grid support provided by GETCO itself, which puts the petitioners to a position so that they can avoid certain costs or they would have otherwise incurred. They have been asked to pay such avoided cost in the form of POC.

**37** Contention that the petitioners are paying according to the contract demand, connectivity charges, penalty prescribed under the law or as contemplated under the agreement, would not save the petitioners from paying POC and this argument is devoid of merits. The CPPs as such, do not have contract demand. Contract demand is for manufacturing utilities to use electricity from the grid. POC is levied on the CPPs i.e. the generating units for support being given to CPPs. Further as per the prevailing HT tariff, contract demand is measured as average of thirty minutes integration period. Grid support, which the CPP derives is usually within 30 minutes and therefore, does not get recorded. This can be tested by proposition that the CPPs can be asked to install metering which would measure the contract demand on average of every minute or half a minute integration period. The CPPs can, thereafter, be asked to pay for demand charges at applicable tariff rate of contract demand and penal rate, if consumer overdraws than the contract demand. GETCO will have a right to disconnect the electricity in case of overdrawal by consumer over and above their contract demand for more than two or three occasions. This system is not being developed by the CPPs. Connectivity charges levied is totally different. It is one time charge for laying down wires and has nothing to do with the charges from grid support. It would not be either logical or proper to argue that GETCO is trying to recover money without there being need and this argument may not be accepted. GERC was asked to decide the issue of admissibility of POC and parties were heard on merit. The GERC could not have avoided the decision on the point of admissibility and therefore, the GERC, by passing the impugned order has observed that CPPs operating parallel to grid are beneficiaries and they are enjoying service through transmission facilities provided by utility. On the

contrary, GERC would have allowed POC as claimed by GEB/GETCO, more particularly in context of material. It is also submitted that there is no merit in the submission that surplus electricity allowed to be pumped into grid system helps utility as the same is not regular supply. Such supply is being made as and when there is surplus generation by CPP. The State utilities do not require such electricity. On the contrary, State utilities absorb the excess generation and acceptance of such excess generated electricity is also service. At one point of time, Mr. Ramachandran has submitted that if these CPPs are able to establish a device, then, they are free not to inject such supply into the grid. Installation of such equipment to control the flow of electricity is not impossible. According to Mr. Ramachandran, the petitioners CPP holders are misleading this Court by stating that they are supplying free electricity to State utility. In reality, CPPs are actually using the grid support to dump excess generation from time to time and such grid support, thus, is in advantage of CPPs running parallel to grid. It is submitted by Mr. Ramachandran that when there is something which is part of tariff, then, the GERC can exercise powers. It was contended that in case of Central Power Distribution Company and others V/s. GERC and others [ [2007] 8 SCC 197] that unless something is part of the tariff, GERC cannot exercise powers and functions and the Supreme Court held the said submission to be baseless. Application of "Availability Based Tariff" [ABT] in relation to unscheduled interchange [UI] charge was within the jurisdiction of GERC. Mr. Ramachandran has taken the Court through the relevant paras 5 to 9 to explain what is the ABT and what are the distinctive features of ABT. Of course, facts of the cited case are materially different, but the say of Mr. Ramachandran is that GERC had jurisdiction to deal with the subject related to grid discipline. GERC has plenary power to regulate grid, more particularly, in context of grid being integrated and connected across the region comprising of more than one State.

**38** While reading the judgment in the case of Vishnu Cement [supra], Mr. Mihir Joshi pointed out that A.P. High Court has considered one important point which lead to merit also. None of the petitioners is intending to argue or to have a finding on merit because of the pendency of the second application filed by the respondent claiming justification for levy of POC. But it is submitted that the ground, one discussed by the A.P. High Court, mentioned in para-65 of the judgment and discussion made thereafter in subsequent paras, more particularly, paras 66 to 72 answer the submissions made by Mr. Ramachandran. It may not be proper to say that decision in the case of Vishnu Cement would not help the petitioners as the decision is based only on account of absence of word "transmission" in the relevant statutory scheme in the State of Andhra Pradesh and when the entire decision is at the doorstep of the Supreme Court and the judgment is not stayed, it would not be either legal or logical to say that the decision of the A.P. High Court would not help the petitioners.

**39** Judgment in the case of Calcutta Discount Co. Ltd., Vs. Income-tax Officer Companies District I, Calcutta [AIR 1961 SC 372] was relied upon by Mr. Mihir Joshi, to submit that it is settled that existence of the alternative remedy is not always sufficient reason for refusing a party quick relief by writ or order prohibiting an authority acting without jurisdiction from continuing such action. Say of the present petitioner is that GERC had no jurisdiction to deal with permanent operation charge or any levy in the name of POC and now one more attempt in furtherance of the finding under challenge is contemplated and therefore, the petitioners decided to rush to this Court invoking writ jurisdiction. In the above cited decision, the Apex Court was dealing with the question whether a writ can be issued against executive authority or such writ can be issued when there is alternative remedy provided in the Statute. In the present case, the applicant GEB had failed to disclose full and true material facts which were otherwise necessary to succeed in the litigation. GERC erroneously and without jurisdiction permitted the erstwhile GEB to place full details and material, if not had collected data. This itself makes the order granting main relief of declaration bad and without jurisdiction.

**40** Mr. Mihir Joshi also relied upon the decision of the Supreme Court in the case of Whirlpool Corporation V/s. Registrar of Trade Marks, Mumbai [[1998] 8 SCC 1]. He has placed reliance on paras 14 and 15 which deal with maintainability of writ against the order of administrative nature.

**41** Mr. Joshi placed reliance upon the following decisions:-

[1] L.K. Verma Vs. HMT Ltd. And another reported in [2006] 2 SCC 269.

[2] L.Hirday Narain Vs. Income-tax Officer reported in [1970] 2 SCC 355.

[3] Ganga Retreat & Towers Ltd and another Vs. State of Rajasthan and others reported in [2003] 12 SCC 91.

[4] M/s. Onkarlal Nandlal Vs. State of Rajasthan and another, reported in [1985] 4 SCC 404

[5] M/s. Filterco and another Vs. Commissioner of Sales Tax, Madhya Pradesh and another, reported in [1986] 2 SCC 103.

[6] Banarasi and others Vs. Ram Phal, reported in AIR 2003 SC 1989.

All these decisions are in reference to the issue raised qua maintainability of the petition. But Mr. Ramchandran has fairly conceded on the point that as the vires of regulation is also simultaneously challenged and the finding in suo motu proceedings was in favour of the CPPs, the respondent may not press the point resisting maintainability. So, it is not necessary to discuss or deal with

the decision relied upon by learned counsel for the petitioners on the point of maintainability of the petition.

**42** Mr. Mihir Joshi has also relied upon the decision of the Supreme Court in the case of Owners & Parties Interest Interested in M.V. "Vali Pero" Vs. Fernando Lopez and others, reported in [1989] 4 SCC 671 submitting that when it comes to interpretation of Statute or the rule having force of Statute,, each word should not be construed literally but should be construed pragmatically so as to avoid injustice and to advance substantial justice. In the present case, when once it was accepted that POC is not tariff and as pointed out by the petitioners, proposed levy of POC is something else than transmission, there was no scope for GERC to generalise statutory scheme. In absence of justification qua auction proposed whether a party can be declared material in judicial or quasi-judicial proceedings is a question to be considered. So, liberal interpretation of the word "transmission" also should not have led GERC to the finding under challenge.

**43** Mr. Mihir Joshi also relied upon the decision of the Supreme Court in the case of Banarasi and others Vs Ram Phal reported in AIR 2003 SC 1989 wherein the Apex Court has observed that where Statute itself confers a right on a person affected in conformity with the principles of natural justice, the Court cannot deny such right on the ground of practical inconvenience. In the present case, the GERC has denied indirectly such right and given opportunity to GEB declaring GEB as practically successful in the application. In reality, the GERC ought to have asked the GEB dismissing the application qua bringing justification simultaneously so that the party who is likely to be affected can meet with the entire case. Basically the finding has resulted into serious prejudice to the petitioners.

**44** Mr. Mihir Joshi, learned Sr. Advocate appearing for one of the petitioners has placed reliance on number of above decisions to canvass the point that the writ petitions filed by CPP holders are maintainable and the point agitated as to maintainability of these petitions is not required to be discussed as learned counsel appearing for GETCO and the respondent electricity companies has fairly accepted that considering the points advanced and more particularly when the petitioners have also challenged the vires of the regulation in question framed by GERC in the year 2005, the respondents are not pressing the point of maintainability of the petitions. So, now, there is no need to discuss and evaluate various authorities cited before the Court in this regard. Similarly, Mr. Mihir Thakore, learned Sr. Advocate has also pointed out that in which circumstances the petitioners have been compelled to approach this Court by filing the above writ petitions invoking constitutional jurisdiction in reference to the order passed by GERC in suo motu proceedings. Suo motu proceedings referred earlier were initiated because Commercial Circular No. 706 was issued by the erstwhile GEB revising POC that was being recovered from the CPPs. The question against maintainability of the petitions is also

raised saying that the order of the GERC quashing and setting aside the Commercial Circular No. 706 could have been challenged by way of an appeal, because, the observations in the order as regards entitlement were recorded against the CPPs. It is not possible for this Court to agree with the submissions made by the respondents that failure to challenge the decision dated 31st August, 2000 quashing and setting aside the Commercial Circular No. 706 would come in the way of any of the petitioners or CPPs who were before the GERC as party in Case No. 24 of 2000, because, ultimate finding was against the GEB. On one or the other ground, the CPPs were able to succeed in getting the Commercial Circular quashed. True it is that the said order records a finding that the erstwhile GEB can approach the GERC with necessary application under Section 59 of ERC Act of 1998. Thus, GEB was held entitled to move appropriate application if it intended to make any enhancement in the POC that was being recovered. The erstwhile GEB was also permitted to continue to recover the POC as per the existing tariff rate. In response to the query raised by the Court, the Court is informed that none of the CPPs had any problem to pay as per the tariff existing at that relevant point of time as the amount was negligible. A party may decide not to challenge validity of charge recovered if the same is otherwise negligible. True it is that entitlement to recover POC as per existing tariff rate was not challenged by any of the CPPs who were party in the proceedings of Case No. 24 of 2000, but the same would not come in the way of any of the CPPs in challenging the legality and validity of such charge merely because they were paying POC at negligible rate. Business personnel can take a decision of not entering into litigation keeping in mind the cost and other administrative criterias. To fight out a litigation with a view to see that even negligible amount levied is also declared void and unauthorized recovery may lead an industry into some hardship and administrative inconvenience including qua cooperation that an industry might be getting from the power supplying agency having element of monopoly. Say of the petitioners CPPs shall have to be accepted that the finding of GERC in suo motu proceeding being Case No. 24 of 2000, at the most, can be construed to be a finding whereby the GERC had decided not to enter into merit of Commercial Circular No. 687 dated 21st December, 1998 whereby it was decided by the erstwhile GEB that POC will be levied at the rate of 7.5% of the demand charges in accordance with the applicable tariff. POC, therefore, was tagged with the demand charges prevailing at the relevant point of time, but in the application moved before the GERC it was prayed to approve a special levy of 50% of the demand charge on the capacity [in terms of MVA] of CPP running parallel to GEB grid as a compensation for the network costs of GEB infrastructure in the Grid system. So, Case No. 256 can be said to have been instituted for materially different type of charge than the charge that was being paid on the strength of Commercial Circular No. 687 issued in the month of December, 1998. Though it seems apparent that POC, as prayed for in the petition submitted to the GERC, is tagged with demand charge, but in reality, it is an attempt to introduce a special levy for capacity in terms of MVA of CPPs and the claim is in the name of compensation for the network cost of erstwhile

GEB. Clause-13 of Commercial Circular No. 687 dated 21st December, 1998 requires to be read with Clause 19. Clause 19 of the said Circular talks about the rate of POC. Clause-13 is about contract demand. The policy says that technical arrangement/evacuation system needed to supply surplus power would be worked out between CPP and the Board mutually and the same would be implemented ordinarily by or through the company putting up CPP as per the Board's specifications. It is not the case that any of the petitioners-CPPs is not in accordance with the specifications required for the purpose and all CPPs are otherwise being operated as per contract demand. In such situation, introduction of POC in different shape and rate if is challenged by way of a petition is not found illegal. Merely because statutory appeal is provided, the petition would not become unsustainable in the eye of law if the petitioner is able to satisfy the Court that interference of the High Court is required as the decision under challenge is without jurisdiction and/or contrary to existing law. Such challenge has been made by the petitioners and simultaneously, vires of regulation of 2005 framed by GERC whereby GERC has introduced the words; "grid support charge" in the said regulation, is also challenged. So, it will not be possible for the Court to dismiss the petition saying that the petitioners ought to have approached the appellate authority challenging the finding that has been challenged in these petitions. Non-challenge of the decision rendered in suo motu proceedings also would not come in the way of the petitioners, because, CPPs were able to get Commercial Circular No. 706 quashed. They were successful party in suo motu proceedings. The appeal, even if, would have been preferred, the appellate authority might not have accepted the appeal saying that no adverse effective finding can be said to have been recorded, especially when the Commercial Circular No. 687 was not under challenge even indirectly. Andhra Pradesh High Court had entertained the petition on merits, filed under Article 226 of the Constitution seeking a writ of prohibition against the finding recorded by the Electricity Regulatory Commission for various reasons mentioned in the judgment between M/s. RCI Power Ltd represented by its Director V. R. Raghunathan Vs. Union of India and others, being Writ Petition Nos. 4770 and 4771 of 2002 and allied matters. In the present petitions, there is scope to examine whether GERC is empowered to fix POC defining the same as grid support charge and that too on the basis of the fact of alleged costs incurred by the respondents in maintaining the entire infrastructure throughout the areas of State of Gujarat wherever grid of the erstwhile GEB is wheeling electricity energy with the support of national grid. The Court is also called upon to examine the question that whether the order of the GERC runs counter to the policy of the government. The parties have argued at length before this Court on all these points. Ratio of the decision of the Apex Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, reported in [1998] 8 SCC 1, squarely helps the petitioners wherein the Apex Court was dealing with the point of maintainability of the petition when there is existence of alternative remedy. The observations of the Apex Court in case of Kavalappara Kottarathil Kochunni Vs. State of Madras [AIR 1959 SC 725] also is found relevant. In the

present case, the declaratory order passed by GERC without granting effective reliefs and making various comments on merit is challenged. This Court, therefore, can construe and decide that the declaration simplicitor made by GERC is an order within its jurisdiction and authority. It is well established that powers of this Court under Article 226 of the Constitution of India are wide enough to make even declaratory order. Whether declaratory order of GERC under challenge is sustainable or not and appropriate relief can be granted to the party aggrieved by such declaratory order passing a declaratory order nullifying the effect of the order is a question which needs no scrutiny when there is challenge to jurisdiction. So, the say of Mr. Ramachandran is not found acceptable that as the petitioners were paying POC even up to the date on which suo motu proceedings came to be initiated by GERC in reference to Commercial Circular No. 687 of 1998 and that the petitioners were paying POC on contract demand charges would make them disentitled for praying relief of the nature that has been prayed for in the present petitions, more particularly asking this Court to declare that GERC has no jurisdiction or authority whatsoever to fix the tariff/rate of POC on the strength of the application moved by the erstwhile GEB. The reason under which charges are being paid is found satisfactorily explained. The Court is also satisfied that there was no need or scope for any of the petitioners to go before the appellate authority challenging the order passed in suo motu proceedings merely because erstwhile GEB was permitted to continue to recover POC under the earlier Commercial Circular of 1998.

**45** By the impugned order, the GERC has held that POC is payable by CPPs to GEB. Undisputedly, there is no formal determination of actual charges payable. GERC has directed the erstwhile GEB to file separate petition after conducting proper study in regard to exact quantum of POC to be determined as payable by CPPs, meaning thereby, proposition placed by the erstwhile GEB that such CPPs running in parallel operation may be asked to pay 50% on the demand charge was not accepted. The ground for justification was placed before the GERC that CPPs synchronized with the grid raise unlimited instantaneous demand for power. Further the operation of the synchronized CPPs creates adverse quality variations in supply of power to other consumers. It is also contended that because of reduction of contract demand by the consumers who install captive power synchronized with the grid, the Board suffers a shortfall in recovering the investment already made for meeting their original contract demand. In the order under challenge, GERC has given basic summary of proposal placed by the erstwhile GEB and this summary contains 2 different tables. Table 2 shows that if proposal is accepted, then, erstwhile GEB would be generating revenue of more than Rs. 299.90 crores against the capacity of CPPs in 1666.13 MVA. Table 3 of summary shows different figure and this figure is in pursuance to the clarifications made on 18th May, 2004 pending the petition. As per these updated details, the Board estimated the revenue from the proposed formula at Rs. 249.77 crores. On that day, about 13 CPPs were operating parallel to grid. On merit, the erstwhile GEB, petitioner

before the GERC was not able to satisfy the GERC that the proposal on merit is acceptable. GERC, it is clear from the order under challenge, was not even convinced to accept the proposal partially. Therefore, the petitioners have not argued any point on merit in reference to justification of the proposal made by erstwhile GEB. It is also submitted by all the three Senior Advocates appearing for the respective petitioners that in view of the pendency of the second petition filed by the erstwhile GEB before the GERC on the strength of alleged data and material as to cost that is allegedly incurred for maintaining infrastructure for benefit of CPPs running in parallel, no submission on merit has been made, because, discussion, if made by this Court or any comment is made in this behalf, is likely to result into serious prejudice to either party when it is jointly submitted that this Court may decide the petitions in reference to the prayer made in the petitions only. It is not necessary to discuss and record the finding in reference to the alleged justification placed by the erstwhile GEB in the petition submitted to the GERC. True it is that whether this Court can deal with the point that by way of parallel operation, whether the CPPs are enjoying any service for which any amount can be levied. If the answer is in the affirmative, then, the CPPs running parallel to grid are at some advantage than the CPPs operating in total isolation and therefore, such CPPs can be subjected to such levy. Crucial question is also required to be decided that whether GERC has jurisdiction to decide and/or impose levy of POC in absence of specific provision in the relevant Statute, that is, Central or State Act. The Court also can examine that whether GERC has committed any jurisdictional error by passing declaratory order without taking decision on the quantum even though proposed specifically by the erstwhile GEB. From the arguments made by the learned counsel for the parties, one question that has emerged is that if the proposal is found contrary or at least not in accordance with the policy of the government, can the declaration of the nature that has been made by the GERC by passing the impugned order be said to be proper and justified or not. It is referred in detail in the foregoing paragraphs that what is the parallel operation and how according to the erstwhile GEB this parallel operation is a service. Undisputedly, there are certain peculiar characteristics of electricity and frequency is required to be maintained at or around 50 Hz. Grievance of the petitioners and as practically accepted even by the learned counsel for the respondents is that it is not possible always to maintain standards of frequency for various reasons and CPPs running parallel to grid are also supposed to generate power in the frequency, so, frequency of both, that is, grid as well as CPP can work harmoniously. Fluctuation in frequency tends to cause serious damages both to generation and load ends and it is not possible to perceive or to quantify or evaluate the fluctuation in frequency is worldly accepted situation. In India, various efforts have been made to bring frequency fluctuation under control. The petitioner erstwhile GEB has attempted to seek justification that unless CPPs running parallel to grid pays any cost of maintenance contribution through POC, the goal to control frequency fluctuation may not be achieved. When electricity in grid and in facilities connected to the grid are getting advantage of free flow of electricity

and CPPs running in parallel to grid is a facility created by the petitioner companies, then, they can be subjected to contribute in the costs of maintenance. In view of the decision in the case of State of Andhra Pradesh Vs. NTPC [[2002] 5 SCC 203], this aspect can be said to have been accepted and would help the respondents. It is not a matter of dispute that it is difficult to maintain constant level of frequency where generation is by CPP and therefore, a very large volume of electricity energy generated and handled through grid is helpful in maintaining frequency, practically for all. There is force in the argument of Mr. Ramachandran that the State Utilities pay heavy penalty if they cause variation into the grid frequency and this payment is being made by way of unscheduled interchange charges.

**46** There is no dispute that the respondent in its affidavit once has stated on oath that POC is not tariff. But Mr. Ramachandran has submitted that earlier stand taken by the respondent has been revoked by making retraction from that stand. It is contended that POC falls in the category of tariff that can be levied as tariff under the head of "transmission charges". Grid support is activity related to transmission. Who will recover, how the same would be recovered, at what rate it would be recovered and whether such charges should be recovered annually or they should be the charges related to actual use etc. are questions which are still open. In the order dated 31st August, 2008 quashing the Commercial Circular No. 706, GERC has amply clarified that the nature of parallel operation charge has been examined and therefore only, the GERC reached to a conclusion that GEB unilaterally could not have imposed or enhanced such charge. Parallel operation charge is independent charge or levy. There should not be any confusion between the POC and demand charges. Demand charges are charged for demand of electricity supply contracted and can also be charged from those CPPs who have opted for parallel operation. It is emerging from the record that earlier, while computing parallel operation charge, demand charge was taken as a base and the rate was fixed at 7.5% in the year 1998. Status of CPPs operating parallel to grid is distinct from the CPPs who opt to operate in total isolation. The argument advanced on behalf of the petitioners that, as per the scheme of the Act, erstwhile GEB could not have refused the desire of the petitioners to permit them to operate their CPPs parallel to grid and it would not keep them in the category of the CPPs operating in complete isolation, is accepted. Statutory right to operate CPP parallel to grid flowing from the Statute if automatically confers certain privilege or advantage, then, element of that advantage can be said to be a service. Thus, CPPs opting for parallel operation can be said to be a plant seeking safety if not security, at least a comfort of a larger system. Now, this larger system is able to establish that to offer advantage of safety or security or comfort to the CPPs operating parallel, the respondent has spent or is incurring cost on this count, then, the reasonable contribution to meet with such expenses can be asked for. Under which head this amount can be asked for has remained a question. Andhra Pradesh High Court has held that Andhra Pradesh Electricity Regulatory Authority had no jurisdiction to decide or

determine any tariff/rate of levy unless specifically provided by law. On careful reading of the decision of Andhra Pradesh High Court referred to herein above, it is clear that it is a detailed judgment dealing with merits and legal issues as also technical issues involved in the matter as well as justification for raising such demand from CPPs who have helped the State by generating power of their own under the liberalized policy of the country being power deficit country.

**47** Of course, an attempt to place some material before the GERC has been made by the erstwhile GEB and the order under challenge also discusses about the nature of support which CPPs get from grid by maintaining parallel operation. It is the argument made on behalf of the present petitioners that merely because the system of counting actual use or drawal of power is not either exact or scientific under which minute to minute recording can be gathered and recorded in the meter installed, would not make the case of the GEB for recovery of POC justified. But it is not possible to ignore the existing reality. Additional drawal of power suddenly or at the time of igniting CPP, parallel operating CPP, obviously would get and are getting advantage. For the sake of argument, even if it is accepted that one or two such CPPs may have decided to operate to the satisfaction of the requirement and are capable of running CPP as an individual consumer may not need grid support, but for such single individual, unless it opts to operate in complete isolation, separate device for levy can be worked out or not may also need consideration. Ultimate finding may go against such self-sufficient CPP supplying power to its own industry without formal drawal of power from grid having higher generating capacity than actually required. It is very likely that that on available evidence and data, all CPPs having parallel operation with the grid may be found responsible to pay something under the head of "transmission charge". Complexity even after the order under challenge has remained there in the finding which also requires to be resolved logically, because, Commercial Circular No. 687 also does not state clearly or even impliedly that CPPs were asked to pay POC as one of the charges leviable under the head of "transmission charge". The argument advanced before the Court is found in two different compartments. It is submitted by the petitioners that POC is a levy which does not fall in the category of any of the charges that can be levied as per the scheme of Central or State Act and therefore only, Electricity Regulatory Authority obviously cannot deal with any such charge that could be levied from CPP merely because it decided to have grid support for smooth and safe running. Section 86[1][a] of the Electricity Act, 2003 refers to a word "transmission" in reference to functions of State Commission and State Commission is authorized to determine tariff for generation, supply, transmission and wheeling of electricity. There is no dispute between the parties that POC does not fall in the category of "activity", which is defined as "wheeling" in sub-section [76] of Definition Section 2 of Electricity Act, 2003. CPPs are transmission licensees and therefore, are authorized to establish or operate transmission lines. At the same time, they are generating companies,

because, they are entitled on permission to own, operate and maintain generating station. "Generating Station" is defined under clause [30] of Definition Section 2 of Electricity Act, 2003. Grid is high voltage backbone system of inter-connected transmission lines, Sub Station and Generating Plant. Thus, CPP, technically can be said to be a grid. On account of parallel operation with the grid, CPP would become a part of grid, but it would not be proper for this Court to say at this stage that CPP, therefore, can also be said to be a part of transmission line merely because grid is medium of transmission. Clause [73] of Section 2 as mentioned earlier, covers definition of the expression "transmission". Activity of transmission can be undertaken through transmission line defined in Clause [72] of Definition Section 2. Say of the petitioners that, in absence of specific data and the figures of expenditure of erecting and maintaining infrastructure etc., the GERC ought not to have declared that erstwhile GEB was entitled to levy POC.

**48** Arguments and the submissions made have not been discussed in detail if the order under challenge is read, because, the say of the petitioners before this Court is that POC, or in other words, grid support is a new phenomenon and does not fall in the category of "transmission". Undisputedly, all consumers including petitioners are paying for the actual consumption and in case of use of electricity contrary to the agreement, they are being subjected to penalty or extra charges. So, for putting extra load on transmission lines impliedly extra charge is recovered in the form of actual consumption and penalty, if any, is otherwise is payable. Each CPP is bound to follow Grid Code and is bound to comply with all obligations flowing from the scheme of the Grid Code. There is no dispute as to existence of State Grid Code and the present petitioners-CPPs are established generating companies operating as per declared specifications and standards read with Section 9 of the Electricity Act, 2003. Therefore, a person generating power by establishing CPP can keep connectivity with the grid referred to in clause [d] of Section 73 by maintaining technical standard. Grid standard is again defined in Section 34 and there was no case before the GERC that on account of non-functioning as per the technical standard or of not maintaining grid standards, the erstwhile GEB suffers specific costs or extra expenses. Hidden element of hypothesis has been projected by the petitioners and therefore, declaratory order of the nature passed by the GERC under challenge has been questioned. In certain situation, even the Statute has provided that no surcharge can be levied. As for example, as per sub-section [2] of Section 42, wheeling charge can be levied but no surcharge on wheeling charge can be taken. So, if any attempt is made to levy surcharge on wheeling charge, then, such action can be questioned. Attempt has been made by the petitioners to show to this Court that POC is charged, which even does not fall in the category of the word "transmission" in stricto sensu if relevant sections of definition as well as Section 86[1] of the Electricity Act, 2003 are read. It is true that tariff on transmission of electricity can be determined by appropriate Commission considering the scheme of the Act, more particularly, Section 62[1][b] of Electricity Act, 2003 and the appropriate

Commission can specify the terms and conditions for determination of tariff and regulation can therefore, be framed qua transmission also if Section 61 of the Electricity Act, 2003 is read. Till 2005, there was no specific regulation in reference to grid support charge. Crucial question which was required to be examined by the GERC was that in absence of data qua grid support making the activity independent or otherwise separable under the statute and the activity related to transmission, formal declaration of the nature that has been made by the GERC could have been legitimately made. A day may come that a solar power based unit also may face similar question. Apparently this may not look technically possible but with the development of recent science and operating system handled by computers which may lead their support, whether would make generating unit liable to pay any charge under the head of such support on grid only though unit is otherwise liable to pay all charges for use of electricity energy as per agreement, including penalty, if any is the main debate. Transmission lines are essential for three purposes, i.e. [a] transmitting power from power site to market; [b] for bulk supply of power to load centres from outlying stations and; [c] for industry connection purpose, that is, for transfer of energy from system to the another or in case of emergency or any response to diversity in the system dips. For more than one particular purpose, transmission line established is used. Use of such transmission line, if is made by the petitioner CPP otherwise in accordance with law and in terms of agreement, special separate charge in the name of support from grid can be levied. For the sake of argument, even if the answer is recorded in the affirmative, in absence of specific provision, such charge could have been levied. The answer, obviously would come in the negative. But as per the practice, POC was being charged since 1998 and the same was being paid by the petitioners and recovered by the erstwhile GEB. The dispute cropped up only when the erstwhile GEB decided to revise the rate and that too, on materially different logic.

**49** Erstwhile GEB was notified by the government as State Transmission Utility. On unbundling of erstwhile GEB, the respondents have come into existence and GETCO is now acting or functioning vice erstwhile GEB. HINDALCO, the petitioner of Special Civil Application No. 14742 of 2002 has even taken a stand in the written arguments submitted to the Court that GETCO cannot substitute GEB, more particularly, in response to para-3 of the written arguments submitted by GETCO. But considering the nature of dispute between the parties and the relief prayed for in the petitions, this point is not required to be dealt with on merits when the petitioners themselves, as one of the respondents, has undertaken major part of the administration in its hands on unbundling of erstwhile GEB. Therefore, erstwhile GEB as well as the respondents discharging functions of State Transmission Utility are bound to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. So, transmission of electricity to generating company like present petitioners-CPPs is nothing but to discharge all statutory obligations. It was not even the say of

the erstwhile GEB before the GERC that parallel operation with grid is unauthorized. On the contrary, for this purpose, agreements have been made, charges have been fixed, clause of penalty etc. has been introduced. So, while granting open access to its transmission system, the State Transmission Utility, i.e. erstwhile GEB had agreed to fulfill its obligation on certain terms. So, any consumer who has been provided open access by the State Commission under sub-section [2] of Section 42 on payment of transmission charges and surcharge thereon, whether can be asked to levy in the name of or head of grid support. It appears clearly that this would depend only on data and certain material facts and such facts might be declared or in the form of expenses and/or costs.

**50** It would be relevant to note that after unbundling of erstwhile GEB into Transmission Utility by distribution licensee, trading licensee and generating company, application could not have been proceeded with. Even today, none of the respondents claim specifically that they would be entitled to levy POC. An entity claiming to provide alleged service of laying support is one and the entity claiming to suffer costs of such alleged service is another. The petitioners have argued that in such situation, declaration simplicitor impliedly permitting GETCO to file a fresh application to justify the claim to levy POC could be declared bad. It is not disputed that Gujarat is power deficit State and establishment of CPP is the direct help or assistance to the government. True it is that the respondents collectively, i.e. erstwhile GEB has larger chunk of power and generating capacity is also huge. In the event of some error in operating the CPP or generating power plant of the State Transmission Utility, it may create breakdown but for that number of technical devices have been installed and it has been seen that how the power would flow to CPP and grid can lay support to CPP. The electricity having free flow, additional power than the actually required and consumed, would flow in the State grid. It is rightly submitted that anybody can claim considering the free flow of electricity that one is using power generated at which place, because, even the State grid has also support of national grid. State as well as national grid are also found scientifically arranged keeping in mind the countrywide need and allocation and power generating capacity of various plants. Therefore, when it comes to costing and more particularly the costing qua maintenance of infrastructure, recovery of any levy in the name of POC could not have been proclaimed as legitimate or justified for want of any data, technical as well as cost wise. Even prior to establishment of CPPs, huge infrastructure expenses might have been incurred by State Transmission System handled by the erstwhile GEB. Under the policy of liberalization, embargoes of establishing private electricity generating plants have been lifted and by amending the existing law, private generation facilities have become possible. Industries having 24 hour running who sometimes face breakdown in electricity supply where it is likely to result into serious loss or damage, started thinking to have their own generating plants. Such electricity generation itself is capable of earning direct or indirect revenue because of varieties of fields within one activity are available for the

purpose. So, when the State Utility claims that laying grid support itself has become costly affair to them, then it is obligatory on their part, i.e. erstwhile GEB to establish that levy of POC falls in the category of levy for which rate/tariff can be determined by the Electricity Regulatory Commission and also justification qua rate/tariff proposed. It appears that this is a case where principle of waiver or estoppel cannot be applied. It would not be legal to say that as the petitioners were paying some amount in the name of POC they would be barred from agitating any issue as to legitimacy of such POC, more particularly, in the background and observations made herein above. As and when particular levy or tax is challenged or comes under legal scrutiny qua its legitimacy, then the courts are supposed to consider and evaluate the point of validity statutorily and/or constitutionally. True it is that the Andhra Pradesh High Court judgment may not squarely help the petitioners directly, because, as pointed out by Mr. Ramachanran, A.P. High Court perhaps was tempted to turn down the decision of A.P. Electricity Regulatory Commission as the word "transmission" was missing in the relevant section.

**51** A.P. Act deals with the functions of Electricity Regulatory Commission in Andhra Pradesh. Section 11A and more particularly, Section 11[e] has been considered by the A.P. High Court. It would be beneficial to reproduce the relevant part of the judgment relied upon by the petitioners:-

"From the above clauses, it is seen that the Commission's role with regard to generation of electricity, transmission, distribution and supply in the State is only advisory in nature as per Section 11[1][a], [g],[h]. But under Section 11[e] the Commission is empowered to regulate the purchase of electricity, maintaining quality of service by the licensees and in fixation of tariff to be collected from the consumers keeping both the interests of the consumers as well as the licensees. In Clause [e] empowering the Commission to fix price for purchase of power and tariff to be collected from the consumers, the words "generation and transmission" are conspicuously missing. Hence, Section-11 itself made a clear distinction on the role of Regulatory Commission in matters concerning generation and transmission of electricity and in the matters relating to purchase of power and fixation of tariff for supply of electricity to consumers and as such it cannot fix the charges for transmission of the power generated by the Generating Companies.

Where as Section 22[1][b] of the Central Act specifically speaks of determination of tariff payable for the use of transmission facilities by the State Commission to be constituted under that Act in the manner provided in Section 29 of that Act and under Section 29 while determining the tariff it has to take into consideration the national power plans formulated by the Central Government duly keeping in mind that the electricity generation, transmission etc. are conducted on commercial principles. There is no such provision in the State Act. But the

Commission placing reliance on Section 26[2] of the Act contends that it is entitled to levy charges for wheeling the energy produced by the Generating Company through the transmission lines owned by the licensee. This contention will be adverted while dealing with the powers of the Commission under Section 26 of the Reforms Act. In fact, the Commission in its written arguments while admitting that mere omission of words "transmission" and "generation" in Section 11[1][e] of the Act does not detract the powers of the Commission since no person can transmit electricity without license under Section 14 and the Commission is authorized to grant license and impose conditions under Section 15 and also fix charge under Section 15[5] read with Section 26 of the Act."

It is submitted by Mr. Ramachandran that in the Gujarat Act word "transmission" is not missing and, therefore, GERC was justified in passing the order under challenge and permitting the petitioners to approach the Commission again for formal determination of rate/tariff. On plain reading of the entire judgment of A.P. High Court, it appears that jurisdiction of Electricity Regulatory Commission to levy is ousted if there is no specific provision in the Act. In the order under challenge, justification is sought by GERC of Central and State Act but it is not logical and legal to decide in convincing manner that POC would fall in the category of transmission and its levy claimed by the petitioners as one of the sub-heads of "transmission activity". On perusal of the order under challenge, it appears that certain technical issues also have not been dealt with in logical manner and therefore only positive finding by drawing technical conclusions perhaps has not been recorded that POC is a part of the charge leviable under the head of "transmission activity".

**52** Grid support is nothing but a support by transmission which is of different class and categories and therefore, leviable from particular class or category of consumer running CPP parallel to grid. Because, grid support is nothing but a support to have transmission of electricity energy which is otherwise necessary to reach to a conclusion that lending support to CPPs operating parallel to the grid is a class or category different than others and, therefore, they can be subjected to levy under the head of grid support. There may not be any element of clear discrimination but it was obligatory on the part of the erstwhile GEB to establish that some charge, may be token, can be levied as POC as a category of consumers who have entered into an agreement for running CPPs parallel to grid are being benefited only on account of the fact that they are permitted to do so. Here, argument that has been advanced on behalf of the petitioner is found relevant whereby it is submitted that there are statutory obligations of State Transmission Utility to provide non-discriminatory open access to its transmission system for genuine users. This duty is to supply electricity energy on request. The petitioner's request to permit them to run CPPs parallel to grid, undisputedly is the result of acceptance of request extended.

**53** One crucial point, that is, nexus between the grid support charge and demand charge, according to me has not been found appropriately resolved in the decisions relied upon and tendered to the Court for perusal which are as under: [i] Decision dated 7th February, 2006 rendered by the M.P. Electricity Regulatory Commission in case of MPPTCL, wherein M.P. Power Transmission Company Limited had approached for determination of SLDC charges; [ii] Decision of the Punjab Electricity Regulatory Commission in the matter of Suo Motu Determination of ARR and tariff for financial year 2007-08, [iii] Decision of Rajasthan Electricity Regulatory Commission in the case of Petition for Transmission and SLDC tariff filed by Rajasthan Vidhyut Prasaran Nigam Limited and; [iv] Decision of the Maharashtra State Electricity Regulatory Commission in the case of Power Purchase and Other Dispensations in respect of Fossil Fuel based Captive Power Plants dated 8th September, 2004. In the present case, if the case before the GERC for levy of grid support charge that too up to 50% of demand charge, is considered closely, then the question that was required to be answered by GERC was that what is the relevance between normal demand charge and charge payable on account of grid support lent to CPPs running parallel to grid. Support by grid or support from grid may be found activity related to transmission. One another point which also is not found dealt with appropriately by GERC is that what is the co-relation between the capacity of CPP, fixed demand charge and POC. According to the petitioners, Maharashtra State Electricity Regulatory Commission and other State Electricity Regulatory Commissions have treated CPPs as special class of consumers and certain excess tariffs of normal demand charge have been applied. But in reality, it is the say of the petitioners that there is no levy of POC under the guise of grid support and what is levied is fixed demand charge for the demand contracted with Maharashtra Electricity Board and nominal stand by charge for any additional demand which such consumer CPPs want to contract. It is pointed out by the petitioners that this stand by charge is being levied at the rate of Rs. 20/- per KVA. The order passed in suo motu proceedings nowhere discusses about the validity of the earlier Commercial Circular issued in the year 1998. So, effect of the order under challenge would be that till a finding is arrived at in the application that was required to be made by erstwhile GEB, the CPPs who were paying some additional charge at the rate of 7.5% of the demand charge may continue to pay and the erstwhile GEB can legitimately recover such amount. The GERC itself impliedly can be said to have held in the order passed in suo motu proceedings that things are required to be scrutinized by the GERC only. In the order under challenge, the GERC could have held that POC is a charge foreign to all classes of tariff that can be fixed by the GERC under its jurisdiction conferred by the Statute. It was also possible for the GERC to say that the petition/application preferred by the erstwhile GEB is not maintainable, but GERC ultimately held that the petition is maintainable and POC can be levied under the Central Act and the Gujarat Act.

**54** The Court is not in agreement with the fact that unbundling of erstwhile GEB would make any difference on merits so far as the dispute between the parties is concerned and consumer has no concern with who recovers levy and the amount collected as levy or charges goes to which coffer and how, because, justification of levy of charge is a charge determined by the GERC. So, the question of exploiting monopolistic situation by the State Transmission Utility would not arise. But simultaneously, it is not possible for the Court to agree with the submission made by Mr. Ramachandran that in the event if it is held that parallel operation charge or grid support charge is not covered within the activity of transmission, or the same is found otherwise outside the purview of GERC, position of the petitioners CPPs would be more worse and in that event, there will not be any obligation on the part of State Utility to get such charge fixed or approved by GERC and the grid support activity would become subject out of purview that are being regulated by the GERC. Such finding then would fall in the terms "other business of the transmission licensee" used in Section 41 of the Electricity Act, 2003. This is not a legally valid argument that when contracted and granted free access in discharge of statutory obligation, a particular class of charge is not leviable, then, whether GETCO or any State Transmission Utility could recover levy of charge where there is prohibition of recovery of surcharge is also a point. Scheme of Section 42 of the Electricity Act, 2003 is found relevant. It would be beneficial to quote relevant part of Section 42 of the Act:-

"42. Duties of distribution licensees and open access.--

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

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

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

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

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

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

The Scheme thus, provides that any charge, even in the name of surcharge cannot be levied merely because open access is provided to a person who has established captive generating plant for carrying electricity to the destination of his own use. This proviso, even prohibits recovery of any surcharge if support of grid is being taken by a company generating electricity for its own use establishing CPP. It appears that India being power deficit country, more particularly, Gujarat being power deficit State enthusiastic to progress by leaps and bounds, only can think of levying any charge as special service charge under the head of "transmission tariff". It appears that this has only created confusion and two conflicting stands emerge, firstly the stand taken in the present petition was that POC is not a tariff and thereafter, from that statement GEB-GETCO retracted and revoked that statement.

**55** One more argument which requires to be dealt with is that erstwhile GEB-GETCO has already recovered charges and, therefore, it may not be held entitled to have POC. On merits even if it is found that the amount spent for infrastructural facilities, i.e. cost and expenses for establishment of the system, has been recovered, the State Transmission Utility would not become disentitled to have levy if the same is otherwise legitimate and recoverable, because, ultimately, entitlement is in reference to revenue requirement and revenue required is to be recovered from all users and beneficiaries. It is argued that GEB-GETCO cannot claim anything in addition to its revenue requirement. Any amount, if is recovered under the head of POC, then, it is to be adjusted and smallest consumer would get the benefit of rise in revenue. GETCO is supposed to appropriately apportion its revenue requirement between all users of the system. There is also force in the argument of Mr. Ramachandran that the matter may not have been looked from the point of view whether GETCO is incurring extra cost or expenses for providing grid support. Establishment of entire grid system is for all beneficiaries which can be notionally compared with general body and each member of general body is supposed to pay against capital cost of the system. Say of GETCO is that the petitioners, as CPPs are running parallel to grid are deriving more benefit as compared to the system. They are saving great cost lending support on the grid owned and established by GETCO. CPPs have not to pay contract demand charge. Contract demand is for the manufacturing utilities using electricity flowing from the grid. CPPs are generation units and support is being given to CPPs by grid and thus, CPPs are consumers or beneficiaries having special status. But merely because there is no perfect system to calculate so that

prevailing tariff contract demand is measured, any charge can be levied putting the same in the category of special service was a question before the GERC and same has not been appropriately dealt with especially when declaration simplicitor has been made. It is submitted on behalf of the respondent that prevailing HT tariff, contract demand is measured as average of 30 minutes integration period. Grid support, which CPP derives is usually within 30 minutes and therefore, it does not get recorded. This can be tested by the proposition that CPPs can be asked to install metering system which can measure contract demand on average of every minute or half a minute's integration period. CPPs can thereafter be asked to pay for the demand charges at the applicable tariff rate of contract demand and penalty rate if the consumer overdraws more than contract demand. Erstwhile GEB, now GETCO obviously has right to disconnect electricity in case of overdrawal by the consumer over and above his contract demand on more than 2 to 3 occasions. It is very likely that by installing such metering system to measure contract demand on average by every minute may create hardship or inconvenience to CPPs. But that by itself would not make the case of levy of POC stronger if the same falls in different category. Undisputedly, connectivity charges and other levies have to be paid by petitioner-CPPs. It may be a one time cost but each line connected with the grid from outside the premises of CPP has to be maintained by the State Transmission Utility. So, all these aspects are required to be scrutinized in reference to the data or details that were required to be produced before the GERC. So, GERC can conclude that recovery of amount as POC or grid support charge is money demanded qua rate for laying only support. But it is difficult for the Court to agree with the submission made by Mr. Ramachandran that GERC can decide the issue of admissibility of a particular charge directing the petitioner to study and to place the exact quantum of POC which is required to be charged. Argument of Mr. Ramachandran appears to be a dilemma. His submission is that the finding is to the benefit of the petitioners and not against them. The GERC-Commission could have allowed POC as claimed by the erstwhile GEB in context of the material placed and the reasons placed as to why the amount was claimed by the GEB, because, it is possible to argue that GERC could have held that for want of appropriate study and data to the satisfaction of GERC, it will not be possible for the GERC to reach to a conclusion that grid support is special service and special benefit to CPPs running parallel to grid. No data based finding is possible that grid support only results into some cost and expenses and the GEB has not placed any exact data or details of study carried out for the purpose and therefore, all things unless brought together before the GERC, it would not be possible for GERC to deal with any of the issues including the issue of maintainability and/or justification in raising demand of such grid support charge.

**56** When this Court is examining the issue whether GERC could have assumed jurisdiction and whether assumption of such jurisdiction and making declaratory order by itself makes the order bad are also relevant questions. It is

necessary to evaluate the entire order and formal finding recorded.

Undisputedly, the GERC is not conferred power or jurisdiction of a Court like Civil Court or High Court. As per the settled legal position, even Civil Court and High Court are refusing relief if relief of declaration simplicitor is asked for want of any consequential relief. In number of cases, relief of declaration has been refused when it is found that the petitioner is not entitled to consequential relief prayed as consequential relief to the declaration sought for. In the present case, GERC has specifically decided that this is a case where more study is required to be made and concrete date, unless is produced before the GERC, it will not be possible for GERC to enter into the details qua rate that can be levied as POC. Hypothetically, in the second application that has been filed and pending at present with the GERC, the petitioners, if are able to uproot the justification by raising demand from 7.5% of demand charges placed by erstwhile GEB, then, what fruitful will remain in declaratory relief granted by the impugned order is a question which needs to be considered. So relief of declaration simplicitor could not have been granted unless GERC was able to conclude positively on strength of the evidence and data available that POC would fall in the category of transmission tariff and total revenue generated as transmission tariff by erstwhile GEB is required to be held inadequate and this can be taken care of saying that by increasing some more revenue qua expenditure and costs in carrying out transmission activity and that can be compensated to some extent from CPPs running parallel to the grid. Reasons are also required to be noted that they should be charged at a particular rate qua demand charge or in any other manner or method, because, prima facie, it appears that demand charge perhaps has no direct relevance if the justification of various tariff is scanned closely. A relief specifically prayed, if is not found acceptable on any ground either on merits or on account of law, then, non-grant of such relief has an effect of dismissal of prayer to grant that particular part of the relief. The relief prayed by the erstwhile GEB in reference to POC as a consequential relief was not found acceptable. Undisputedly, GERC could have reached to a conclusion that on available data and the study placed, erstwhile GEB can recover POC not at the rate of 50% of demand charge as prayed, but it may recover such charge at a particular rate lesser than 50% actually demanded, but even that jurisdiction has not been exercised. So, it is possible to argue and also infer that as such, after the order passed in suo motu proceedings, erstwhile GEB in haste decided to rush to the GERC with a petition being Case No. 256 of 2000. But it ultimately failed to justify the claim on merits. In this fact situation, GERC ought to have dismissed the petition by holding that for want of justification qua consequential relief prayed, the GERC is not inclined to grant relief of declaration simplicitor as it has no jurisdiction like Civil Court or High Court. GERC conferred privilege to erstwhile GEB which is now GETCO, to approach the GERC-Commission again with study details and other relevant data. The finding under challenge, thus, appears to be the result which may seriously prejudice the petitioner-CPPs in the second petition, because, Regulation purportedly framed by GERC under Section 45[2], 61 and 62 read with Section

181 of Electricity Act, 2003, that is, part of Regulation 62 of Gujarat Electricity Regulatory Commission [Terms and Conditions of Tariff] Regulations, 2005 after the order under challenge, has moulded legal situation to some extent. There may not be any merit in the submission made on behalf of the petitioner-CPPs that surplus electricity generated, obviously flows into the grid system and State Transmission Utility automatically gets indirect support in maintaining frequency on account of free flow of electricity. Such possibility may be cropped up as and when there is surplus generation of CPPs. It is claimed by the State Transmission Utilities that they do not require such electricity. On the contrary, it is submitted that by taking such electricity absorbing excess generation, State Transmission Utilities are providing facilities to CPPs indirectly. Argument advanced does not sound either logical or acceptable. Mere logical argument normally should not be accepted by a Court of law when the same is not found sound on the facts available. So, the Court is not inclined to accept the argument that CPPs are free not to inject such supply and install equipment to control the flow of electricity. True it is that CPPs may be conferred with such privilege and if the State Transmission Utility so decides or desires, whether it would be legally possible for the State Transmission Utilities to argue that as they have been conferred with such privilege to CPPs, they will also lend grid support if State Transmission Utility has surplus electricity. The answer would be in the negative. Of course, the State Transmission Utilities are under statutory obligation. Tendency of electricity to flow freely in the grid is a situation where such argument would not add any justification to the relief of declaration simplicitor made by the GERC. On the contrary, it is possible for CPPs to convince GERC or any competent forum that everybody must smoothly have support of each other and therefore, if the CPPs running parallel to the grid are specially categorized consumers, then, some additional HT direct demand charge can be levied, and tariffs. Even if it is otherwise legally possible, a tariff can be fixed accordingly after examining the merit of such demand or revised demand, but no charge can be levied or recovered under the concept of grid support. Contract Maximum Demand [CMD] is a matter of agreement between the CPP and the State Transmission Utility and the words "Maximum Demand" have been explained by the Apex Court in the case of Orissa State Electricity Board Vs. IPI Stell Ltd., reported in [Manu SC 0295/1995] = AIR 1955 SC 1553. But it is not necessary that either of the party can insist for particular load of maximum demand. In case of IPI Stell Ltd. [supra], maximum demand was up to but not exceeding 7778 KVA, so the CPPs can give maximum figure if they so desire and therefore, linking grid support charge with maximum demand charge would not be perhaps rational.

**57** Judgment of Andhra Pradesh High Court is challenged before the Apex Court by the petitioners before the AP Electricity Regulatory Commission, which is distinguished by the other side. However, the Apex Court has not granted stay against the operation and effect of the said judgment. Here, it is relevant to note that there is a finding of the appellate forum where legitimacy

of POC had come up for scrutiny. In Appeal No. 99 of 2006, in the case of Urla Industries Association Vs. Chhatisgarh State Electricity Regulatory Commission, the Appellate Tribunal, while getting impressed on the strength of the presentation made by the expert that Parallel Operation is definitely a service, has observed in the very order that:

"In the tariff petition which is pending consideration, Commission may fix charge for Parallel Operation on the basis of the datas, materials and scientific inputs relating to Parallel Operations already placed by the parties or that may be placed by the parties before the conclusion of hearing and such exercise shall be carried out by the first respondent Regulatory Commission independently and without in any manner being influenced by this judgment."

In the present case, there was no satisfactory data, material or scientific inputs with GERC and the finding of the Appellate Tribunal, obviously, has no binding force and on facts, there is ample scope for recording a finding different than the finding recorded by the Appellate Tribunal.

**58** When the nature of POC, impliedly, was under challenge, GERC ought to have recorded some positive finding in this regard by giving cogent reasons and that is missing in the order under challenge. In para-4.96 of the order under challenge, while recording a finding in respect of the commercial aspects involved in the matter, it is observed by the Commission that;

"In view of the foregoing, it is strictly speaking, not necessary to look at the arguments based on the commercial or financial aspects of POC. The Commission felt that it would be useful to briefly narrate the main points for completing the narrative. It is however clarified that the Commission is not expressing any opinion on the points made by the Board or the objectors in this regard."

The facts placed by the erstwhile GEB before the GERC in the present case are based on technical features of grid connectivity which the GERC has drawn heavily from the judgment of the A.P. High Court. I have considered relevant paragraphs 4.67 to 4.95 of the order under challenge and the ultimate observation emerging from the discussion is that without empiric studies it may be difficult to evaluate rival arguments at purely theoretical level as the levy of POC has been challenged on several technical and commercial grounds. Approximate estimations of cost involved, in providing support to CPPs synchronized with the grid, will be needed. [Para 4.69 of the order under challenge]. All the above referred paragraphs indicate arguments advanced by the Board and the objectors. It is very likely that CPPs synchronized to the grid may cause quality problem like excessive reactive power drawal/voltage reduction, frequency dips, supply shortage etc. But it is also possible that on account of failure of grid or sudden dips it may cause inconvenience to such

CPPs operating parallel to grid. The GERC itself, in the judgment under challenge has stated that;

"Commission however, has an open mind on the issue and will be guided by technical studies. As already outlined, after dealing with the legal issue, the Commission come to the conclusion that grid support charges or POC can, if need be, levied under the Central Act and Gujarat Act."

**59** When the theoretical assertions are found of the nature, they require to be tested on the touchstone of empirical data that may be provided, is also the say of the Commission in the judgment under challenge. Declaration simplicitor of the nature could not have been made by the Commission.

**60** While passing the orders of partly allowing the petition of the erstwhile GEB, the GERC-Commission ought to have considered various issues, i.e. Change in the policy of the Government of India to give up monopolistic enjoyment by governmental organizations with regard to generation, distribution and supply of electricity and the decision taken by the government to invite private investments in the electricity sector to meet with ever increasing demand of power in the country and to bridge the gap between rapidly growing demand of electricity and the supply in context of paucity of resources at their command. Ultimately, in the month of October, 1995, all Chief Secretaries were asked to encourage co-generation plants in the country, i.e. industries to establish their own captive power plants by pulling up their resources by offering some initiatives. On account of liberalization in the policy and different path selected by the government, the CPPs have come up and they are impliedly operating ultimately in the government's and national interest. Undisputedly, the functioning of the State Electricity Boards was worsening year after year and therefore, the government decided to restructure the power sector so that financial health of the State Electricity Boards can be improved. Under Clause-10 of the Common Minimum National Action Plan for Power, State Governments were supposed to encourage co-generation/captive power plants to facilitate evacuation of power from these plants to the grid. The States were also supposed to plan transparent policy for purchase of power and willing charges, which provide fair returns to the cogeneration/captive power plant owners. CPPs could also sell power to a group of industries as well as other categories of consumers in the relevant industrial areas. Of course, none of the petitioners before this Court is selling power either to the State Transmission Utility or any of the companies owned or managed by GETCO, or to a third party. In this context, the Central Act contemplated establishment of Central Electricity Regulatory Commission at Central level and State Electricity Regulatory Commission at State level duly specifying functions of each of the Commissions under the Act. So, a Commission, either Central or State, is supposed to act as per the jurisdiction conferred by the Statute and on plain reading of the relevant provisions in the Central or State Act, there is nothing under which it can even be inferred impliedly that Commission can assume

role of a Civil Court or of a Court vested with the powers to pass any order in the ultimate interest of justice. The Commissions have no power to issue Rule or Writ or a declaratory order which can be executed or implemented in subsequent proceedings. Here, the nature of the order passed by the Commission under challenge whereby erstwhile GEB has been given benefit. So, execution of such favourable order would create confusion on unbundling of the erstwhile GEB. The Commission, according to me has exceeded its jurisdiction in partly allowing the petition and the direct result of the finding recorded in the impugned order is likely to result into serious prejudice to CPPs in the subsequent application filed by the State Transmission Utility. In case of Vishnu Cement, it is observed that; "Role of the Commission under the provisions of Reforms Act is that of a Court under the Common Law and its powers are only adjudicatory in nature." While passing the impugned order, the GERC, forgetting the statutory adjudicatory role assigned to it under the Statute, assumed pro-active role and passed declaratory order in the nature of Rule or Writ which is not the function of Common Law Court.

**61** Close scrutiny of whether levy of grid charges is reasonable or arbitrary would be a matter of controversy in the second petition filed. Of course, on merits, submissions have not been made by the petitioners and therefore, any comment on merits may have adverse effect and therefore, it would be appropriate for the Court at this stage to keep the question open otherwise, some comments could have been made by this Court keeping in mind the discussion in paragraphs 81, 82 and 83 of the judgment in the case of Vishnu Cement Ltd. [supra].

**62** Gujarat Electricity Industry [Reorganization and Regulation] Act, 2003 has independent Chapter-VI in reference to Tariffs. It appears that the Commission, while passing the order under challenge may have considered Section 32 of the above Gujarat Electricity Industry [Reorganization and Regulation] Act, 2003. This Section 32 requires to be read in reference to Section 86[1] of the Central Act of 2003. Section 32 of the above Act confers power on Commission to determine, by regulations, the terms and conditions for the fixation of tariff and in doing so, the Commission should seek guidance from the factors mentioned in sub-section [2] of Section 32. This sub-section [2] of Section 32 did refer to the word "transmission" along with the words "generation, distribution and supply". Commercial principles are always to be kept in mind and while keeping these commercial principles in mind, the purpose of liberalized policy and the fact that country is in great demand of electricity energy and it is not possible for the State to meet with the deficit power for inadequate funds and paucity of resources are also to be kept in mind. So, any charge, which may discourage establishment of private CPPs would also be a question that can be considered legitimately by the Commission if need be. Clause [b] of the Explanation in this Section 32 reads thus:

"[b] 'Tariff' means a schedule of standard prices for transmission, distribution or supply of electric energy or charges for specified services, which are applicable to all such specified services provided to the type or types of purchaser or person who avails the service or consumer specified in the Tariff."

**63** So, to have a grid support or to have a facility to run CPPs parallel to the grid would fall in the category of specified services also is a question, because, once stand of respondent was that COP is not a tariff. True it is that the statement made in the affidavit can be revoked or retracted but this retraction is legal and genuine or it is a convenient move to get out of legal consequences which are likely to emerge also needs consideration. Objective finding can be arrived at by competent authority, i.e. GERC in the present case if the parties are offered an opportunity to place their say on all counts. It is even possible for the petitioners to argue, of course, they have not argued this point at this stage as the argument would drag them to the submissions on merit. So, they have kept this privilege open. The erstwhile GEB and thereafter, GETCO had failed in convincing the Commission that on merits, they have sound case and POC can be placed under the category of specified services in reference to the transmission activity of electricity energy or activity related to the transmission. It is possible to observe that GERC also could have dismissed the petition observing that the Commission can be approached again after empirical study and other required data and the petitioners also could have been directed to satisfy the Commission that POC can be levied and therefore, can be determined by the State Commission either as specified services to CPPs running parallel to grid or its part of transmission or both. There is no technical, cogent and convincing finding even in this regard in the order under challenge. It appears that in allowing the petition partly, the Commission has done some unwarranted haste resulting into serious prejudice to the petitioners.

**64** It is also relevant here to note that as per the settled legal position that finding of the Court or adjudicating authority should not be recorded on the ground of practical convenience or inconvenience. The order under challenge appears to have been passed keeping in mind the convenience of one party, that is, original petitioner-GEB. The purpose may be of saving time, but this logic would not help the respondent, because, by way of abundant caution, the Commission has permitted the erstwhile GEB to continue with the recovery at 7.5% of contract demand as parallel operation charge [POC]. So, this amount could have been considered as ad-interim arrangement without prejudice to the rights and contentions that the parties may raise and the State Transmission Utility could have been directed to approach the Commission de novo with all details of empirical study and data collected with a copy in advance to the other side so that the CPPs can meet with all the points. It could have been kept open to CPPs to convince the Commission that even after the finding recorded at the end of empirical study or data produced, grid

support does not fall in the category of any specified service or transmission activity and therefore, no tariff can be levied. Alternatively, it could have been kept open that with the data available, there is no need to levy such charge, because, ultimately, CPPs are operating impliedly in the interest of the power deficit State having limited resources to meet with the demand of public at large.

**65** As mentioned, the petitioners have prayed that Regulation 62 of Gujarat Electricity Regulatory Commission [Terms and Conditions of Tariff] Regulation, 2005 to the extent that; "In addition, Commission may also determine charges on account of the services rendered by a Utility to the Consumers, i.e. Grid support charges", is ultra vires to the Act and null and void. Backbone of the argument made on behalf of the petitioners is that GERC, while framing the said Regulation has exceeded the power conferred on it under Section 62 of the Electricity Act, 2003 and Section 32 of the Gujarat Act. Therefore, the Commission can determine tariff only for [a] supply of electricity by generating company to distribution licensee; [b] transmission of electricity; [c] wheeling of electricity and; [d] retail sale of electricity. However, by framing the said Regulation, the Commission empowered itself to determine charges on account of the services rendered by the Utility to the Consumer including grid support charges. Determination of levy under the head of "Grid Support Charge" is beyond the scope of the Electricity Act, 2003 as well as Gujarat Act. The Commission has attempted to overreach the powers. It is also argued that similar Regulations framed by Central Electricity Regulatory Commission do not contemplate such regulation. So, the Gujarat Act, if is found inconsistent with the provisions of Electricity Act, 2003, then, the Central Act, i.e. the Electricity Act, 2003 would prevail. Therefore, the regulation that could not be framed under the Electricity Act, 2003 cannot be framed under the Gujarat Act, 2003. After passing the order under challenge and more particularly after filing of the petition in the year 2004, the Electricity Regulatory Commission enlarged its functions and powers beyond the scope of the provisions of Electricity Act, 2003 and therefore, it should be held to be ultra vires. It is submitted by Mr. Soparkar that framing of regulation in the year 2005 after passing the declaratory order appears to be in colourable exercise. On close reading of the order under challenge, it is not possible for the Court to reach to a conclusion that positive finding was recorded by GERC that POC i.e. Grid support is special or specified service to CPPs operating parallel to grid and/or it is a part of transmission. Merely because a consumer is getting facility of availing supply of electricity energy under the agreement and on account of statutory obligation on the State Transmission Utility, whether, such consumer can be subjected to any charge that too under the head of "tariff" is a question. Here, at this stage, while appreciating the arguments of the parties on the point of vires of the regulation framed by GERC in the year 2005, it would be appropriate to consider that how CPPs installed by the HT industrial units are running parallel to the grid.

**66** As mentioned earlier, copy of the petition filed before the Electricity Regulatory Commission in the State of Gujarat has not been made available to the Court for perusal nor findings recorded by the GERC are made available. Only decision of the appellate authority has been pointed out to the Court wherein, levy of POC has been upheld. Attempt has been made by Mr. Ramachandran to distinguish the judgment of A.P. High Court referring to certain paragraphs of the judgment, but entire reading of the judgment satisfactorily establishes one fact that this judgment is not only on one point which Mr. Ramachandran tried to highlight that absence of the word "transmission" in relevant Regulation had led A.P. High Court to record a finding of overruling the decision of A.P. Electricity Regulatory Commission. In the matter of determination of a tariff for assessment of financial year 2006, based on the tariff application made by M.P. Power Transmission Company Limited and determination of SLDC charges, M.P. Electricity Regulatory Commission in its order has discussed about the POC and grid support charges. Paras 4.90 and 4.91 of the order give an impression that both these concepts, i.e POC and grid support charge have been discussed as if there is some distinction between the two. Here, according to GERC, in the judgment and order under challenge and the stand taken by GETCO are found little bit different. It is submitted that POC is a charge required to be levied for grid support provided to the CPPs operating parallel to grid. In the order dated 7th February, 2006, M.P. Electricity Regulatory Commission in the ultimate finding recorded by it has observed thus:

"[p] Parallel Operation Charges

4.90 The Licensee has proposed parallel operation charges on all open access customers whose generators are connected to the transmission system at Rs. 388/KW/Month. The charge proposed by the Licensee has neither been provided in the Open Access regulations nor in the regulations on terms and conditions of transmission tariff. The Commission would not go into the issue of levying these charges once again. This issue was discussed with the Transmission Licensee while framing regulations on Open Access and Terms and Conditions of tariff. The proposed charge was not included in the list of allowable charges for the inability of the Licensee to quantify the perceived benefits in monetary terms after the applicability of open access charges for the use of transmission system. Further these charges have not been proposed for a generating station and a captive generating plant under section 9 of Electricity Act has to be treated at par with a generating station. The discrimination proposed is not acceptable to the Commission.

Grid Support charges:

4.91 The Transmission Licensee has proposed a surcharge equal to 25% of transmission charges on arc induction furnaces, rolling mills and

unbalanced railway traction supply at two phases to compensate for the ill effects of such loads if such load avail supply from other than the licensee. According to licensees these loads pass on the harmonics in the licensee system and results in voltage jerks and unbalancing of licensee's system resulting in the failure of EHV transformers. The Licensee has computed the loss at Rs. 3.61 Lakh per MVA. The concept that dirty loads should pay for the ill effects caused by them on the system is widely accepted. However, characteristics of various types of load on the distribution need to be studied and categorized according to their effects on electrical network. The quantum of adverse impact on the electrical network due to such load needs to be established in monetary terms. No such data is available with the Commission and the Licensee is advised to collect information on the subject from other State Transmission Utilities and orders passed by other State ERCs. The Licensee has provided data on failure of transformers which were supplying to such loads but it could not establish that the failure of these transformers took place due to ill effect of these loads. This issue warrants a deeper study either by the Licensee or such some research organization. The Licensee if it wishes to proceed ahead on this issue may do so for which it should seek the help of some reputed research organization in getting the ill effects of dirty loads probed and the quantification of implication of such effects in monetary terms. As this charge has neither been prescribed in the Open Access regulation nor in the regulations on terms and conditions of tariff the Commission would like to impose any such charge only after receiving report of the detail study as suggested and the views of other stakeholders have been sought."

It is held that MPPTCL has proposed POC on all open access customers whose generators are connected to the transmission system. This charge proposed by MPPTCL has neither been provided in the open access regulations nor in the regulations and the terms and conditions of transmission tariff. Further, these charges have not been proposed for generating station and a captive generating plant under Section 9 of the Electricity Act has to be treated at par with a generating station. In view of this, the Commission did not agree with the licensee's contention that there shall not be any POC.

**67** Rajasthan Electricity Regulatory Commission, Jaipur, in its order dated 31st March, 2006, in the matter of Petition for Transmission and SLDC Tariff initiated by Rajasthan State Vidhyut Prasaran Nigam Limited ["RSVPNL" for short], has discussed connectivity and POC in para-11 of its order. It would be relevant to refer to relevant part of the order. Of course, this part referred hereunder is based on certain facts and data that were placed before this Commission.

"However, data in respect of 11 KV connectivity is not available. In absence of these, it will not be feasible to determine connectivity charges

precisely. Presently, generating companies are not making any payment for transmission charges, but they will have to pay connectivity charges, if levied, as they too are connecting their power station[s] with RVPN's system. This will add to their cost of generation and will be recovered by them as part of generation tariff. Besides this, HT consumers also avails connectivity with RVPN grid but effects payment as per retail tariff, which present covers transmission charges. These will require either exemption to them or to effect revision to their retail tariff. In view of these, Commission is not presently specifying connectivity charges and directs RVPN to furnish separate petition, which will be considered as part of this petition. The concept of parallel operation charges based on installed capacity of power plant, in addition to grid connectivity charges does not seem logical. RVPN has submitted that grid connectivity of the power plant does not require various activities to be undertaken which includes absorbing fluctuations of the plant, protection coordination, earthing connectivity, system fault calculation, load flow study, synchronizing jerk on the grid besides the same level of general supervision and monitoring activities as applicable of all power plants connected with the grid and supplying power through grid by the RVPN staff at various levels of SLDC. IPP/CPP will have generating units of size much smaller than operation capacity in Northern region and parallel operation of their set with Northern region would have associated risks as such yet they have advantage which off sets such risks and request for connectivity of the power plant are forthcoming. Exchange of active or reactive power associated with these must be feasible to be recorded through ABT complaint meters and it can then be billed. RVPN may collect data and then submit petition accordingly."

**68** In the present case, the GERC has held that this matter needs specific data based on study and after doing necessary study in this regard, fresh application may be submitted to the GERC. Ultimate finding shows that the action of imposing POC has not been accepted as it is. The Rajasthan Electricity Regulatory Commission, thereafter decided in reference to Annual Revenue Requirement [ARR] of RVPN with its segregation to generation, transmission and SLDC. Thus, finding of Rajasthan Electricity Regulatory Commission can be said to be similar finding to the finding recorded by GERC in the present case. This Court is not informed as to whether the said finding was challenged either before the High Court or before any other forum.

**69** With this background, whether it is possible to separate Transmission Charges in two different parts; one is being paid in capacity of a consumer for asking a particular power load and second Transmission Charges [under contemplation] on the strength of the order passed by the GERC as supporter through Grid for contracted load labelling it as grid support charge. There is understanding in the form of agreement between the petitioners having CPPs as to the use and drawal of power and how and under what manner the

petitioners would be charged for additional or excess load/power thrown on grid and consumed or used against the contracted load. Without taking a decision on the quantum of POC and putting POC into a particular category affirmatively, whether any declaration could have been given by the GERC is also a matter of dispute.

**70** In the matter of Power Purchase and other Dispensations in respect of fossil fuel based CPPs, Maharashtra Electricity Regulatory Commission giving an illustrative example to explain applicability of additional demand charges has ruled that;

"Various issues have been raised in the matter of additional demand charges and it would like to clarify these issues so as to avoid any misinterpretation of its order. It should be clearly understood that additional demand charge is applicable only on stand by components and only on the quantum if any, in excess of contract demand."

**71** Two cases have been hypothetically discussed while dealing with the illustrative example in the order under challenge and the Commission has issued orders to levy charges in three different categories; [i] Contract Demand Charge [ii] Additional Demand Charge of stand by component and; [iii] Additional Demand Charge for excess demand. Thus, in plain words, no levy has been discussed or determined in the matter of parallel operation or of grid support. The finding is based on an inference that excess drawal of power in addition to the contract demand is measured and excess demand can be calculated. In the present case, there is no dispute that because of some installed metering system, it is not possible to record minute to minute drawal of power and therefore, excess drawal on number of occasions remains unrecorded. This by itself, whether would have an effect on justification to levy POC or grid support would again be a question which requires determination. Even if answer is in the affirmative, whether it is possible to levy such charge in absence of detailed study data leading to justification of such levy.

**72** Punjab State Electricity Regulatory Commission in suo motu determination of ARR and tariff for the financial year 2007-08 in Chapter-6 of the order has observed thus:-

"6.1.1 Presently, the Captive Power Plants/Co-generation plants feeding the Captive load and also supplying surplus power to the Board are charged Parallel Operation charges proportionately on the total capacity available for deeding the Captive load worked out by deducting capacity earmarked for sale of power to the Board from the total capacity of the Captive Plant @ Rs. 200/KVA of 5% of such worked out capacity of TG Set in KVA.

6.1.2 Keeping in view the necessity of tapping and pooling up energy sources in the State and also to remove irritants like levy of Parallel Operation charges and also for the reasons detailed below, the Board has conveyed its proposal to the Commission to discontinue with the levy of Parallel Operation charges.

[a] Northern Grid is big enough to take on small TG/DG sets without any setback to the system.

[b] Levy of these charges is against the provision of Electricity Act, 2003 .

[c] The revenue by way of Parallel Operation charges per annum is less than Rs. 3.5 crore which is meagre with reference to total revenues and can be foregone keeping in view the benefits of more and more private generation in the State.

[d] Group of the Forum of Regulators has also observed that there is little justification for levy of Parallel Operation charge/Grid Support charges.

[e] Cogenerators like Sugar Mills are facing financial hardships due to levy of these charges even when they are not running their CPPs during off season.

6.1.3 The Board has however proposed to levy one time permission fee for parallel operation @ Rs. 50/KVA. Those who run their plant in parallel in an unauthorized way may be asked to pay double the permission fee besides suitable compensation to the Board for damage, if any, caused to Board's system.

6.1.4 The Commission has considered the proposal of the Board and proposes to discontinue levy of Parallel Operation charges subject to following conditions:

[a] Monthly Parallel Operation charges shall be discontinued with effect from the date of implementation of Tariff Order for the year 2007-08.

[b] One time permission fee for examination of technical aspects from all Captive/Cogeneration Plant owners who intend to run their plants in synchronism with the grid shall be charged.

[c] The fee for such technical examination shall be charged upfront @ Rs. 50/KVA of the capacity for feeding captive load which shall be worked out by deducting capacity earmarked for sale of power to the Board from the total capacity of the Captive Plant.

[d] Any person found un-authorizedly running this plant in parallel to Board's system shall be charged @ Rs. 100/KVA and its running in parallel shall not be allowed until technical feasibility examined by the Board in case the technical requirements are not met with, the parallel operation shall not be allowed to continue and the charges levied @ Rs. 100/KVA shall stand forfeited.

[e] Captive Power Plant owners who are not consumers of the Board may also be permitted to run their unit in parallel with the Board's system.

[f] The cost of power injected more than the scheduled power by the Captive Power Plant/Co-generator Plant owners, shall be determined as per Regulations for captive generation to be framed by the Commission."

**73** From the findings recorded by number of State Electricity Regulatory Commissions, it is possible for the Court to observe, without entering into merits of the orders referred herein above passed by the different State Electricity Regulatory Commissions, and other factual matrix considered by the GERC while passing the order under challenge at the time of directing erstwhile GEB to carry out necessary study and produce the data that, declaration simplicitor of the nature ought not to have been made by GERC. By doing so, the GERC has exceeded its jurisdiction assuming the role of a Court of law or a Court entitled to issue a writ or an order. This is not a case where such declaration could have been made keeping in mind the element of equity and/or of idea to keep balance between the parties. Unless the element of justification is found from all corners from the point of view of genuineness of demand and statutory entitlement, such declaration could not have been made. This would result into serious prejudice in meeting with a case on merit or assail the finding recorded by the GERC in the study that may be carried out or other details that may be placed in the proceeding of subsequent application. This order by itself, it appears that, has tempted the GERC to frame Regulation in the year 2005 incorporating the words "grid support". The petitioners therefore, have challenged vires of this regulation and it is rightly argued that in the proceedings pending at present before the GERC in the nature of subsequent petition filed by the successors of erstwhile GEB, the petitioners, practically will have no legal stand while assailing the justification or statutory entitlement.

**74** Vires of the Regulation-62 is challenged in the present petitions by the petitioners by way of amendment. On close scrutiny of the powers vested with the Gujarat Electricity Regulatory Commission, it is clear that the State Electricity Regulatory Commission is entitled to frame regulations, but it is the stand of the petitioners that by Regulation-62 under challenge, the Commission has attempted to introduce grid support charges and this is beyond the scope of the Statute. In other words, POC is one of the areas where Electricity Regulatory Commission has no powers to make orders and regulate

that area under the system of electricity generation, transmission, distribution and use etc. Grid support or POC is a different concept as discussed above. Neither Central Act of 2003 nor ERC Act, 2003 empowers the State Electricity Regulatory Commission to introduce new subject or topics over which the Electricity Regulatory Commission can deliberate or issue regulatory orders. CPP is a generating station, even then, the same is part of the grid while operating parallel to grid. Though arguments have been advanced that admission made by the erstwhile GEB in the affidavit that POC is not tariff, the same shall have no legal bearing on the merit of these petitions. But it is necessary to scrutinize whether POC or grid support charge has or can have nexus with the word "tariff" used in context with the relevant law. Grid support, as placed before the Court during the arguments advanced by the learned counsel for the parties, has no nexus with wheeling of electricity and there is no dispute that wheeling charges, if are required to be paid, they are paid. Electricity Regulatory Commission has only powers to determine tariff and nothing outside the tariff can be decided by the GERC. So, the fact that POC would fall in the category of tariff as per the statement made by the other side while retracting the earlier statement also needs to be examined. It is possible to examine this aspect by Electricity Regulatory Commission. The petitioners can uproot the stand taken by GEB that grid support or POC is altogether different concept and does not fall in the category of tariff leviable under any head either under the law or under any agreement between the State Transmission Utility and CPPs. In suo motu proceedings, the CPPs have remained successful in uprooting the Commercial Circular No. 706, so, no appeal could have been preferred before the Appellate Tribunal constituted under Sec.110 read with Section 111 of 2003 Act. Though number of observations have been made in the order quashing and setting aside the Commercial Circular No. 706 by GERC, but the ultimate issue in suo motu proceedings before the GERC was that erstwhile GEB could have made any alteration in POC that was being levied on the strength of earlier Commercial Circular No. 687 dated 21st December 1998. Electricity Regulatory Commission Act, 1998 has received assent of the President of India on 2nd July, 1998 and it came into Statute Book as Electricity Regulatory Commission Act, 1998 [14 of 1998]. So, non-challenge of levy of POC would not make the petitioners disentitled to challenge the legality and validity of POC. Undisputedly, isolation is one device of system to prevent serious damage to equipment. Such isolation devices are bound to be installed and they are installed. As per the Grid Code, operating units are entitled to and should not be prevented from picking up 5% extra load more than the declared and maximum continuous reading for at least 5 minutes or within declared limits specified by the manufacturers when the frequency falls due to system contingency. It is provided that in case any generating unit of 50 MW and above does not meet with this requirement for any period, the generating company is supposed to intimate the same to the SLDC along with reasons. So, the Grid Code takes care of regulatory measures which are required to be taken in reference to demand control and system security.

**75** Gujarat Electricity Industry [Reorganization & Regulation] Act, 2003 which provides for tariff does not speak anything about either grid support or POC. Of course, there is reference of three important words, namely, "transmission", "distribution" and "supply" and nexus may be found ultimately between POC or Grid Support charges. Parties have concentrated their arguments in reference to challenge to vires of Regulation 62 to Regulation 32 of the Regulations of 2003. Relevant Sections of the said law as well as other powers flowing from Section 86 of the Indian Electricity Act, if are considered, it is possible that ultimately, the State Electricity Regulatory Commission may reach to a conclusion that there is a nexus between the activity of "transmission" and "grid support". It is equally possible that the Commission may reach to a contrary finding, because, under the Statute, it has a privilege under the law to have electricity power [supply] from State Transmission Utility and there is no right of denial to supply electric energy if the application made for the purpose is otherwise found acceptable. When a privilege is conferred to have electricity and its legitimate use under the law as well as regulation framed, Grid Code and the agreement between the parties, whether any device can be developed to extort more money by dividing one activity into two different labels is a point which needs some consideration. The State of Gujarat as well as the whole country are suffering from electricity power deficiency. Against rising demand, power deficit is now being felt in every corner of the country and therefore, under the policy of liberalization as discussed earlier, CPPs have been permitted to be installed and are being installed. Constitutional validity of Regulation-62 has not been challenged. Say of the petitioners is that it is violative of the statute and the same is not in accordance with the relevant statute or POC in the parent statute or the prevailing statutory rules or regulations at relevant point of time, more particularly when the Regulation is framed in the year 2005. The regulation framed in the year 2003 referred to herein above does not speak anything about either POC or grid support, the Commission ought not to have conferred power on itself to determine anything in this regard. This act of GERC, according to the petitioners is violative of law and therefore, such Regulation cannot stand in the eye of law. Absence of power or authority to frame a Regulation or to modulate a Regulation contrary to the parent legislation, would make the regulation ultra vires is the backbone of the argument. It is also further argued that this phraseology used in Regulation-62 of the year 2005 is only with a view to see that the cause taken up by the CPPs operating parallel to grid is defeated. Now, there are more than one findings. Perhaps in the year 2004, when the impugned order came to be passed, decisions of other State Electricity Regulatory Commissions were not before the State Commission. Discussion made by M.P. Electricity Regulatory Commission in its order dated 7th February, 2006 has held categorically that there is no scope to levy POC and some other State Electricity Regulatory Commissions have interpreted alleged grid support in different context. When it comes to sustainable development, duty of the Court and the State in such matters would be materially different. If CPPs are not permitted to operate or they are not permitted to operate parallel to grid, then, what would be the

deficit of electricity is also a relevant point. When a Statute is to be carved out, that too, contrary to basic structure already in existence, the principle of sustainable development must be kept in mind and the authorities, while carving out the law are bound to consider the need of future generation. Gesture should be coherent and coordinating which may meet its obligation of sustainable development. In case of Central Power Distribution Company and others Vs. Central Regulatory Commission and others, reported in [2007] 8 SCC 197, the Apex Court has discussed about electricity tariff under jurisdiction and powers of Central Electricity Regulatory Commission. The Apex Court has dealt with the following four major questions:-

(A) Whether the application of Availability Based Tariff (ABT) in relation to Unscheduled Interchange (UI) charges, which otherwise is not a component of tariff in terms of Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and they are liable to be held as beyond the jurisdiction of the Central Electricity Regulatory Commission (CERC)?

(B) As such the impugned order passed by the Appellate Tribunal for Electricity has completely ignored the fact that the CERC order, which was passed suo moto and ex parte, is non est and without jurisdiction?

(C) Can the Availability Based Tariff as established and provided in the order of the CERC by its order dated 4.1.2000 be implemented under the provisions of Electricity Act, 2003, particularly when there is no provision under the statute that allows the CERC to levy Unscheduled Interchange Charges? and

(D) whether in the present facts and circumstances as regards the Simhadri SPTS thermal station of the National Thermal Power Corporation (NTPC) which admittedly supplies power to the State Grid and has no connection with the management of the National Grid, can the CERC in such circumstances exercise, particularly when matters relating to the State Grid falls within the role and function of the State Electricity Regulatory Commission?"

In para-5 of the judgment, the Apex Court has interpreted and analyzed ABT, that is, "Availability Based Tariff". Order of Central Electricity Regulatory Commission passed in suo motu proceedings was challenged whereby CERC inter alia, ordered the application of Availability Based Tariff to Simhadri SPTS Thermal Station of National Thermal Power Corporation [NTPC] with effect from 1st December 2005. The order of Central Electricity Regulatory Commission was challenged before the Appellate Tribunal and the finding of the Appellate Tribunal was assailed before the Apex Court as the Appellate Tribunal dismissed the appeal filed by the appellant-Central Power Distribution Company. The facts of the cited decision are substantively different. But the

ratio of the judgment is that when it comes to grid frequency and its maintenance ideally at 50 Hz at the most, distinctive features of ABT were required to be considered by the Regulatory Agency and therefore, the CERC can claim that it has jurisdiction to regulate. When it comes to assurance of discipline in the integrated system, the Commission, at least, is entitled to look into the matter.

**76** Here, submissions extended by Mr. Soparkar, learned Sr. Advocate need consideration, because, according to the petitioners, GERC, after passing of the impugned order under challenge has attempted to formulate Regulation-62. So, there may not remain any scope to put up a debate on the issue if any tariff or rate is fixed and subsequently amount is recovered as per rate fixed as levy under the lable of "grid support charge" i.e. POC. This gesture of GERC, according to Mr. Soparkar is nothing but an attempt to widen the jurisdiction by carving out a law by itself only. To buttress the say of the petitioners, Mr. Saurabh Soparkar, learned counsel appearing for one of the petitioners relied upon a decision in the case of Hukamchand etc. V/s. Union of India and others [ [1972] 2 SCC 601]. The decision is of administrative law and the same is relied upon by Mr. Soparkar to indicate that if there is difference between the subordinate legislation and statutory laws, powers to make rules retrospective are limited and if such rule is framed, then, the same is ultra vires. Regulation framed by GERC after passing of the impugned order is nothing but an attempt to have regulation which is not consistent to the main scheme of Statute and grid support or Permanent Operation Charge [POC] is being attempted to be introduced by framing a fresh regulation and such regulation is not sustainable. If the present petition is not accepted and the petitioners, if are relegated to GERC to fight out second application preferred to get permanent operation charge fixed, then, this newly framed regulation, if not turned down would come in the way of the petitioners, which is otherwise, according to Mr. Soparkar, ultra vires.

**77** Mr. Soparkar relied upon another decision of the Supreme Court in the case of Board of Directors of A.P. Cooperative Central Land Market Bank Ltd and others vs. Chittur Primary Cooperative and Market Bank Ltd and others [[1974] 1 SCC 608]. It is pointed out from para-6 of the judgment that rule making power conferred on the government for carrying out of any of the purposes of the Act must be confined to such of the purpose as are enumerated or indicated in the preamble or any of the provisions of the Act. The Supreme Court was dealing with the scope of powers of the Board of Directors and the power of the Registry under Section 116[a] of Andhra Pradesh Cooperative Societies Act, 1964. Either in Electricity Act or in Gujarat Act, where there is no provision subject wise, and Permanent Operation Charge or Grid Support Charge are not mentioned, the GERC cannot assume jurisdiction to deal with the subject nor can frame regulation introducing such charge or charges.

**78** 5th proviso of Section 39, on the contrary, puts an embargo even on recovery of surcharge. It says that surcharge shall not be levied in case open access is provided to a person who has established captive generating plant for carrying electricity to the destination of his own use. Thus, CPPs have been conferred different status while enjoying facilities from the State transmission utility. Grid support would not fall in the category of services for which separate charge or tariff would be levied.

**79** Mr. Soparkar relied upon a decision of the Supreme Court in the case of General Officer Commanding in Chief and another Vs. Dr. Subhash Chandra Yadav and another [[1988] 2 SCC 351]. This decision is also in reference to administrative law where the Supreme Court has held the rules framed under the provisions of a statute form part of the Statute. But before a rule can have the effect of a statutory provision two conditions must be fulfilled, namely, [i] it must conform to the provisions of the statute under which it is framed and ; [ii] it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. So, according to Mr. Soparkar, merely because one regulation has been framed introducing the words "grid support charge" or "Parallel Operation Charge" by GERC would not make the impugned order either valid or legal. On the contrary, this attempt indirectly indicates that in absence of such specific words in electricity Act or Gujarat Act, GERC was conscious that it may not have jurisdiction to order levy of charges under the guise of transmission tariff. Some other three decisions also have been cited on behalf of the petitioners on this issue.

**80** Keeping in mind the law/existing statute, if the State Transmission Utility had failed practically in convincing the GERC on the strength of facts and other technical studies or data, then the part of Regulation-62 under challenge cannot be said to be contrary to the statute or statutory regulation as it would depend upon several relevant aspects which are still required to be examined.

**81** One more crucial question that has cropped up is whether it would be justified or proper at this stage for this Court to say that Regulation-62 is ultra vires and/or totally inconsistent or contrary to the Scheme of either Central Act or State Act or to throw away the contention of the petitioners holding the Regulation in question as valid and sustainable legislation.

**82** Mr. Mihir Thakor, learned Sr. Advocate appearing for some of the petitioners, in the alternative has submitted that parties may be relegated to GERC again so that the GERC can decide the dispute de novo keeping in mind the relevant Central Act, Law and the rules and regulations framed thereunder, i.e. State and Central Act and the rules and regulations framed thereunder. When GERC has accorded an opportunity to the State Transmission Utility to prefer second application/petition, then, both the applications can be heard and decided conjointly and in the meanwhile, charges that are being paid in

the name of parallel operation can be collected by the State Transmission Utility without prejudice to the rights and contentions that may be raised by the petitioners.

**83** It is possible to order so, i.e. accepting the alternative submission made by Mr. Thakor, but crucial question would be that what status in the meanwhile, should be accorded to the regulation framed by the Commission.

**84** In certain categories of cases, this Court and even the Apex Court have left the question of challenge to vires open, more particularly in cases where matters are either remanded back or in cases where decisions are given on other points available for determination of the matter. In the present case, constitutional validity of Regulation-62 has not been challenged and the said Regulation has been assailed on the ground of it being contrary to statutory laws and also the authority of the GERC to carve out such law in the form of Regulation. The case on hand is a case which falls in the category of a case where some vital issues are re-scrutinized or need determination based on facts or data. Second petition as ordered by GERC has been filed and the same is pending and some exercise obviously shall have to be carried out by the GERC. Therefore, scope of inquiry can be widened by asking the GERC to reappraise the entire say de novo as the findings under challenge on technical issues are also not found complete and conclusive. If this Court says that Regulation-62 is ultra vires, then, GETCO, petitioner of the second petition may face serious prejudice and the second petition may fail only on such verdict. Undisputedly, GERC has directed the original petitioners, now, its successors-GETCO, to approach the GERC again with a second petition after necessary studies and data which are required to be tendered before the GERC. The petitioners obviously would get an opportunity to assail the said application/petition from all corners. It is obviously obligatory on the part of the State Transmission Utility to firstly convince the GERC that grid support is nothing but an activity of transmission and it is something more and different than transmission being part of transmission activity. It is special service and it is possible to separate this special service from normal activity of transmission of electricity energy to a consumer to whom the State Transmission Utility is otherwise supposed to supply electricity as per the law and the agreement. The State Transmission Utility is also supposed to convince the GERC that CPP though is a generating station is part of grid and in spite of reciprocal relations to maintain frequency between them to avoid breakdown in the system in the event of high drawal of power or dip in supply of electricity energy, grid support charge still can be levied though same is not specifically referred either in the relevant law or Regulation-32 dealing with the tariff which was in force at least on the day on which the impugned order came to be passed. An attempt to distinguish the judgment of A.P. High Court made by Mr. Ramachandran need a fresh look, more particularly in reference to activity of "transmission" referred to in Regulation-32.

**85** Keeping in mind the law, existing statute and keeping Regulation-62 under challenge in the present petition in the reverse seat, if State Transmission Utility succeeds in convincing the GERC on the strength of all technical issues as well as on facts available after technical study report and data collected, then, it is possible to record a fresh finding accordingly. But if the State Transmission Utility fails in doing so, then, such finding shall have a direct bearing on the merit as well as on the assailed part of Regulation-62.

**86** It is possible that GERC while dealing with the case on merits may decide that State of Gujarat is a power deficit State, sustainable development is need of time and any attempt to levy POC is nothing but a trick to extort more money running into hundreds of crores from limited group of legitimate consumers. Only on the count that they are being provided grid support, no separate levy or charge therefor, can be collected or such charge at least cannot be termed as tariff within the meaning of Regulation-32 and even then also, ultimately, the same shall have bearing on sustainability of Regulation-62.

**87** Undisputedly, the words; "grid support" in Regulation-62 have been introduced for the first time after the pronouncement of the order under challenge in the year 2005. Introduction of such words or phraseology of Regulation framed in the year 2005, whether is proper execution of power by Electricity Regulatory Commission is obviously a question. Recording of answer to this question in the present petition may result into serious prejudice to either party. Where subordinate legislation has been assailed on the ground that the same is contrary to the statutory laws, it is not obligatory on the part of the Court to answer the question either in the negative or in the positive. The Court is not always supposed to say that legislation under challenge is either intra vires or ultra vires. The Court can answer this question and pass orders keeping such crucial question open. Under the given set of facts, it is possible and necessary for this Court to leave this question open when several crucial technical as well as factual aspects need fresh deliberations on merits. There are more than one judgments but the Court would like to refer the decision in the case of Girdharlal Ganpatlal Vs. Ahmedabad Municipal Corporation, reported in 1 GLR 223. Of course, in the said matter, the petitioners had not pressed the contention regarding vires of the sections assailed by way of petition and this Court decided to leave that question open as the same was not pressed. Learned Advocate General of State of Gujarat had assisted the High Court. So, the Court had reason to believe that the learned Advocate General also must have supported the proposal made by the petitioners of not pressing the contention qua their challenge as to vires of Section referred to in the cited decision. Second judgment is in the case of Prem Chand Vs. Union of India and others, reported in AIR 1981 SC 613 wherein also, the Court had decided to leave the question of vires open. In the said case before the Supreme Court, powers exercised by Delhi Police in reference to externment and surveillance were in issue, more particularly, in reference to Sections 47 and

50 of Delhi Police Act, 1978. In the said case, the petitioner had contended that on account of possibility of abuse of power conferred on the Police, the said power be declared as violative of Articles 14, 19 and 21 of the Constitution. After deliberations and making certain observations, the Apex Court decided to leave the question of vires open for final investigation, if necessary, in other cases pending before the Court, meaning thereby, on account of some litigation, the Apex Court did not decide on the point of vires assailed in reference to the power exercised.

**88** In view of the discussion made and the reasons aforesaid, the present petitions are required to be partly allowed and accordingly are partly allowed. Impugned order under challenge in the present petitions is hereby quashed and set aside with a direction to the respondent GERC that it shall now make deliberations on both the petitions, i.e. one under which impugned order has been passed and the second petition which is filed by the State Transmission Utility as ordered by the GERC, simultaneously and conjointly as if they are one petition. The GERC shall afford an opportunity to the petitioners to assail the legality, validity, propriety and justifiability including entitlement to pray for fixation and levy of such grid support charge de novo. The GERC shall do this exercise without being influenced by the earlier findings recorded by it. The GERC shall also decide the matter without being influenced by the observations made by this Court in the present judgment independently.

**89** It is clarified and ordered that this Court, has not recorded any finding either positive or negative qua sustainability of assailed Regulation-62 of 2005 and it will be open to the petitioners to assail the vires of the said Regulation if need be. The GERC, while dealing with the case between the parties shall exclude existence of Regulation-62 treating the said Regulation as inoperative qua the present dispute to avoid prejudice and likelihood of other further legal complications. The GERC shall hear and decide the matters as expeditiously as possible.

**90** It is hereby ordered that the petitioners shall continue to pay charges @ 7.5% that are being paid as per the Commercial Circular No. 687 dated 21st December, 1998, but such payment that may be made by the petitioners shall be treated as payment made without prejudice to the rights and contentions of the petitioners that they have raised before this Court.

**91** Before parting with the order, the Court is tempted to observe that in the ultimate interest and development of the State and growing industrial zones, scope of installations of other CPPs being need of time, some mediation or conciliation proceedings, if possible, can be initiated by GERC if it thinks fit and try to resolve the issue amicably, keeping the battle of the Court under suspension, because, State Transmission Utilities and private generating activity, both need substantive development.

**92** As the substantive petitions are partly allowed, no formal orders are required to be passed on both the Civil Applications seeking stay of the impugned order passed by the GERC. Rule is made absolute accordingly in each of the petitions. Registry is directed to keep copy of this judgment in each of the petitions.

