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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA
Case No. 39 of 2017

In Re:

HPCL-Mittal Pipelines Limited ('HMPL')

Informant

And

Gujarat Energy Transmission Corporation Limited

Opposite Party No. 1

State Load Dispatch Centre, GETCO, Gujarat

Opposite Party No. 2

Paschim Gujarat Vij Company Limited ('PGVCL')

Opposite Party No. 3

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S.L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Appearance:

For Informant:

Shri Ramji Srinivasan, Sr. Advocate
Shri Kartik Nayar, Advocate
Ms. Kanika Chaudhary Nayar, Advocate
Shri Rishab Kumar, Advocate
Shri Sarthak Malhotra, Advocate
Shri Rudresh Pratap Singh, Advocate
Ms. Modhulika Bose, Advocate



Shri Tushar Bhardwaj, Advocate
Shri Rajiv Khanna, AGM Legal, HMPL
Shri Ramesh Kumar Rojasara, Manager
(Tech), HMPL

For OP-1

Ms. Ranjitha Ramachandran, Advocate

For OP-2

Ms. Ranjitha Ramachandran, Advocate
Shri N.N. Sheikh, Executive Engineer,
SLDC

For OP-3

Ms. Swapna Seshadri, Advocate

Order under Section 26(1) of the Competition Act, 2002

1. HPCL-Mittal Pipelines Limited ('HMPL') (hereinafter, the '**Informant**'/'**IP**') filed the present information, under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against Gujarat Energy Transmission Corporation Limited (hereinafter, the '**GETCO**'/ '**OP-1**'), State Load Dispatch Centre, GETCO Gujarat (hereinafter, the '**GETCO-SLDC**'/ '**OP-2**'), and Paschim Gujarat Vij Company Limited (hereinafter, the '**PGVCL**' / '**OP-3**') alleging, *inter alia*, contravention of the provisions of Section 4 of the Act.
2. The Informant is stated to be a wholly owned subsidiary of Hindustan Mittal Energy Limited (hereinafter as '**HMEL**'). HMEL is a joint venture between Hindustan Petroleum Corporation Limited (HPCL) and Mittal Energy Limited. HMPL operates the business related to crude oil receipt, its storage and cross-country transportation and is primarily responsible for the Mundra Bathinda Pipeline that transports crude oil from Mundra, Gujarat to HMEL's Guru Gobind Singh Refinery at Bathinda, Punjab. It is submitted that HMPL is an industrial consumer of electricity with a contract demand of 6.7 MW and is currently being supplied with the same by OP-3, *i.e.* PGVCL.



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3. OP-1 is an electrical power transmission company in the State of Gujarat, India, setup in May, 1999 and incorporated under the Companies Act, 1956. As per the Gujarat Electricity Grid Code, 2013, OP-1 is recognized as the State Transmission Utility (STU). OP-2, GETCO-SLDC, a wholly owned subsidiary of OP-1, is a statutory body constituted under Section 31(1) read with Section 31(2) of Electricity Act, 2003 and is involved in generation scheduling, monitoring real-time power system network, managing line and unit outages and assets of OP-1.
4. OP-3, incorporated on 15.09.2003, is one of the 4 electricity 'Distribution Licensees' as defined under Section 2(17), Electricity Act, 2003 in the State of Gujarat, which came into existence subsequent to the unbundling of electricity segment into three segments, viz. generation, transmission and distribution, which were earlier performed by the erstwhile Gujarat Electricity Board ('GEB'). OP-3 is involved in electricity distribution and retail supply in the western part of the State of Gujarat.
5. The Informant states that electricity is a subject that falls under the Concurrent List of the Indian Constitution, which enables the Central as well as the State Government to enjoy co-extensive regulatory domain over it. The Informant has highlighted various historic developments in the electricity sector, including the provisions of the Electricity Act, 2003 (hereinafter 'EA03') to contend that EA03 was designed to infuse competition in the sector. Various attempts have been made in the past at the central as well as the state level to bring competition in various segments of the electricity value chain—comprising of Generation, Transmission, Distribution and Retail Supply.
6. Under the new electricity regime of EA03, the sub-segments of electricity value chain were unbundled. Thermal power generation was kept license free to promote competition and private sector participation. Power trading was introduced as a licensed activity leading to the creation of power bourses



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namely Indian Energy Exchange (IEX) and Power Exchange India Limited (PXIL). Further, open access was introduced in the transmission and distribution segment with the aim of creating an environment in which generators could sell the power generated to the highest bidder and consumers could buy power from the most economical source. The STUs were obliged to consider the open access requests of such generators and consumers to allow this framework to evolve.

7. The Informant has relied upon Section 2(47) of EA03, which defines Open Access as '*non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission*', to contend that the consumers should be able to choose among a large number of competing power companies (Generator/Distributor) instead of being forced to buy electricity from their existing distribution licensee. In particular, large consumers such as industrial units, who can avail regular supply should be given an option of choosing their electricity supplier at competitive rates. Thus, open access was designed to operationalise in phases in consideration that the distribution licensee in a particular area also needed assurance of adequate consumer demand. As per EA03, large users of power having connected demand load of 1 megawatt (MW) and above are eligible to apply for open access so that they are able to purchase cheaper power from a source other than the distribution licensee licensed to supply power to a particular geographic region, *i.e.* from the open market. The EA03 also empowers the CERC and State Electricity Regulatory Commissions to formulate their own open access regulations to regulate inter-state and intra-state open access, respectively. The Informant has cited Section 39(2) and Section 40 of the EA03, namely, to emphasize that the EA03 specifically identifies provisioning of open access as one of the functions as well as duty of the STU/transmission licensee.



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8. It is submitted that in case of sourcing electricity through open access route, in addition to power purchase cost which is to be paid to the generator/ supplying entity, there are several other charges to be paid by open access consumers which include connectivity charges, Point of Connection (PoC) charges, Transmission Charges, Transmission Losses, Wheeling Charges and Losses, Cross Subsidy Surcharge, SLDC Charges, RLDC Charges *etc.* In case, the open access is sought by a large consumer from a source located within a particular state (intra-state), it is only possible after obtaining a permission/approval from the SLDC or an STU. In the State of Gujarat, intra-state open access is governed by the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-state Open Access) Regulations, 2011 (hereinafter, '**GERC Regulations**'), under which the open access is categorised in the following three categories:
- a. Short Term Open Access ('**STOA**')- Open Access for a period upto one month at a time, but not exceeding a period of six months in a calendar year
 - b. Medium Term Open Access ('**MTOA**')- Open Access allowed for a period of 3 months to 3 years
 - c. Long Term Open Access ('**LTOA**')- Open Access allowed for a period of 12 years to 25 years.
9. Para 4 sub-para (1) of the GERC Regulations states that only consumers with a load demand of 4 MW and above may apply for open access. The Informant is an industrial consumer of electricity with a contract demand of 6.7 MW, and thus an eligible open access consumer, which is currently supplied by OP-3, the distribution licensee in the area where the Informant is located. The Informant, being desirous of taking electricity through an alternative supplier (open access), sought permission of OP-2, on 12 different occasions between September, 2014 to September, 2016, but the same was incessantly denied the



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same on the ground of 'upstream network/system constraint' on 10 occasions and for 'non-submission of undertaking' on 2 occasions.

10. The Informant has highlighted all the applications made to OP-2 and the response received from OP-2 on each occasion, which have been annexed with the information. Prior to applying for the open access permission, the Informant also sought approval for installation of necessary equipment for facilitating the same from OP-1, *vide* letter dated 26.03.2014, since the scheme of EA03 is such that the sub-station and route through which open access is to be allowed is identified by the STU. Thereafter, the decision to supply the power requirement as per HMPL's open access application through 220 KV Nanikhakar sub-station was taken by OP-1. In response to the Informant's request for installing necessary equipment at 220kv Nanikhakar sub-station, OP-1, *vide* letter dated 29.05.2014, conveyed that the Informant's request will not amount to seeking permission for open access, and for availing the same separate application would have to be made. Accordingly, the Informant submitted a fresh application (dated 17.06.2014) accompanied with requisite documents seeking NOC for availing open access (STOA). *Vide* letter dated 23.06.2014, OP-2 informed the Informant of the technical requirements and documentary formalities for establishing Radio link between Informant's plant premises and OP-1's nearest Remote Terminal Unit (RTU). This, as per the Informant was completed and OP-2 was informed of the same *vide* letter dated 03.07.2014. The Informant claims to have spent Rs. 11,76,152.40 in fulfilling the technical requirements. However, despite repeated applications for availing open access (STOA), the Informant had not received a favourable response.
11. It is submitted that since the initial application of the Informant seeking open access, OP-1 has been citing 'upstream network constraints' in the transmission line routed through the 220 KV Nanikhakar sub-station. It has been stated that similar denials for open access were also allegedly faced by



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other industrial consumers, namely Adani Wilmar and HPCL. The Informant has alleged that the rejection of application on the ground of 'upstream network constraints' is misplaced when the Informant is currently using the same transmission lines to procure the contractually committed demand of 6.03 MW of power that has been approved from OP-3. That the application for NOC for STOA is being made for only 5 MW in the recent months which is lower than approved contractual demand of 6.7 MW with OP-3. The Informant submits that grant of STOA shall not in any manner put any pressure/ constraint on the said lines as the present accounted demand for the Informant is 6.7 MW. Thus, routing the same through open access will only change the source of power from OP-3 to IEX while the same transmission lines/ network would be used for distribution of power. The Informant further submits that in case of open access power there would not be any change in loading of lines since the power supplied by OP-3 flows through the same transmission lines. Thus, such summary rejections by OP-2 could only be termed as unfair and suggest non-application of mind. It is further submitted that the said discrimination by OP-2 between regular power being procured from OP-3 and power that is sought to be availed through STOA, is contrary to the concept of open access introduced for promotion and maintenance of healthy competition in the market.

12. Further, the Informant claims that because of the anti-competitive conduct of the OPs, it has suffered a loss of INR 31.91 crore (for 101350.92 MW of electricity consumed during the reference period) incurred towards purchasing of expensive power from OP-3 at an average cost of INR 8427.63/MW as opposed to the cost of purchasing open access electricity in Gujarat at INR 5278.77/MW; apart from incurring installation cost for facilitating open access.



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13. In the light of the aforesaid facts, the Informant has alleged contravention of the various provisions of Section 4 of the Act. It is alleged that arbitrary and consistent denial of open access by OP-2 has led to the contravention of Section 4(2)(a)(i) as the same amounts to imposition of unfair/arbitrary condition in the provision of services. It is further alleged that by denying open access permission to Informant and other similarly placed consumers/power generators, OP-2 (also OP-1) has limited and restricted production of electricity and the provision of supply of Open Access Electricity, in contravention of Section 4(2)(b)(i). The Informant has also alleged contravention of Section 4(2)(c) stating that consistent denials by OP-2 has led to denial of market access to the Informant as well as other power generators who can supply to the Informant through open access. Lastly, it has been alleged that OP-1 has manipulated the downstream distribution market in favor of its sister-concern distribution facility (*i.e.* OP-3) by virtue of being a parent entity for OP-2 and thereby contravened the provisions of Section 4(2)(e) of the Act.
14. Based on these facts and allegations, the Informant has, *inter alia*, prayed for initiation of an investigation against the OPs under Section 26 (1) of the Act, appropriate directions such that STOA applications filed by the Informant are not rejected arbitrarily by OP-1 and OP-2 and imposition of penalty under the provisions of the Act.
15. The Commission considered the information in its ordinary meeting held on 14.09.2017 and decided to call the parties for a preliminary conference on 07.11.2017. On 31.10.2017, OP-2 filed its response to the information filed by the Informant. On 06.11.2017, the Informant filed an application seeking a short adjournment of the preliminary conference scheduled on 07.11.2017, which was allowed by the Commission and the preliminary conference was accordingly postponed to 22.11.2017. On the said date, the Informant as well



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as the Opposite Parties presented their oral submissions before the Commission, through their respective learned counsel.

16. During the preliminary conference, the learned senior counsel representing the Informant, Shri Ramji Srinivasan, reiterated the facts and allegations elucidated in the information. After providing the brief background facts of the case, Shri Srinivasan highlighted the conduct of the OPs that has led to anti-competitive effects in the market. It was stated that open access is an economic activity which allows competition to prosper in the electricity markets. As a consumer of electricity, eligible to apply for open access as per the law and regulations, the Informant should not be deprived of procuring electricity from an available cheaper source. However, the procedural roadblocks created by OP-2 has led to denial of open access. Responding to the claim made by OP-2, that open access has been allowed to many consumers, Shri Srinivasan contended that in such a case the investigation is even more required to ensure that the Informant has not been discriminated against others when its open access applications were denied by OP-2. Shri Srinivasan also argued that the open access requests of the Informant have been incessantly denied, despite there being available capacity during certain period e.g. February 2015, as per the submissions made by OP-2.
17. Further, it was submitted that OP-3 has already taken an undertaking from the Informant that if open access source does not work out during the period for which open access has been allowed, the Informant cannot approach OP-3 for electricity. Thus, the claims regarding universal obligation are without any basis. With regard to jurisdiction, it was submitted that the Commission has jurisdiction over all such matters/issues which have competition issues involved. It was argued that OP-2 has admitted, in its submissions, that it is a monopoly. Thus, considering the conflicting commercial interest and commonality of interest within OP-1, OP-2 and OP-3, the jurisdiction of the Commission is triggered. Shri Srinivasan also argued that the Informant does



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not have a remedy under the EA03 as Section 60 of the same is limited to issuance of directions by the Appropriate Commission to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry. Since OP-2 is neither a licensee nor a generating company, Section 60 will not be applicable. Shri Srinivasan also relied upon Commission's previous orders in the electricity sector to reiterate Commission's jurisdiction in the matter.

Reply/ Objections filed by OP-1 and OP-2

18. The learned counsel appearing for OP-1 and OP-2, Ms. Ranjitha Ramachandran, on the other hand, denied the allegations regarding anti-competitive conduct against OP-1 and OP-2. At the outset, it was submitted that OP-1 was notified as an STU *vide* notification dated 29.05.2004 and accordingly entrusted with the functions of an SLDC. Such exercise of functions by Government companies is consistent with the EA03 and there is no *per se* conflict in the discharge of functions of STU and SLDC by the same entity. The mere fact that OP-2 is a Government Company and can be called as a group company of OP-3, does not mean that OP-2 has acted in the commercial interests of OP-3, *i.e.* contrary to its statutory functions. OP-2 submits that the STOA application is processed by OP-2 and the role of OP-1 and OP-3 is limited in such process. The alleged monopoly by OP-1 in the transmission business of electricity in the State of Gujarat does not affect the decision on the grant of open access.
19. It was stated that the grant of open access is dependent upon the available transmission capacity which is determined in accordance with the GERC Regulations. Further, OP-1 has a virtual monopoly in the discharge of SLDC functions due to the scheme of EA03, but such dominant position of OP-1 in



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the transmission business cannot *ipso facto* be treated as an abuse of such position as the transmission charges and transmission losses are determined by the State Regulatory Commission.

20. Ms. Ramachandran raised a preliminary objection with respect to the jurisdiction of the Commission citing various provisions of the EA03. It was submitted that Section 33(5) of EA03 provides that any issue with regard to the grant and denial of open access, particularly with regard to constraints in the transmission system lays within the domain of the sector regulator, namely, the Gujarat Electricity Regulatory Commission (GERC) in the present case. In this regard, reliance was also placed upon the Judgment dated 16.02.2017 passed by the Hon'ble Competition Appellate Tribunal in Appeal No. 33 of 2016 of *Anand Prakash Agarwal v. Dakshin Haryana Bijli Vitran Nigam Limited*, wherein it was held that the Commission does not have jurisdiction on the matters pertaining to electricity tariff. It was further argued that although the said case pertained to electricity tariff, the issue of open access also falls within the jurisdiction of the Appropriate Commission, as stated under Section 60 of the EA03.
21. With regard to the allegation pertaining to denial of open access, it was submitted that open access is granted or denied on the basis of available transmission capacity which is calculated in terms of the GERC Regulations framed by the State Regulator. Regulation 43(1) of the said Regulations requires the STU to make the calculations with respect to the available transmission capacity on a quarterly basis and publish it on their website. OP-1, in its role as an STU, has been regularly and consistently calculating the available capacity and publishing the same on its website. Further, OP-2 has been determining the load flow on the system based on system study as per the Orders of the Gujarat Electricity Regulatory Commission (GERC) and the report is being uploaded on the website of OP-2 from March 2015 onwards.



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22. Attention of the Commission was drawn to the table provided in the written submissions filed by OP-2 containing month-wise details of STOA granted to various consumers for the period September, 2014 to September, 2017. Relying on the said table, it was argued that OP-2 has been allowing open access applications in a non-discriminatory manner in all cases where the conditions/requirements under the GERC Regulations allow for the same. It was submitted that rejection of Informant's open access application by OP-2 was based on transmission constraints in the upstream network. It was contended that the Informant's challenge to the said rejection is based only on the principle that there cannot be any transmission constraint since Informant is seeking to substitute consumption of power from the distribution licensee, *i.e.* OP-3, with the open access source. Countering the said contention, OP-2 submitted that substitution of contract demand with STOA, as claimed by Informant, is not possible as the two possess distinct and separate characteristics and implications.
23. The supply by the distribution licensee under a contract demand is under the universal supply obligation and duty casted under Section 42 and 43 of the EA03. The distribution licensee has a 'priority status' over the power system, including transmission/distribution lines, to discharge such obligations and is placed at the highest pedestal by the State Commission as per the Statutory Regulations detailed therein. The distribution licensee contributes to the cost of establishment, upgradation *etc.* of the transmission and distribution system as against the short term or medium term open access customers who do not contribute to the capital cost of the transmission and distribution system. The distribution licensee has the facility to meet the contract demand of a consumer from any source and through any line, whereas the conveyance of the open access power is through a contract/designated path for which the access is granted. Moreover, OP-2 is bound by the GERC Regulations to compute availability of transmission capacity for allowing/disallowing open



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access applications and as such, the said Regulations do not permit for substitution or non-consideration of Contract Demand in the formula.

24. It was submitted that there is no reason to deny STOA to applicants if there is available capacity. At the same time, when there is a transmission constraint, OP-1 and OP-2 are not obligated to allow STOA. It is always open to the consumers to apply for LTOA and require OP-1 to upgrade the system as per the provision of Regulation 10 of the GERC Regulations. However, as the Informant has chosen not to apply for LTOA and, therefore, its request for open access is to be considered as per the existing capacity. While the distribution licensee and LTOA users contribute to the capital cost of the transmission line as well as for its upgradation, the short term open access users do not contribute towards its capital cost. Thus, owing to these peculiarities, the short term users will be given open access only for the margin available after meeting the requirements of distribution licensee and thereafter the long term users and subject to the priority of even the medium term users.
25. Out of the various rejections referred to by the Informant, some applications were rejected due to absence of consent from OP-3. Regulation 16 of the GERC Regulations clearly provides that if an applicant seeking open access is connected with a distribution licensee, then the consent of that Distribution Licensee is required. As the Informant is connected to OP-3, the consent from OP-3 is required. The Informant has not challenged the non-grant of consent in those cases. The open access applications of Informant were rejected due to the transmission constraints and not due to any collusion with distribution companies such as OP-3 or any other entity.
26. The decision of OP-2 is taken in accordance with Regulation 43 dealing with the computation of capacity availability for open access. The constraints in the line are notified on website of OP-1. Further, the data pertaining to maximum



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loading for the previous month, the month for which NOC was applied for has been furnished by OP-2 in its response.

27. It was highlighted that as per the allotment of priority under Regulation 19 of the GERC Regulations, in case a person surrenders the contract demand or reduces the quantum of contract demand, the capacity so surrendered or reduced becomes surplus and is used for the requirements of other consumers of the Distribution Licensee. Under the GERC Regulations, the distribution licensee for retail supply of power has the highest priority. Even if it is assumed that there are no other consumers of the distribution licensee, the priority over the transmission capacity would be given to the LTOA first, then to MTOA consumers and lastly to STOA applicants.
28. Relying on these submissions, it was submitted that there has been no abuse of dominant position by OP-2 in denying the open access applications of the Informant, as the denial was purely based on transmission constraint. It was further submitted that even if the Commission reaches a conclusion that the transmission constraint cited by OP-2, while denying open access to the Informant, is found to be incorrect, the same cannot be held as abuse of dominant position but only an erroneous interpretation by it with regard to the available capacity.
29. Lastly, it was argued that the alleged harm claimed by the Informant is incorrect, as OP-2 had specifically informed the Informant that application seeking permission for installation of relevant equipment does not amount to seeking permission for open access. The Informant chose to install the necessary equipment before grant of open access. Further, the claim of average cost of electricity made by the Informant is also incorrect.



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Reply/ Objections filed by OP-3

30. The learned counsel appearing for OP-3, Ms. Swapna Seshadri, refuted all the allegations against OP-3 and vehemently argued that any electricity consumer on its network can opt for open access if the said consumer is eligible for open access as per the GERC Regulations. It was clarified that there is no system constraint in the distribution lines and OP-3 has never blocked/refused open-access to any applicant. The constraint, cited by OP-2, is with regard to the upstream network which is not within the realm or control of OP-3.
31. The Commission has examined the information available on record, including the submissions filed by the parties, and heard the oral submissions made by their respective learned counsels on 22.11.2017. The Informant is primarily aggrieved with the denial of open access and, consequently, the right to choose its electricity supplier which, according to the Informant, is guaranteed under EA03. This denial has been alleged to be an abusive exercise of the dominant position held by OP-2 in the relevant market, wherein open access applications made by the Informant have been persistently denied by OP-2. Contravention of various provisions of Section 4(2) of the Act have been cited by the Informant which will be dealt with in the ensuing paragraphs.
32. Before analysing the said allegations within the realm of the Act, it is pertinent to deal with the preliminary objection raised by OP-1 regarding maintainability of the present case on account of lack of Commission's jurisdiction to entertain the present matter, which, as per OP-1/OP-2, falls under the sole domain of the electricity regulator.
33. OP-2 has relied upon the judgment dated 16.02.2017 passed by the hon'ble erstwhile COMPAT in Appeal No. 33 of 2016 (*Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran Nigam Limited*) to argue that the EA03 has its own system of addressing the issues of abuse of dominance and other



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consumer grievances. It is submitted that Section 60 of EA03 authorises the Appropriate Commission to issue such directions as it considers appropriate to a licensee or a generating company, if it abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry. Further, *vide* the same order, the erstwhile COMPAT held that Sections 173 and 174 of EA03 provide that the provisions of the EA03 *'have an overriding effect except that such provisions or any rule or regulation made thereunder shall not have any effect insofar as these are inconsistent with the provisions of the Consumer Protection Act, 1986 or Atomic Energy Act, 1962 or the Railways Act, 1989. The legislature has not put the Competition Act amongst the Acts whose provisions were to prevail over the provision of the Electricity Act. Thus, in the case of a conflict between the provisions of the Electricity Act and the Competition Act, the former will override because Section 174 of the Electricity Act would get attracted and Section 175 of the Electricity Act will have to yield'*. It is further argued that based on these observations the erstwhile COMPAT has concluded that *there is an implied immunity from the Competition law in matters of electricity tariff approved by the Appropriate Commission in terms of EA03.*

34. Relying on this judgment of the Hon'ble erstwhile COMPAT, OP-1/OP-2 has claimed that the Commission does not have jurisdiction to deal with the present matter and though the above decision was related to electricity tariff, the issue of open access also falls within the purview of the Appropriate Commission.
35. The Commission has perused the decision of the Hon'ble erstwhile COMPAT and heard the arguments advanced by the learned counsel for OP-1 and OP-2. To appreciate the objection raised by OP-1/OP-2, it is necessary to understand the background facts that led to the Hon'ble COMPAT's order in *Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran Nigam Limited* case. Shri



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Anand Prakash Agarwal, the Informant in the said case, a consumer of electricity was taking electricity from Dakshin Haryana Bijli Vitran Nigam (DHBVN), who was one of the licensed supplier of electricity in the State of Haryana supplying power to the area in which Anand Prakash Agarwal was residing. It was alleged that DHBVN, being the sole supplier of electricity to the area where his residence was located, it was imposing unfair and discriminatory price upon consumers by charging Fuel and Power Purchase Cost Surcharge Adjustment (“FSA”), which was in the nature of uncontrollable cost incurred in the supply chain on account of variations in the input cost prices of fuel, as one of the components added to the price of electricity supplied. Further, it was alleged that DHBVN was charging higher FSA from the consumers whose consumption of electricity was higher and thereby allegedly directly imposing an unfair and discriminatory price upon consumers and cross subsidizing the FSA cost. Though the Commission agreed with the Informant with regard to the dominance of DHBVN in the relevant market, the Commission did not agree that differential pricing in that case constituted abuse of dominance in terms of Section 4 of the Act. The Commission *prima facie* found the classification to have economic justification based on market segmentation and the same was not held to be discriminatory. Further, the Commission categorically stated that the said case was one related to the functions discharged by the Electricity Distribution Company and the State Electricity Regulatory Commission (HERC) in respect of fixation of FSA and no competition issue was discernible from the facts presented. The relevant excerpts of the Commission’s order in this regard are reproduced below:

“15. *The issue highlighted by the Informant in the present case essentially relates to the functions discharged by the Electricity Distribution Company and the State Electricity Regulatory Commission in respect of fixation of FSA; and no competition issue is discernible from the facts presented in the information.[.....].”*



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36. Thus, *vide* order dated 10.02.2016, the Commission closed the case under Section 26(2) of the Act. Shri Anand Prakash Agarwal, the Informant, preferred an appeal to the hon'ble erstwhile COMPAT against the order of the Commission. One of the issue framed by the erstwhile COMPAT for consideration was whether the Commission had the jurisdiction in the matter of alleged abuse of dominance arising from computation and levy of FSA which was approved by the HERC. While dealing with the said issue, the COMPAT held that the Commission did not have jurisdiction in the matter of alleged abuse of dominance arising from computation and levy of FSA which was approved by the HERC.
37. This has been relied upon by OP-1 and OP-2 in the present case to argue that the Commission does not have jurisdiction in the matter concerning electricity sector. The Commission is of the view that the interpretation suggested by the learned counsel of OP-1/OP-2 is not only flawed but also opposed to the basic tenets of statutory interpretation.
38. By relying on the non-obstante provisions in Section 174 and 175 of the EA03, the OPs have suggested that the operation of competition law is overridden by the said provisions.
39. At the outset, the Commission notes that the ruling of COMPAT, which has been relied upon by OP-1/OP-2, is not inconsistent with what was held by the Commission in its order dated 10.02.2016. The Commission did not assume its jurisdiction to decide the case pertaining to 'determination of tariffs' and 'other essential functions discharged by the State Electricity Regulatory Commission' in respect of fixation of FSA. Rather, the Commission categorically acknowledged the domain of State Electricity Regulatory Commission to deal with such technical matters. The relevant excerpt reproduced below is relevant in this respect:



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“15. [.....] Further, as noted earlier, OP-1 computes and levies FSA as per the Regulations framed by OP-2. Any issue regarding non-compliance of the Regulations would be thus, dealt with by OP-2. Any person aggrieved by the decision of a State Electricity Regulatory Commission could also appeal such decision before the Appellate Authority under the Electricity Act, 2003.”

40. Thus, there does not seem to be real or ostensible discrepancy in the view taken by the Commission and opinion expressed by the hon’ble erstwhile COMPAT in *Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran Nigam Limited* case. Rather, the Commission unequivocally expressed its hesitation, in the said order dated 10.02.2016, in adjudicating on an issue that falls within the sole domain of the electricity regulator. The hon’ble erstwhile COMPAT reiterated the stand taken by the Commission while giving its conclusion on the issue of jurisdiction as is clear from the ratio of the said order, reproduced below:

18.11 We are of the view that, there is an implied immunity from the Competition law in matters of electricity tariff approved by the Appropriate Commission in terms of the Electricity Act, 2003 and therefore, the Appellant cannot seek any relief under the Competition Act.

41. The aforesaid ratio of the hon’ble erstwhile COMPAT clearly indicates that the said judgment was only with respect to matters pertaining to electricity tariff approved by the Appropriate Commission under the EA03.

42. Certainly, EA03 is a special legislation governing, *inter-alia*, matters pertaining to generation, transmission and supply of electricity. However, to argue that in all matters in the electricity industry EA03 would prevail over the provisions of the Act, because of the presence of a sectoral regulator, would go against the spirit of the said statute as well as against the purpose for which the Act was enforced. The Commission notes that various provisions of



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EA03 and the policies made thereunder unequivocally expresses the intention of the legislature to promote competition. It is unconceivable that by inserting Section 174 and 175, the legislature had intended to oust the jurisdiction of the Commission. The OPs have specifically highlighted the provisions of Section 173 of EA03 which states that '*[n]othing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989*'. It has been argued that the fact that the legislature has not included the Act, *i.e.* Competition Act, 2002, along with Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989, shows that the intention was to give supremacy to EA03 over the provisions of the Act. To further substantiate this argument, OP-1/OP-2 has argued that both EA03 and Competition Act, 2002 are special statutes and since EA03 was enforced on a later date, it will have an overriding effect.

43. The Commission finds these arguments opposed to the basic rules of statutory interpretation. The latin maxim of *generalia specialibus non derogant* suggests that where a general statute and a special statute relating to the same subject matter cannot be reconciled, the special statute ordinarily will prevail. And in case where a subject matter is covered by two statutes, both of which are special, the one enforced on a later date ordinarily prevails. However, these rules of statutory construction are not absolute in nature but merely indicate the statutory meaning that can be overcome by textual indications that point in the other direction. The first attempt, while resolving such conflicting provisions, should be aimed at giving effect to both the provisions so as to not render any of those redundant. This position has been reiterated by the Hon'ble Supreme Court in plethora of cases.



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44. Where there is a conflict between any two special statutes, the constitutional bench of Hon'ble Supreme Court *vide* its judgment in *Ashoka Marketing Limited v. Punjab National Bank [(1990) 4 SCC 406]* has provided guidance. Relevant portions are extracted here:

“In other words, both the enactments, namely, the Rent Control Act and the Public Premises Act, are special statutes in relation to the matters dealt with therein. Since, the Public premises Act is a special statute and not a general enactment the exception contained in the principle that a subsequent general law cannot derogate from an earlier special law cannot be invoked and in accordance with the principle that the later laws abrogate earlier contrary laws, the Public Premises Act must prevail over the Rent Control Act. We arrive at the same conclusion by applying the principle which is followed for resolving a conflict between the provisions of two special enactments made by the same legislature. We may in this context refer to some of the cases which have come before this Court where the provisions of two enactments made by the same legislature were found to be inconsistent and each enactment was claimed to be a special enactment and had a non obstante clause giving overriding effect to its provisions.”

45. Relying on various other judgements, the Hon'ble Supreme Court held as under:

“The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as Special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. We propose to consider this matter in the light of this principle.”

46. Both, the EA03 and the Act, are special statutes. However, both have their designated spheres of operation. The former aims at regulating activities in the electricity industry and the latter aims at promoting competition in every sphere and sector of the economy. The jurisdiction of the Act extends to all



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sectors of the economy and sectors regulated by sector specific laws such as telecommunication, electricity, petroleum, insurance *etc.* are also included within the ambit of the Act for the competition related matters/issues. To this extent there is no conflict as both these statutes have their respective and mutually exclusive regulatory regimes. This observation is in sync with the Commission's holding in many previous cases in the electricity sector and other regulated sectors. As observed by the Commission in *Case No. 91 of 2014 (Open Access Users Association vs. Tata Power Delhi Distribution Limited & Ors.)*, the mandate of the Commission is to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Sectoral regulators have necessary technical expertise to determine access, maintain standard, ensure safety and determine tariff. The issues relating to entry conditions, technical details, tariff, safety standards have direct control on prices, quantity and quality primarily seems to be within the exclusive ambit of sectoral regulators. Thus, sectoral regulators focus on the dynamics of specific sectors, whereas the Commission focuses on functioning of the markets by way of increasing efficiency through competition. In fact, the role played by the Commission and the sectoral regulators are complementary and supplementary to each other as they share the common objective of obtaining maximum benefit for the consumers.

47. Thus, the Commission is of the view that there is no issue of conflict in the present case between the provisions of EA03 and the provisions of the Act which cannot be reconciled adopting the harmonious construction. Though EA03 is a special statute for the purposes of dealing with electricity matters, the Competition Act, 2002 is a special statute for regulating competition in the market. Just because there is a provision in EA03 suggesting that the Appropriate Commission may issue directions to a licensee or a generating company if such licensee or generating company enters into any agreement or



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abuses its dominant position, does not mean that this provision in EA03 is a special provision. For any competition related matter, the Act is a special statute, being the market regulator mandated to promote and regulate competition in the market.

48. Further, it will not be out of context to highlight a recent case where the issue of jurisdiction of Competition Act vis-à-vis a sectoral regulator has recently been dealt with. In the matter of *Telefonaktiebolaget LM Ericsson (Publ) vs. CCI [WP (C) NO. 464/ 2014 AND WP (C) NO. 1006/2014]*, the question of jurisdiction of CCI in matter related to abuse by an IPR holder was considered. The hon'ble Delhi High Court held that there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. In the absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted.
49. Based on the aforesaid discussion, the Commission is of the considered view that, keeping in view the object and purpose underlying both the enactments viz., the EA03 and the Act (*i.e.* Competition Act, 2002), it does not appear that the provisions of the Act are in any way superseded by the EA03, in the context of the facts and allegations under consideration. The mandate of the Act is vast and its jurisdiction cannot be perceived to be ousted by EA03. The COMPAT's judgment relied upon by OP-1/OP-2 is only with respect to electricity tariff, which the Commission had also held that issues pertaining to electricity tariff fall within the ambit of the State Electricity Regulatory Commissions. Thus, the Commission holds that it has jurisdiction to proceed with the present matter.
50. Moving further with the main issues, the Commission observes that the assessment of Informant's allegations requires determination of the following:



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Issue 1: Whether OP-1/OP-2 hold a dominant position in the relevant market?

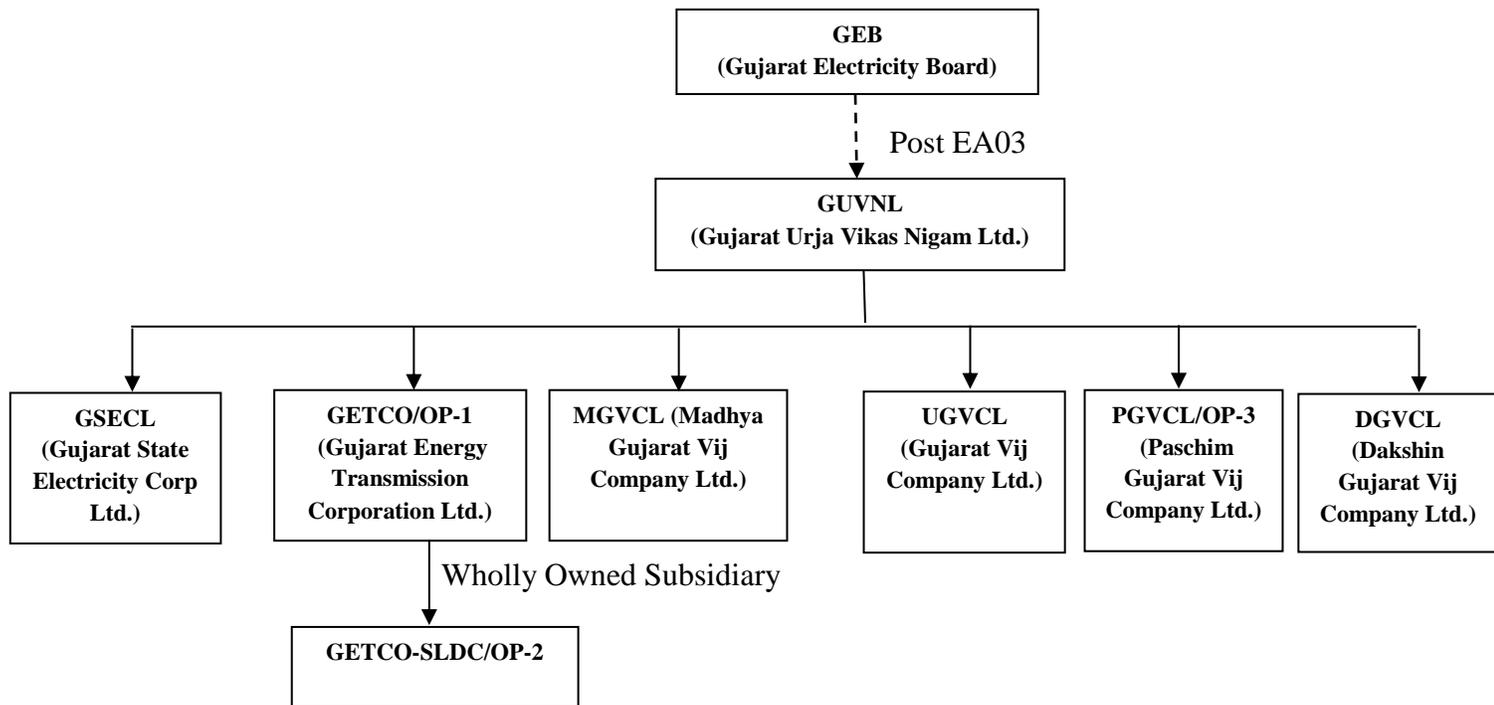
Issue 2: Whether the Informant has been denied Open Access and whether such denial amounts to a contravention of the provisions of Section 4 of the Act?

51. For holistic determination of the aforementioned issues, the Commission finds that it is imperative to understand the background and context which led to the enforcement of EA03. Historically, the electricity sector in India featured vertically integrated monopolies that was operated and managed by State Electricity Boards (“SEBs”), which were subject to strict regulation. The SEBs were autonomous bodies responsible for the development and operation of generation, transmission and distribution of electricity within each State. The performance of such SEBs, however, was plagued with various issues that led to inefficiencies and low productivity. The EA03 was envisaged to bring structural changes in the electricity regulatory regime by unbundling the functions performed by SEBs into three so as to induce competition in every sub-segment. License-free generation, non-discriminatory open access in the transmission system and gradual implementation of open access in the distribution system were some of the salient features which were designed to pave way for creation of power market in India. Competition in distribution was mainly envisaged by ensuring non-discriminatory open-access in transmission and distribution so as to allow an efficient match-making between the consumers and alternative source of power suppliers. Further, competition in retail supply was envisaged through electricity exchanges where power generators and consumers could interact to sell and purchase electricity.
52. However, it has been argued by the Informant that despite express legislative intent, competition in the electricity sector has been compromised by the incumbent state utilities which have ensured that unbundling remains only on



papers. Ownership structure of the different sub-segments in the electricity value chain has been illustrated to argue that mere functional autonomy has been introduced by various State Governments, as opposed to the ownership separation prescribed, while transitioning to EA03 regime.

53. Against the aforesaid backdrop, the Commission has analysed the issues/allegations raised in the information. It is the Informant’s case that dominance as well as anti-competitive intent is attributable to the inter-linkages between OP-1, OP-2 and OP-3. The following figure explains the transition from erstwhile Gujarat Electricity Board into the newly formed entities in the unbundled regime under the Gujarat Electricity Industry Re-organization & Comprehensive Transfer Scheme, 2003:



54. For the purpose of assessing dominance, delineation of relevant market, with reference to the relevant product market as well as relevant geographic market, as per Section 2(r) of the Act is required. The relevant product market



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as defined under Section 2 (t) of the Act means “*a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.*”

55. The determining factor for defining relevant product market is demand side interchangeability/ substitutability of the product, from the point of view of factors such as basic characteristics, intended end-use, price *etc.* In the present case, the Informant is aggrieved by the alleged abusive conduct of OP-2 in disallowing open access permission to it for use of transmission infrastructure of OP-1 for sourcing electricity from a source other than the distribution licensee *i.e.* OP-3. The Informant is, accordingly, a consumer of services relating to usage of transmission services/facilities for availing open access transmission of electricity. Thus, the Commission is of the view that the relevant product market appears to be “*market for services relating to use of transmission facility for availing open access electricity*”.
56. The relevant geographic market as defined under Section 2(s) of the Act means the “*market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.*” As highlighted *supra*, electricity is a subject that falls under the concurrent list of the Indian Constitution. With regard to regulations governing open access framework, the intra-state open access is regulated by each individual state. The instant case pertains to State of Gujarat where the services and infrastructure for drawing open access power is governed by the GERC Regulations. Each State is governed by separate intra-State open access regulations and as the present dispute pertains to intra-State open access in Gujarat, the conditions for open access electricity would be consistent/ homogeneous in the State of Gujarat; and would be distinct from those prevailing in neighbouring States. Considering these



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aspects, the Commission opines that the relevant geographic market would be the state of ‘Gujarat’. On the basis of above, the relevant market would be the *“market for services relating to use of transmission facility for availing open access electricity in the State of Gujarat.”*

57. Having delineated the relevant market, the next issue is to determine whether OP-2 holds a position of dominance, as alleged, in the said relevant market. The Act defines ‘dominant position’ under explanation (a) to Section 4 as, *“a position of strength enjoyed by an enterprise, in the relevant market, in India, which enables it to (a) operate independently of competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favor”*.
58. Besides statutory position held by OP-2, the Informant has also relied upon factors enshrined under Section 19(4) of the Act such as highest market share, comparative size and resources, economic power of OPs being an undertaking of the Government, vertical integration amongst OP-1, OP-2 & OP-3, dependence of consumers on OP-2 to seek open access permission, and OP-1/OP-2 enjoying statutory monopoly position *etc.*
59. The Commission notes that the underlying principle for assessing dominance of an enterprise is linked to the market power enjoyed by the enterprise. An enterprise is regarded as dominant if it enjoys/possesses a position of strength in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.
60. In the present case, the Informant, a subscriber of power from OP-3, has been an applicant of STOA in the state of Gujarat. While inter-state open access is governed by CERC (Open Access in inter-state Transmission) Regulations, 2008 (‘Central Regulations’), the intra-state open access is governed by the State level regulations. In Gujarat, the same is governed by GERC



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Regulations. It is submitted by the Informant that OP-2 is a statutory body constituted under Section 31(1) read with Section 31(2) of EA03, which specifically lays down ‘regulation of transmission facilities to avail open access electricity’ as a primary function of SLDC, *i.e.* OP-2.

61. As per Regulation 8 of the GERC Regulations, the nodal agency for permitting short term open access within the State of Gujarat shall be the SLDC *i.e.* OP-2. Every consumer desirous of availing open access for supply of electricity in Gujarat has to obtain the approval of OP-2, which is the condition precedent. Being the nodal agency, it has the sole prerogative to allow or disallow open access permission, though subject to the GERC Regulations. Thus, considering this statutory compulsion of approaching OP-2 for every open access request, it is apparent that OP-2 holds a dominant position in the relevant market. The other factors *i.e.* OP-2 holding 100% market share, dependence of consumers on OP-2 for availing open access are direct fall-outs of this statutory arrangement. Thus, although the Informant has relied upon the comparative size and resources of OP-1 (since OP-1 is the parent company of OP-2) with similar entities in other States, the same will not have much bearing on the assessment of dominance. Irrespective of the comparative strength held by any of the transmission utility/SLDC, if the statute bestows an entity with the absolute power to decide on the open access applications, the said entity will have a strong position *vis-à-vis* the applicants.
62. For the aforesaid reasons, OP-2 seems to hold a dominant position in the relevant market owing to the statutory provisions and powers accorded to it under the EA03 read with GERC Regulations.
63. The Informant has alleged that though OP-2 ought to decide requests for open access permission with regard to facility owned and operated by OP-1 independently, the inter-linkages between OP-1, OP-2 and OP-3 affects its independence. It has been argued that the anti-competitive intent can be read



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into the denials by OP-2, when read in the light of inter-linkages between OP-1, OP-2 and OP-3, since denial to the Informant would safeguard the contracted demand of electricity for OP-3.

64. The Informant has alleged that by denying open access permission to the Informant, OP-2 has contravened the provisions of Section 4(2)(a)(i) of the Act as there has been an imposition of unfair terms and conditions. The Commission is of the view that contravention of Section 4(2)(a)(i) can be made out only when there is a sale of goods/services and certain terms and/or conditions are imposed which are unfair or discriminatory. Since in the present case the main allegation is that of outright denial of permission, and not of imposition of unfair/discriminatory terms/conditions in the sale of goods or services, *prima facie* a contravention of Section 4(2)(a)(i) of the Act is not established.
65. The Informant has further alleged that denial of open access permission to Informant and other similarly placed consumers/power generators, OP-2 (also OP-1) has limited and restricted production of electricity and the provision of supply of open access electricity. The Commission observes that the provisions of the EA03 are very indicative of the intention of the legislature to facilitate competition and trading of electricity in a smooth and non-discriminatory manner. Open Access is considered as one of the most progressive provision for meeting that objective. The National Electricity Policy, 2005, under Clause 5.3.3, states that '*Open Access in transmission has been introduced to promote competition amongst the generating companies who can now sell to different distribution licensees across the country. This should lead to availability of cheaper power. The Act mandates non-discriminatory open access in transmission from the very beginning. When open access to distribution networks is introduced by the respective State Commissions for enabling bulk consumers to buy directly from competing generators, competition in the market would increase the availability of*



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cheaper and reliable power supply. However, despite such enabling provisions, open access seems to have not been adopted with the right spirit. The present case highlights the instances of continuous denials by OP-2 to the Informant, which ultimately limits/restricts the production of goods (i.e. electricity) by the power generators) as markets will not evolve unless the demand of products/services is boosted. By denying open access permission, to the Informant and possibly to other consumers, OP-2 appears to have curtailed or discouraged the demand for open access electricity. Thus, it seems that *prima facie* OP-2 has limited and restricted production of electricity and the provision of supply of open access electricity in contravention of the provisions of Section 4(2)(b)(i) of the Act.

66. The next allegations are with regard to the contravention of Section 4(2)(c) and Section 4(2)(e) of the Act. It has been alleged that consistent denials of Informant's STOA applications by OP-2 has led to denial of market access to the Informant as well as other power generators, in terms of section 4(2)(c) of the Act, who can supply to the Informant through open access. Further, OP-1 has allegedly manipulated the downstream distribution market in favour of its sister-concern distribution facility (*i.e.* OP-3) by virtue of being a parent entity for OP-2 and has therefore, contravened provisions of Section 4(2)(e) of the Act.
67. The Commission notes that the Informant, in the present case, has applied for STOA to OP-2 on 12 different occasions. However, most of those requests were denied by OP-2 citing upstream network constraints. The Informant argues that denials were arbitrary and discriminatory, though OP-2 alleges that they were based on the GERC Regulations. During the preliminary conference, the Informant stated that OP-2 has admitted that the designed capacity for the transmission lines is 35MW and in its written submissions, OP-2 has submitted data regarding the maximum loading for previous months



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as against this designed capacity for all those months when the Informant applied for STOA. The said data is reproduced below:

Month applied for	Previous month to be considered	Design Capacity	Maximum Load
Sept 2014	Aug 2014	35	40.8
Oct 2014	Sept 2014	35	39.5
Nov 2014	Oct 2014	35	43.3
Jan 2015	Dec 2014	35	39.8
Feb 2015	Jan 2015	35	33.3
July 2015	June 2015	35	51.5
Aug 2015	July 2015	35	54.2
Nov 2015	Oct 2015	35	44.3
April 2016	March 2016	35	36.5
Sept 2016	Aug 2016	35	42.4

(emphasis supplied)

68. Relying on the aforesaid data, the Informant submitted that there is no basis to justify as to how OP-2 allowed maximum load for the transmission line to be 51.5 MW for one period and not allow its STOA application when the maximum load for a previous month was as less as 33.3 MW. It was alleged that even if OP-2's submissions are accepted that contract demand cannot be substituted for open access demand, the Informant's application for the period February 2015 was wrongly denied as the maximum load during that period was lesser than the design capacity.
69. The main issue that needs to be ascertained is whether the denial by OP-2, citing systems constraint, was valid ground for denial or a mere charade to discourage consumers from opting out of the distribution network of OP-3.



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70. The Commission observes that as per the Hon'ble COMPAT's view in *M/s Kansan News Private Ltd.* Case, denial of market access is a competition law issue only when such denial is occasioned to a competitor. In this regard, it is relevant to note that although Informant is only a consumer in the present case and as such not competing with OP-1 or OP-2, the denial of market access is exclusionary to the 'source/electricity supplier' through which the Informant was planning to access its power requirement. Further, such 'source/electricity supplier', was competing with OP-2's group entity, OP-3, which was a group entity of OP-1 (the holding company of OP-2) and was the licensee distributor for the Informant during the relevant time when open access permission was denied. *Prima facie*, it appears that the denial of open access permission to the Informant has resulted in a violation of Section 4(2)(c) of the Act.
71. Further, this denial of market access under Section 4(2)(c) also seems to be a consequent violation of Section 4(2)(e), in the present case. It appears that OP-2 has leveraged its dominant position in the relevant market to adversely affect the competition in the downstream market, where it is present through its group entity OP-3. The structural linkages between the OPs as depicted in the diagram illustrated earlier also points toward the conflict of interest that exists in the present case. Thus, given the conflict of interest situation that exists in the present case, anti-competitive motive behind such denial by OP-2 cannot be ruled out and may need to be tested in detailed investigation.
72. Based on the foregoing analysis, the Commission is of the considered view that *prima facie*, the contravention with regard to Section 4(2)(b)(i), Section 4(2)(c) and Section 4(2)(e) of the Act is made out against OP-2, which warrants detailed investigation into the matter. The DG is, thus, directed to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report to the Commission, within 60 days.



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73. During the course of investigation, if involvement of any other party/entity is found, the DG shall investigate the conduct of such other party/entity(s) who may have indulged in the said contravention. It is, however, made clear that nothing stated herein shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observations made herein.
74. The Secretary is directed to send a copy of this order, along with the information and the documents filed therewith, to the DG.

**Sd/-
(Devender Kumar Sikri)
Chairperson**

**Sd/-
(S.L. Bunker)
Member**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

**Sd/-
(U.C. Nahta)
Member**

**New Delhi
Dated: 31/01/2018**