

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri U. N. Behera, Chairperson
Shri S. K. Parhi, Member**

Case No. 55/2016

OPTCL Vrs. East Coast Railway & Others	Petitioner Respondents
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In the matter of: An application under Section 16 of the Electricity Act, 2003 read with Regulation 13(1) of the OERC (Terms & Conditions for Open Access) Regulations, 2005, Regulation 4 of OERC (Determination of Open Access Charges) Regulations, 2006 and Regulations 9(1) & 76 of the OERC (Conduct of Business) Regulations, 2004 and also in accordance with Order dated 05.11.2015 of the CERC in Petition No. 197/MP/2015.

For Petitioner: Shri L. N. Mohapatra, Advocate for OPTCL, Shri S. K. Puri, Sr. GM (RT&C), OPTCL.

For Respondents: Ms. Anushree Bardhan, Advocate for East Coast Railway, Shri Arjit Maitra, Advocate, GRIDCO Ltd., Shri S K Harichandan, OSD (Law), CESU, Shri K. C. Nanda, DGM (Fin.), WESCO Utility, Shri B. K. Sahoo, Authorized Officer, NESCO Utility, Shri P. K. Mishra, CLD, SLDC and Shri A K Sahani are present. Nobody is present on behalf of DoE, GoO and ERLDC.

ORDER

Date of hearing: 07.08.2018

Date of order: 25.02.2020

1. The instant petition has been filed by OPTCL (State Transmission Utility) before the Commission inter alia to acknowledge East Coast Railway (ECoR) as a deemed Distribution Licensee and specify the License Conditions under Section 16 of the Electricity Act, 2003. OPTCL has narrated the sequence of events leading to this application which are given below:
2. (i) The present petition has been filed by OPTCL acting as a single window for facilitating open access which was decided on 12.08.2016 in a special meeting held at ERPC, Kolkata on scheduling of open access power from Bharatiya Rail Bijlee Company Ltd. (BRBCL), Nabinagar to Indian Railways.

- (ii) In response to the clarification sought by Ministry of Railways (Railway Board) in letters dated 13.03.2014 and 27.03.2014, the Ministry of Power, Government of India vide letter dated 06.05.2014 clarified that Railways is a deemed licensee under the third proviso to Section 14 of the Electricity Act, 2003 and it may be read with other applicable provisions of the Electricity Act, 2003 and policies made thereunder.
- (iii) In response to the application of the Indian Railways, the Hon'ble CERC while disposing of Petition No. 197/MP/2015 vide their order dated 05.11.2015 vide para 52 has granted the following reliefs:

Para-52

“In view of the above discussion, the prayers of the petitioner are decided as under:

- (a) *In the light of the judgment of the Supreme Court in UOI Vs UPSEB supra, it is held that the petitioner is an authorized entity under the Railways Act to undertake transmission and distribution activities in connection with the working of the railways, independent of its status under the Electricity Act. Therefore, the information sought by MSETCL vide its letter dated 06.7.2015 are not relevant for grant of connectivity and concurrence to the petitioner for scheduling of power from RGPPL and GUVNL through the ISTS and State network by availing long term access or medium term open access in terms of Connectivity Regulations.*
- (b) *The petitioner is a deemed licensee under third proviso to Section 14 of the Electricity Act and no separate declaration to that effect is required from the Appropriate Commission. The petitioner as a deemed licensee shall be bound by the terms and conditions of licence specified or to be specified by the Appropriate Commission under proviso to Section 16 of the Electricity Act.*
- (c) *The drawal points from ISTS located within a State shall be treated as a single entity for the purpose of scheduling. The group of TSSs situated in a State and connected directly with ISTS may be treated as one “fragmented control area” and the responsibility for scheduling, metering, balancing, applicability of ISTS charges and losses etc., shall vest in the concerned RLDC. For the TSSs situated in a State and connected to State network, these functions shall vest in the concerned SLDC.*
- (d) *All concerned RLDCs, State Transmission Utilities and SLDCs are directed to facilitate long term access and medium term access in terms of Connectivity Regulations from the generating stations or other sources to the facilities and network of Indian Railways.”*
- (iv) The aforesaid order dated 05.11.2015 of the Hon'ble CERC was challenged by West Bengal State Electricity Distribution Company Ltd. (WBSSEDCL) before the Hon'ble APTEL in Appeal No. 276 of 2015 with IA No. 445 of 2015. Hon'ble APTEL vide their judgment dated 16.12.2015 in IA No. 445 has

rejected the application of WBSEDCL for interim stay on the operation of CERC's order dated 05.11.2015. The said appeal is still pending before the Hon'ble APTEL.

- (v) Based on the above orders/judgments of the Hon'ble CERC and the Hon'ble APTEL, the 1st Respondent- East Coast Railway (ECoR) (the Respondent herein also) approached the Department of Energy, Government of Odisha, GRIDCO & OPTCL for grant of "No Objection Certificate (NOC)" as well as the Grid Connectivity Certificate as a Deemed Distribution Licensee.
- (vi) The ECoR is presently operating with 29 Railway Traction Sub-Stations (i.e. 29 drawl points) in the State of Odisha, drawing power from the concerned DISCOMs as long term consumers having requisite quantum of contract demands under valid contract period.
- (vii) In order to procure 110 MW of power through Short Term/Medium Term Open Access, the Railway Energy Management Company Limited (REMCL - a joint venture of Indian Railways and RITES Ltd.) has executed an agreement with M/s. JITPL on 04.03.2016 under Case-I Bidding (for Medium Term). Thereafter M/s. ECoR applied to ERLDC for getting open access under MTOA on 05.03.2016. Further, M/s. JITPL vide their letter dated 07.03.2016 applied to SLDC, Odisha for issue of NOC for MTOA for selling power to the ECoR and the ECoR vide their letter dated 08.03.2016 requested OPTCL & SLDC to issue Grid Connectivity Certificate & NOC respectively in favour of them.
- (viii) In connection with the above, several meetings were held among Department of Energy, Government of Odisha, GRIDCO, OPTCL/SLDC on 11.03.2016, 04.05.2016, 23.05.2016 and 30.05.2016 to discuss/deliberate on the issue of granting NOC as well as the Grid Connectivity Certificate as a Deemed Distribution Licensee to ECoR.
- (ix) A special meeting was held on 12.08.2016 at ERPC, Kolkata on scheduling of open access power from BRBCL, Nabinagar to Indian Railways. The decisions taken in the said meeting are as follows:

***"Para 18-** Member secretary opined that instead of railways applying to transmission, distribution, regulator and SLDC separately from case to case, it would be better to have a single window and requested that the transmission*

licensee should act as a single window for facilitating open access. In turn, as required, the transmission licensee would co-ordinate with SLDC, distribution licensee and regulator and get the NOC needed by ERLDC. WBSETCL, WBSEDCL, OPTCL, GRIDCO and BSPHCL/BSPTCL representatives agreed.

Para 19- *Therefore Railways were advised to apply for getting connectivity, LTA and requisite No Objection to MD OPTCL with a copy to GRIDCO in OERC format for 60MW allocation to Odisha for Railway from BRBCL 1st Unit.*

Para 20- *Member Secretary requested OPTCL, WBSETCL and BSPTCL to offer single window facilities in offering NOC to ERLDC so that scheduling from first unit of BRBCL would be started in time without further hindrance."*

- (x) In pursuance to the above decisions taken in the ERPC special meeting, a follow-up meeting was also held on 08.09.2016 among ECoR, GRIDCO, OPTCL and SLDC representatives where various techno-commercial issues involved in the proposed open access transaction were discussed. Some of the decisions taken during the said meeting are as quoted below:
- a) *All necessary approval/NOC required for connectivity and Long Term Open access to East Coast Railways shall be facilitated by OPTCL which shall act as a single window. If required, OPTCL shall also seek necessary approvals in this regard from OERC through appropriate application as required under Item No. (ii) of Annexure-1 of Chapter-4 (Connection Conditions) of Odisha Grid Code Regulations, 2015.*
 - b) *In order to avail firm and consistent supply of power on TOD basis, ECoR shall have to enter into separate commercial contract with GRIDCO which shall have to be duly approved by State Commission (OERC).*
 - c) *Compensation on account of system unbalance occurring due to consumption pattern of ECoR may be raised before OERC separately by OPTCL.*
- (xi) ECoR as an Inter-State LTOA/MTOA customer has to bear the intra-state transmission charges and losses approved by the Commission.

In addition to the above, OPTCL proposes the following charges to be levied on ECoR for the proposed Open Access transaction.

- a) *Energy meter data from the power drawal points have to be collected on weekly basis by deploying additional manpower. Hence, OPTCL proposes to collect 10 paise per unit for the said purpose.*
- b) *Besides drawing unbalanced power, drawal of ECoR will also generate harmonics which shall be absorbed by the OPTCL system. Hence, OPTCL proposes to collect 15 paise per unit towards compensation.*

- (xii) OPTCL has stated that as per clarification of MoP, observations of Hon'ble CERC and APTEL, there is no ambiguity in the fact that the first respondent ECoR qualify as a deemed Distribution Licensee in the state of Odisha under the appropriate provisions of the Electricity Act, 2003. Therefore, ECoR should be declared as deemed Distribution Licensee and terms and conditions of such License should be specified under Section 16 of the Electricity Act, 2003.
3. In its reply, ECoR has submitted that since fuel bill constitutes about 25% of the ordinary working expenses, various initiatives are being taken by Indian Railways to reduce electricity bill by procuring power through bilateral arrangement, undertaking power trading etc. About 85% of the electricity is being used for Traction application over electrified network. In Odisha, ECoR is availing Traction power supply through 18 Traction Substations (TSSs) whereas South Eastern Railway (SER) is availing power supply through 11 TSSs. Railway Energy Management Company Limited (REMCL – A Joint Venture of Indian Railways and RITES Limited) on behalf of Indian Railway has made agreement for procurement of 110 MW of power from M/s Jindal India Thermal Power Ltd. (JITPL) on Medium Term Open Access (MTOA) basis. Further, Indian Railways is setting up a 1000 (4x250) MW Captive Thermal Power Plant at Nabinagar, Bihar in collaboration with NTPC Ltd. which will be managed by Bharatiya Rail Bijlee Company Ltd. (BRBCL) (A Joint Venture of NTPC and Indian Railways). From this plant, 60 MW power has been allotted to the state of Odisha. In this regard, bulk power purchase agreement between PGCIL and Railways has been executed. Around 50 MW of power shall be available to Odisha after taking into consideration auxiliary consumption etc.
4. ECoR has further submitted that Indian Railways is an authorized entity to distribute electricity in connection with the working of the Railways under Section 11 of the Railways Act, 1989. Such statutory provision is preserved under Section 173 of the Electricity Act, 2003. The CERC vide their order in petition No. 197/MP/2015 dated 05.11.2015 has accepted this status of Railways. The CERC has held that Indian Railways would be governed by the Railways Act and are entitled to grant of open access in connection with working of the railways as per the provisions applicable to a distribution licensee. The order of CERC has been challenged by WBSEDCL in

Appeal No. 276 of 2015 before Hon'ble APTEL which is still pending there. However, Hon'ble APTEL has refused to grant stay on the order of Hon'ble CERC.

5. ECoR has concurred with the view of OPTCL that this petition has been filed by OPTCL acting as a single window for facilitating open access as was decided on 12.08.2016 in a special meeting held at ERPC, Kolkata on scheduling of open access power from BRBCL, Nabinagar to Indian Railways. Indian Railways has the authority to undertake distribution and supply of electricity under the Railways Act, 1989 and independent of Electricity Act, 2003 with regard to distribution of electricity. Railways has brought before us an order of Hon'ble Supreme Court in Union of India Vs Chairman, UP State Electricity Board decided on 09.02.2012 (Transferred Case No. 37 and 38 of 2001) where Hon'ble Court has held as under:

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

The Railways have stated that though the above judgment was in context of transmission of electricity, the position is same for distribution of electricity.

6. The Railways have further stated that even if deemed Distribution Licensee status is invoked under third proviso to Section 14 of the Electricity Act, still then Section 16 providing for Condition of Distribution License has no application. This is because Railways is not distributing electricity to the public at large. In addition to the status under Railways Act, the respondent – EcoR being a Central Government Department is a deemed Distribution Licensee under third proviso to Section 14 of the Electricity Act, 2003. It has been submitted that power is being procured and consumed by the Railways in connection with its working. Therefore, the Condition of Distribution License is not applicable to them since public are not involved.
7. However, Indian Railways is ready to comply with the requirements relating to connectivity, grid security and stability as well as conditions of open access. The Railways is willing to comply with the terms of Grid Code as well as other Regulations of the Commission.

8. Indian Railways have agreed to bear the transmission charges and losses approved by the Commission as applicable to a Distribution Licensee. However, the proposals of OPTCL for collection of additional 10 paise/unit for the collection of meter data as well as 15 paise towards compensation for harmonics are not acceptable to them. ECoR submitted that collections of these charges are inconsistent with the Open Access Regulation of the Commission and therefore not payable. In order to avail firm and consistent supply of power on ToD basis, the Indian Railways shall enter into separate commercial contact with GRIDCO with due approval of the Commission. However, these issues are commercial in nature and cannot be a ground for grant of connectivity, NOC and open access.
9. One of the respondents – CESU, which is a Distribution Licensee submitted that since Railways has not filed any petition for open access before the Commission, there is no cause of action to grant them open access. Hon'ble APTEL while refusing grant of stay on CERC order dt.05.11.2015 has made it clear that all observations made in that order which may touch the merit of the case of either side are prima facie observation made for the disposal of the application of stay. The order passed by CERC is having no binding effect on the State Regulatory Commissions. For the sake of argument but not admitting as per the Act even if the Railway is finally determined as deemed licensee, in that case also he has to apply before the Commission for the reliefs under the Act to get the license and area of supply. If the Railways is to undertake distribution of Electricity under Railways Act which is independent of Electricity Act, 2003, the Electricity Act would have acknowledged the same as has been done in case of Damodar Valley Corporation (DVC) under Damodar Valley Corporation Act, 1948. CESU submitted that none of the proviso to Section 14 of the Electricity Act provides that the Railways shall be deemed to be a licensee under Electricity Act and shall not be required to obtain a licence and the Railways Act would continue to apply to Railways. CESU has executed power supply agreements with ECoR as per the provisions of OERC Supply Code. There is no provision for termination of power supply agreement during the continuance of the agreement period. If the Railways is entitled for connectivity as Distribution Licensee, he is required to be notified under Section 17(1) and (2) of the Act. Section 11(g) of the Railway Act relates to setting up and maintenance of infrastructure in connection with working of the Railways. The Railways is not carrying on any transmission or distribution functions. Rather it is

using the transmission and distribution infrastructure of OPTCL/CESU to avail power supply for consumption of electricity at various points of electrical traction. The Railways is neither a Distribution Licensee nor engaged in the supply of electricity as per the provisions of the Electricity Act, 2003. The clarification of Ministry of Power regarding status of Railways as deemed licensee is not acceptable because Indian Railways was not engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date as per Section 14 of the Electricity Act, 2003. The clarification of Ministry of Power cannot be treated as policy direction to OERC as provided under Section 107 of the said Act. Since the issue relating to conferring the deemed licensee status is still sub-judice before appropriate court of law to adjudicate the issue, the clarification cannot create any substantive right in favour of Railways. Since respondent – Railways has already made agreements to avail power supply through open access, they may avail the same with the payment of cross subsidy surcharge as well as wheeling charge for utilizing the Distribution system of CESU. The decision in the meeting held on 08.09.2016 cannot be conclusive since though the right of CESU is going to be affected through that meeting, it was not invited to the said meeting. Had it been invited to that meeting, these issues would have been raised in that meeting. Therefore, decision of that meeting is not binding on CESU. The DISCOM - CESU further submitted that Railway being a prime consumer cross subsidises other economically unviable consumers in the present tariff structure of the state. Railway's availing power supply from sources other than DISCOM will upset the retail supply tariff and the economy of the state. At all times, CESU has taken sufficient care to provide uninterrupted and steady power supply to Railways, even with feed extension and without any financial burden on Railways. The application of Railways is not maintainable and is liable to be dismissed.

10. Respondents SOUTHCO and WESCO Utilities stated that as per the prescribed provisions of law as laid down under Electricity Act, 2003 the area that is to be carved out from the licensed areas of the existing DISCOMs including SOUTHCO and WESCO Utilities are required to be specified by ECoR. Even if ECoR has got the autonomy of maintaining and operating its own distribution system by virtue of Railway Act, 1989, in absence of any provision as regards the mode and manner of carrying out said distribution activity in the Railways Act, 1989 the provisions of

Electricity Act to that effect shall be applied for determining the *modus operandi*. Therefore, the provisions of Section 16 of the Electricity Act is well applicable for setting out terms and conditions of distribution of electricity as a Licensee within specified area. SOUTHCO and WESCO Utilities further submitted that there is no provisions of open access in the Railways Act though ECoR claims it. In absence of any specific provision in the Railways Act, 1989 regulating trading, open access, etc. the regulatory mechanism as laid out under Electricity Act shall apply. SOUTHCO Utility further submitted that if any person operating within the operational and functional area of an existing distribution licensee decides to draw power from outside the licensed area of the Utility, that person has to pay cross-subsidy surcharge. In the instant case since Railway Traction sub-stations are distribution system of ECoR as per the provision of Railway Act, 1989, wheeling charges may not be applicable but cross-subsidy surcharge for open access is certainly payable. It would be proper to await the decision of Hon'ble APTEL in this regard in Appeal No. 276/2015.

11. Another Respondent NESCO Utility stated that the objective of the OERC is to look into the interest of the people of the State which *inter alia* translates in to the protection of the distribution Utilities. The fact is that CERC regulates the Utilities of Central Government. In similar vein OERC has got to look into the interest of the institution of the Government of Odisha. This is the reason why directive of Hon'ble CERC is not binding on OERC merely on the ground that Hon'ble CERC has considered it justified. Under the Orissa Electricity Reform Act, 1995 as well as Electricity Act, 2003 OERC is to grant license for distribution of electricity. Under Section 14 (2) of OER Act, 1995 it is OERC and no other institution which has to decide as to whether any person is or is not engaged in the business of supplying Electricity. Under Section 16 (1) of the OER Act, 1995 in case OERC were to grant exemption to Indian Railway then Railway is to make application as per the Regulation 1998 framed by OERC in this regard. Since Electricity is a concurrent subject Regulation made under OER Act, 1995 is still valid and OERC is the appropriate body to decide the question of grant of status of deemed licensee. No other body has such authority to decide the matter. The observation of Hon'ble APTEL while disposing the interim prayer for grant of stay on CERC order has no application in the final decision of that Hon'ble Tribunal.

12. NESCO Utility further submitted that the letter issued by Ministry of Power, Government of India dated 06.05.2014 is devoid of jurisdiction since powers of the Government to grant license vest with Electricity Regulatory Commission. The letter dated 06.05.2014 issued by Ministry of Power clarifying that Railways is a deemed licensee is ex-facie inconsistent and contrary to Section 12, 13, 14 and Section 15 of the Electricity Act, 2003. The letter issued by Ministry of Power on 06.05.2014 clarifying that Railways is a deemed licensee under the third proviso to Section 14 of the Electricity Act, 2003 is a mere clarification. In that letter also Ministry of Power has mentioned that the clarification is to be read with other applicable provisions of Electricity Act, 2003 and Policies made thereunder. Therefore, even if it were to be accepted (without admitting) that the Ministry of Power letter dated 06.05.2014 is valid in law the OERC will have full jurisdiction to apply the “other applicable provisions of the Electricity Act, 2003 and Policies made thereunder” to the Indian Railways. NESCO Utility continued to submit that Section 2(17) of the Electricity Act defines distribution licensee as a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. The Railways in their submission has admitted that they are not supplying electricity to the consumers rather they are consuming the same. Therefore, Railways does not fall under third proviso to Section 14 which applies only where an appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity. As per Section 11 of the Railways Act, 1989 the Railway Administration is not engaged in the business of supplying electricity to the public and instead is limited to construct electric supply lines, operate power supply and installation only for the purpose of constructing or maintaining a railway or in connection with the working of the Railways. NESCO Utility has referred to the report of Standing Committee on Energy on the Electricity Bill, 2001 which had recommended that Ministry of Railways be exempted from licensing for erecting, maintaining and transmission of electricity subject to the condition that transmission network is outside the Grid and erected for their own use. The licence would be insisted for grid operation. Therefore, exemption to Railways from the requirement of obtaining license was limited to transmission of electricity, if such transmission lines are not connected to the Grid and erected for their own use only. Therefore, Parliament has not exempted Railways from licensing. NESCO Utility has requested the Commission to consider metering issue,

communication facility, cross subsidy surcharge and additional surcharge issues in case Railways is treated as deemed distribution licensee.

13. Shri A. K. Sahani a member of the general public and the intervener/ Respondent in the present case submitted that the application filed by OPTCL seeking clarification of the Commission regarding Respondent No. 1 (East Coast Railway) as a deemed distribution licensee has no locus standi. M/s. Jindal India Thermal Power Ltd. (JITPL) is going to sell its power to Railways (Respondent No. 1) through the transmission system of the petitioner without paying the cross subsidy surcharge/wheeling charges to the distribution utilities which would cause heavy loss to the DISCOMs and would lead to the hike of the retail supply tariff of the LT domestic consumers in the State. M/s. JITPL without supplying 12% State share power to GRIDCO Ltd., is going to sell the power to the Respondent No. 1 through open access who in turn will avail the power without paying cross subsidy surcharge to the DISCOMs claiming itself a “Deemed Licensee” as per order dated 05.11.2015 of the Hon’ble CERC in Petition No.197/MP/2015. Since the matter is sub-judice before Hon’ble APTEL in Appeal No. 276/2015 the application of OPTCL / ECoR should be rejected at the threshold.
14. Very forceful submissions have been made by GRIDCO Ltd. The representative of GRIDCO Ltd. submitted that The Orissa Electricity Reforms Act, 1995 is one of the enactments in the schedule to the Electricity Act, 2003 and Section 185(3) of the said Act states that the provisions of the enactments are applicable, in so far as they are not inconsistent with the provisions of the Electricity Act, 2003. The subject of “Electricity” is placed under Entry 38 in List III (Concurrent List of the 7th Schedule) to the Constitution of India. Article 246 of the Constitution provides that the State Legislature has power to make laws with respect to any of the matters enumerated in List III of the 7th Schedule which includes Electricity. In the above background, Section 14(2) of the Electricity Reforms Act, 1995 where any difference or dispute arises as to whether any person is or is not engaged or about to engage in the business of transmitting or supplying electricity, the matter shall be referred to the Commission for decision which shall be final. Under Section 14 (3), the Commission shall have the power to order any unlicensed person to cease operating and disconnect its operations. Under the Electricity Act, 2003 as well as under the OER Act, 1995, the commission is the grantor of license to any person for transmission, distribution or trading in

electricity. Under Section 14 of the Electricity Act, 2003, any person claiming to be protected as a deemed licensee and seeking exemption to obtain a license has to be subject to the decision of the State Commission as to whether such a person is indeed a deemed licensee or not. Section 14 (2) of the OER Act, 1995 states that the decision of the Commission in this regard shall be final. Under Section 16(1) of OER Act, 1995 the Commission is mandated to take the consent of the distribution utility in whose area of supply the ECoR is claiming to be a deemed licensee. If the Commission grant exemption to the Respondent No.1 from the requirement to have a license, it would be mandated to lay down conditions as stated in Section 16(1) of the OER Act, 1995 and also frame regulation for such an exemption. Therefore, the Commission cannot grant exemption to the Respondent No.1 without making a regulation in that regard. The Commission has already notified the OERC (Exemption for License) Regulations, 1998. The Respondent No.1, if it wishes to seek exemption from the requirement to obtain a license for supplying electricity, shall have to submit an application in the prescribed format under the said Regulation, 1998. Notwithstanding the foregoing submissions, the Respondent No. 1 also does not appear to fall under any categories as per Regulation 3 of the said Regulation, 1998.

15. GRIDCO further stated that the order dated 16.12.2015 of the Hon'ble APTEL is in the nature of an interim order while disposing IA No. 445 of 2015 in Appeal No. 276 of 2015 in case West Bengal State Electricity Distribution Co. Ltd. Vs. CERC and Ors. In the said judgment the Hon'ble Tribunal opined prima facie that the issue whether Railways were a deemed licensee or not was not before the Central Commission. Hon'ble APTEL recorded that it was not the case of the Railways that the distribution and retail supply of Railways can be regulated by the Central Commission. The railways have full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act, particularly Section 11 thereof. Section 11 of the Railways Act, 1989 circumscribed by the words "for the purpose of constructing or maintaining a railway" and "in connection with the working of the railway" and it does not expressly or impliedly empower the Railways to operate distribution installation for supplying electricity to consumers. The Hon'ble Tribunal has made a prima facie observation at para 20 of the said interim order only for the disposal of the interim application. It is settled law that an Interim order is not the final authority on the subject matter before the Court. Railways cannot claim to be

a deemed distribution licensee in the State of Odisha either by taking any support from the order of the Central Commission dated 05.11.2015 or by taking support of the interim order passed by the Hon'ble Tribunal dated 16.12.2015. Since electricity is a concurrent subject Odisha has its own legislation on this matter i.e. OER Act, 1995, therefore, OERC is the appropriate body to decide as to whether the Indian Railway is a deemed licensee in Odisha.

16. GRIDCO stated that the letter issued by the MoP, Central Government dated 06.05.2014 is devoid of any jurisdiction, as MoP neither is vested with any authority under the Electricity Act, 2003 to grant license, exempt from the grant of license and /or hold/ decide as to whether any entity like Indian Railways as in the present case is a deemed licensee or not. The Indian Electricity Act, 1910 and the Electricity Act, 1948 stood repealed with the enactment of the Electricity Act, 2003, where the powers to grant license was vested with the State Government or Central Government according to the place of their operation but after Electricity Act, 2003, came into effect the said power to grant license vests with the State Commission. The powers of the Government in this regard to grant license stood extinguished. In view of the above the Letter dated 06.05.2014 issued by MoP clarifying that the Railways is a deemed licensee is *ex facie* inconsistent and contrary to Sections 12, 13, 14 & 15 of the Electricity Act, 2003. Furthermore, the said letter issued by MoP expressly refers to its own letter as a "Clarification" which is as follows:-

"It is clarified that Railways is a deemed licensee under the third proviso to S.14 of the Electricity Act, 2003. The said clarification may be read with other applicable provisions of the Electricity Act, 2003 and the policies made thereunder." Even if the said letter of MoP is valid in law, the Commission have full jurisdiction to apply the "other applicable provisions of the Electricity Act, 2003 and policies made thereunder" to the Respondent No.1. The third proviso to Section 14 of the Electricity Act, 2003 applies only where an appropriate Government "transmits electricity or distributes electricity or undertakes trading in electricity". The term "distribute" can be derived from the definition of 'distribution licensee' in Section 2(17) of the Electricity Act, 2003 which means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in its area of supply. Respondent No.1 does not supply electricity to the consumers, it only supplies the power in connection with the working of the Railways. The recommendation of the Parliamentary Standing

Committee for exemption to the Railways from the requirement of obtaining license was limited to transmitting electricity, if such transmission lines are not connected to the Grid and erected for their own use only. The said Committee however categorically suggested that the license would be insisted upon for grid operation and there was no recommendation whatsoever in relation to exemption to the Railways from the requirement of license for distribution of electricity. It can be clearly seen from the provisions of Section 14 of the Act, 2003 that no exemption has been provided to the Railways from the requirement of obtaining a license for transmission of electricity. However, it would be seen that the fourth proviso to Section 14 of the Act exempts Damodar Valley Corporation from the requirement to obtain a license under the above Act, but no similar exemption has been accorded to Railways. Even under Section 184 of the Act, 2003 no exemption has been given to Railways from the applicability of the provisions of Section 184 the Act which is as follows:-

“The provisions of this Act shall not apply to the Ministry or Department of the Central Government dealing with Defence, Atomic Energy or such other similar Ministries or Departments or Undertakings or Boards or institutions under the control of such Ministries or departments as may be notified by the Central Government.”

Furthermore, the Ministry of Railways did not require to request for exemption from the Electricity Act, 2003 or request for exemption/concession under Clauses 12, 42, 47, 67, 68 & 169 of the Electricity Bill, if the Railways were governed independently under the Railways Act, 1989 in regard to distribution and supply of electricity. GRIDCO pointed out the report of Parliamentary Standing Committee on Energy on Electricity Bill, 2001 (Enacted as Electricity Act, 2003) on the request of Railways which states as follows:

“The Committee desire that the Ministry of Railways be exempted from licensing for erecting, maintaining and transmission of electricity, subject to the condition that the transmission network is outside the grid and erected for their own use. The licence would be insisted upon for grid operation.”

It can be clearly noticed from above extracts that the recommendation of the Parliamentary Standing Committee for exemption to Railway from the requirement of obtaining licence was limited to transmitting electricity, if such transmission lines are not connected to the grid and erected for their own use only. Therefore, it would be seen that fourth proviso to Section 14 of the Electricity Act exempts Damodar Valley Corporation from the requirement to obtain a licence under the Electricity Act but no

similar exemption has been accorded to the Railways. Therefore, the Legislative intention for not granting 'deemed licensee' is clear.

17. Railways had certain special privileges under the Indian Electricity Act, 1910 (now repealed) which had granted exemption to the Railways under Section 30 to transmit and use electricity for public carriage of passengers, animals or goods, or for the lighting or ventilation of the rolling stock of any Railways or tram ways. However, no such exemption was granted to the Railways by the Parliament while enacting Electricity Act, 2003. Noticeably, Section 12 of the Electricity Act, 2003 says that no person shall transmit electricity unless he is authorised to do so by a licence issued under Section 14. There is no exemption provided for transmission or use of electricity by the Railways. Even in Indian Electricity Act, 1910 (which is repealed now) there is no exemption to Railway from the requirement to obtain a licence 'to supply energy'. Indian Railways has been taking electricity supply from various distribution licensees for decades even after enactment of Electricity Act, 2003. It is a matter of surprise that the Indian Railways have suddenly realised that they are deemed licensee and not a consumer.
18. The Representative of GRIDCO further submitted that Section 2(15) of the Electricity Act, 2003 defines the term "Consumer" as any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under the Electricity Act, 2003 or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person as the case may be. It is an admitted fact that the Indian Railways has been taking electricity supply from various distribution utilities in India for the purpose of electric traction and power supply in connection with the working of the Railways. The Hon'ble Apex Court in their order in case of Northern Railways Vs. UPSEB (2012) 3SCC329 has observed vide para 19 that the direct sale of power by a generating Company to a consumer is specifically permitted under Section 10(2) of the Act, 2003 thereby indicating the Indian railways to be treated as a consumer under the Electricity Act, 2003. Further, the Hon'ble Apex Court vide their judgment dated 09.02.2012 in case of Union of India Vs. UP State Electricity Board has observed that in case of railways the transmission of electricity is governed by the Railways Act and not by the enactments governing electricity. The

Indian Railways were empowered to construct transmission lines for drawing power from NTPC's generating Stations only. The Hon'ble Apex Court did not decide the issue as to whether the Indian Railways were a deemed licensee not required to obtain a license for supplying electricity to consumers. Neither was this issue ever adjudicated upon by the Hon'ble Apex Court nor was this issue adjudicated upon in the aforesaid judgment. On the contrary, the Hon'ble Supreme Court indicated at para 19 that direct sale of power by a generating company to a consumer is specifically permitted under Section 10 (2) of the Electricity Act thereby indicating that Indian Railways are a 'consumer' authorised to construct transmission line dedicated for their own purposes, for drawing power from NTPC's power plants.

19. Vehemently opposing exemption of cross subsidy surcharge for Railways, GRIDCO Counsel submitted that only exemption from the payment of cross subsidy surcharge is to a person who has established a captive generating plant for carrying electricity to the destination of his own use under fourth proviso to Section 42 (2) of the Electricity Act. A distribution licensee does not establish a captive generating plant to generate electricity for its own use. The moment the Railways contend that they are setting up a captive generating plant, the Railways would be deemed to be a consumer and not a distribution licensee. GRIDCO referred to Para 30 of the order of Hon'ble Supreme Court in Sesa Sterlite Ltd. Vrs. OERC and Others (2014) 8 SSC 444 that "even a licensee which purchases electricity for its own consumption either through a 'dedicated transmission line' or through 'open access' would be liable to pay cross subsidy surcharge under the Act." This Supreme Court's decision would squarely cover the case of Railways who claim that they are a distribution licensee and wish to purchase electricity for their own consumption through open access.
20. GRIDCO submitted that Electricity Act, 2003 is an exhaustive complete code on all matters concerning electricity. Hon'ble Supreme Court in PTC India Ltd. vrs. Secy. CERC; AIR 2010 SC 1338 at Para 9 page 1354 has held that 2003 Act is an exhaustive code on all matters concerning electricity. Electricity Act specifically requires the SERC's (OERC) to grant licence to any person to distribute electricity as distribution licensee (Section 14 (b)). Section 16 of OER Act, 1995 requires OERC to make Regulation regarding this. The Learned Counsel for GRIDCO stated that Hon'ble Supreme Court held in case of 'Gujarat Urja Vikash Nigam Ltd. Vrs. Essar Power' (2008) 4 SSC 755 as follows;

“The principle laid down in Section 174 of the Electricity Act 2003 is the principal or primary whereas the principle laid down in Section 175 is the accessory or subordinate to the principal” i.e. “when there is any express or implied conflict between the provisions of Electricity Act 2003 and any other Act, then the provisions of the Electricity Act will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.”

21. GRIDCO stated that Section 173 of the Electricity Act provides that the Electricity Act or any rule or Regulation there under or any instrument there under shall not have effect so far as it is inconsistent with the Railways Act, 1989. Hence, there must be some inconsistency between Electricity Act and the Railway Act for Section 173 to apply.
22. The Learned Counsel of GRIDCO while dwelling on the Railways Act stated that it does not provide that the Railways are not required to obtain distribution license under the Electricity Act, 2003. The Railways Act was enacted in 1989 when Electricity Act, 1910 was in force. The Indian Electricity Act, 1910 provided for the requirement to obtain a licence for supply of electricity and was in existence during the time when the Railways Act, 1989 came into force. The Railways Act does not state that the Railways are not required to obtain a licence for distribution or supply of electricity under the Indian Electricity Act, 1910. The Railways Act, 1989 was not even amended later on i.e. post the enactment of the Electricity Act, 2003 stating that the Railways do not require a licence under the Electricity Act, 2003. Therefore, it is amply clear that the Parliament/Legislature never intended that the Railways would be exempted from the requirement to obtain a licence to distribute or supply electricity under the Indian Electricity Act, 1910 and under the Electricity Act, 2003. Therefore, if the OERC acting under the Electricity Act, 2003, requires the Railways to obtain a licence, there can be no inconsistency with the Railways Act. The Counsel for GRIDCO has also tried to answer which of the two Parliamentary statutes will prevail by referring Hon’ble Supreme Court’s observation in case of *Solidaire India Ltd. Vrs. Fair Growth Financial Services Ltd. & Others* [Rep in (2001) 3 SSC 71] where Hon’ble Court has observed as follows:

“Where there are two special statutes which contain non-obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non-obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.”

The above judgement / decision of Hon'ble Supreme Court is a complete answer to the Railways contention that Railway Act, 1989 will prevail over the Electricity Act, 2003.

23. GRIDCO further submitted that in the event OERC were to come to the conclusion that Indian Railways are a licensee referred to in the third proviso to Section 14 of the Electricity Act, 2003, in that event, the OERC would be mandated under the proviso to Section 16 to specify by Regulations 'any general or specific conditions of licence' applicable to the Indian Railways. GRIDCO requested the Commission to specify provision regarding metering, communication facility, cross subsidy surcharge, additional surcharge, charges for deviation, point of connection charges, standby charges for drawal of power, reactive energy charges etc. in case Railway is granted open access.
24. Replying to all the above contentions the Respondents East Coast Railway stated that Indian Railways (East Coast Railway and South Eastern Railway) is currently availing traction power supply from different distribution companies in Odisha at total 29 traction sub-stations. Pursuance to the meeting held on 12.08.2016 at Eastern Regional Power Committee (ERPC), Kolkata on scheduling of open access power from BRPCL to Indian Railways, a decision was taken for providing a single window for issuance of no objection certificate. Basing on this ECoR applied as a distribution licensee to the Petitioner (OPTCL) for grant of connectivity and LTOA / MTOA on Intra-State network for drawal of power to traction sub-station which was not processed by them. In the present petition the Petitioner (OPTCL) sought for an acknowledgement of Railways as deemed distribution licensee. There is no requirement for the State Commission to issue license or otherwise grant licence to a deemed licensee. The requirement of such notification is contrary to the concept of deemed licensee. There is no such requirement either under Railways Act, 1989 or in the Electricity Act, 2003. On a petition filed by the Indian Railways bearing No. 197/MP/2015, CERC by order dated 05.11.2015 held that Indian Railways is an authorised entity to distribute and supply electricity in connection with the working of Railways under the Railways Act. The Indian Railways shall be entitled for grant of open access in connection with the working of Railways as per the provisions applicable to distribution licensee. The Hon'ble CERC at Para 52 (b) of the said order held as under:

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

The above decision has been challenged before the Hon’ble APTEL in Appeal No. 276/2015 but Hon’ble APTEL refused to grant stay on the order of CERC and specifically upheld the right of Indian Railways for open access. Though the above order of the Hon’ble Tribunal is subject to the final decision, this does not mean that the order is not to be implemented. Railways submitted that the decision of Central Commission is a decision on the status of the Railways as a distribution licensee. Further once the Central Commission has decided an issue the principle of comity would require that all the State Commissions also recognise the same. Otherwise this would result in contradiction wherein various Regulatory Commissions would decide differently. If the order of the Central Commission is not accepted it would lead to an anomalous situation wherein the status of Railways as deemed licensee is recognised in some states and not in others, particularly when the said status is as per the interpretation of Railways Act, 1989 and the Electricity Act, 2003 which is equally applicable to all states. It is well settled position of law that unless a stay is granted, the orders have to be implemented. Mere filing or pendency of appeal does not operate as a stay. It is submitted that the Petitioner (OPTCL) has accepted the order of Central Commission and relied on the same in its petition. It cannot be that a decision on interpretation of the same statute (Railways Act, 1989 and Electricity Act, 2003) would be different for different Utilities. In view of Section 11 and 12 of the Railways Act, 1989 Railways have the authority to distribute electricity. The status of the Respondent Railway as being authorised to distribute electricity under the Railways Act is recognised notwithstanding anything contained contrary in the Electricity Act, 2003. Functioning of Railways is governed by a Special Act called Railway Act, 1989 which is a special enactment. Hon’ble Supreme Court in General Manager, Northern Railway represented by Union of India Vs. UP Power Corporation Ltd. decided on 09.02.2012 (Transferred Case No. 37 and 38 of 2001) (3 SCC 329) (2012) has held that

“15. it is true that in terms of Section 27D of the Electricity Supply Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other than those authorised or otherwise exempted by an Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution

*of electricity. **However, in the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989, and not by the enactment governing electricity.***

The East Coast Railways contend that the above judgement given in the context of transmission of electricity is also applicable in case of distribution of electricity.

25. In view of the above status of Railways under the Railways Act, 1989 the Railways being an appropriate Government (Section 2(5) of the Electricity Act, 2003) is a deemed licensee under the third proviso to Section 14. The Proviso specifically provides that there is no need for the Government to obtain a licence. The letter of Ministry of Power on 06.05.2014 is an acknowledgement and not grant of licence as alleged by the utilities. CERC has also held in their order that

“Therefore, administration of the Electricity Act, 2003 is the responsibility of Ministry of Power. Being the nodal Ministry, Ministry of Power has examined the proposal of the Ministry of Railways with regard to its deemed status as a licensee under the Electricity Act in consultation with Ministry of Law and Justice which has been vested with the power to render “advice to Ministries on legal matters including interpretation of the Constitution and the laws”. Moreover, the clarification has been issued with the approval of the Hon’ble Minister of Power (Independent Charge). Therefore, we are of the view that the clarification issued by Ministry of Power with regard to the deemed licensee status of the Indian Railways meets the requirement of law. There is no requirement for a declaration to that effect to be issued by an Appropriate Commission.”

26. With regard to contention that Electricity Act, 2003 is a complete code, Railway submitted that Electricity Act, 2003 itself recognises Railways Act, 1989 and provides for its superior application. The reliance on Orissa Electricity Reform Act, 1995 is misplaced. The licensing provisions under the earlier Electricity Acts and Electricity Act, 2003 are different. The Electricity Act, 2003 has repealed the earlier Acts and further stated that the Orissa Electricity Reforms Act would only apply to the extent it is not inconsistent with the Electricity Act, 2003. The application of Railways Act, 1989 in electricity matter has also been upheld by the Hon’ble Supreme Court in Union of India represented by General Manager, Northern Railways vrs. Chairman UPSEB and others case.
27. The Railways further contended that Utilities are wrongly submitting that Electricity Act, 2003 would override the provisions of the Railway Act, 1989 by ignoring the exception created in Section 173 of the Electricity Act, 2003. The contention of utilities that there is no such non-obstante clause in the Railways Act, 1989 is misconceived when the Electricity Act, 2003 has itself recognised the Railway Act,

1989 under Section 173. The Railways being the appropriate Government (Section 2 (5) of the Electricity Act, 2003) is deemed licensee under the third proviso to the Section 14.

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

The proviso specifically provides that there is no need for the Government to obtain a licence. Therefore, there cannot be any need for Railways to obtain or seek declaration with regard to licence from the State Regulatory Commission. The letter dated 06.05.2014 by Ministry of Power has recognised this.

28. The submissions of Utilities regarding electricity being in the concurrent list of the Constitution of India are completely misconceived. The concurrent list enumerates the subjects /areas wherein both Parliament and State Legislature have power to legislate. This power to legislate is only with the Legislature and does not extend to statutory bodies like OERC. The grant of licence, the deemed licensee, provision and the procedure for licence being provided in the Electricity Act, 2003, the procedure provided in Orissa Electricity Reform Act, 1995 is inconsistent with the Electricity Act. Railways pointed out that delegated legislation such as Regulations cannot be contrary to the parent Legislation (Electricity Act, 2003) nor any other Legislation such as Railways Act, 1989. Railways submitted a decision of Hon’ble Supreme Court in this regard.

“Kerala Samasthana Chetu Thozhilali Union V. State of Kerala (2006) 4 SSC 327

13. *A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature....”*

The Regulation i.e. exemption from licence Regulation, 1998 was framed under the Orissa Electricity Reform Act, 1995 and not under the Electricity Act, 2003. Hence, the said Regulations cannot govern the grant of licence or exemption from licence contrary to the provisions of the Electricity Act, 2003 or Railways Act, 1989.

29. Railways submitted that the Utilities have wrongly contended that since Railways is not recognised under Section 184 of the Electricity Act, 2003 it cannot be exempted from obtaining licence. Section 184 provides that the Electricity Act, 2003 would not

apply to certain departments of the Central Government. Since Railways is recognised under Section 173 of the Electricity Act the non-inclusion of Department of Railways in Section 184 has no relevance or impact. No conclusion can be drawn on the basis of the report of the Standing Committee on Energy. Since Railways Act, 1989 grants authority to Respondent to undertake distribution the same cannot be denied on the basis of the Electricity Act, 2003.

30. The Railways have stated that there can be no estoppel against the Railways with regard to the status as a distribution licensee under the provisions of the Railway Act, 1989 read with Electricity Act, 2003. There was no requirement for any request for exemption or otherwise under the Electricity Act, 2003.
31. They have further stated that the issue of applicability of cross subsidy surcharge and additional surcharge is outside the scope of the Petition. The Respondent being a distribution licensee and procuring power as distribution licensee, there can be no liability of cross subsidy surcharge or additional surcharge. The Railways have right to seek open access under Electricity Act, 2003 independent of any other provision. The distribution licensee cannot refuse grant of open access merely because they might lose Railways as a consumer. Railways has submitted that they have been granted open access or no objection for open access after becoming distribution licensee in various states such as Maharashtra, Gujarat, Rajasthan, Madhya Pradesh, DVC Command area, Jharkhand, Karnataka, Uttar Pradesh, Delhi, Bihar and Haryana. There is no operational issues there.
32. We have heard the Petitioner, Respondents and the Intervener very extensively. In all the arguments and counter arguments the moot questions are
 - (a) Whether this Commission has the jurisdiction to decide the grant of deemed distribution licence to anybody?
 - (b) Whether Railways (ECoR and SER) are deemed distribution licensees in the State of Odisha under third proviso of Section 14 of the Electricity Act, 2003?
33. Let us examine the first question. As per third proviso to Section 14 of the Electricity Act, 2003 in case an appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of the Act, such Government shall be deemed to be licensee under this Act. In this context we bring into discussion the clarification issued by Ministry

of Power, Government of India on request of Ministry of Railway on 06.05.2014 which states as follows:

- “2. *The issue of granting deemed licensee status to Railways under the Electricity Act, 2003 has been examined by this Ministry in consultation with the Department of Legal Affairs, Ministry of Law and Justice. It is clarified that Railways is a deemed licensee under the third proviso to Section 14 of the Electricity Act, 2003.*
 3. *This clarification may be read with other applicable provisions of the Electricity Act, 2003 and policies made thereunder.”*
34. Regarding jurisdiction of this Commission on exemption of any applicant from distribution licence (deemed licensee) the following regulatory provisions are available. In exercise of power given under Section 181 of the Electricity Act, 2003 this Commission has made a Regulation called OERC (Conduct of Business) Regulations, 2004 which deals with this matter. Regulation 49 of the above Regulations states as follows:

“49. Exemption of the Distribution Licence

- 1) *Until otherwise directed by the Commission, the following classes of persons engaged in the supply of electricity in the State of Orissa shall be deemed to have applied for and granted the Distribution Licence for the purpose contained herein and subject to the fulfilment of the conditions contained in clause (2):*
 - i) *Persons who supply electricity generated by themselves and/or supplied to them by an authorised person, for the purposes of an event or function not exceeding two months, and when the electricity is distributed through a system owned by them.*
 - ii) *Persons who supply electricity to the residential colonies as a part of their activity of maintaining such colonies for use and occupation of their employees and/or for use and occupation of persons providing facilities and services to the employees, where such person procures electricity from any Licensee or from any other source approved by the Commission and distributes the electricity within the residential colonies on no-profit motive basis.*
 - iii) *Persons receiving electricity from the licensee and supplying electricity to their own employees’ colony including ancillary facilities, on no profit basis.*
 - iv) *Persons receiving electricity from the licensee at a single point in a residential or commercial complex and supplying the same to the persons in the same premises, on no profit basis.*
 - v) *Such other persons as the Commission may from time to time by order notify, subject to such terms and conditions as the Commission may direct.*

- 2) *The Licence under clause (1) above shall:*
 - i) *establish the electric line or works and restrict its activity only within the area of operation;*
 - ii) *comply with all applicable rules and regulations concerning the safety and security of the operation.*
- 3) *If any difference or dispute arises as to whether the person is entitled to undertake supply of electricity as a Licensee under this Regulation 49, the decision thereon of the Commission shall be final.”*

In Odisha another Act called Orissa Electricity Reform Act, 1995 also holds the field. Therefore, we also perused the provisions in the Orissa Electricity Reform Act, 1995 in this regard which is saved under Section 185 of the Electricity Act to the extent it is consistent with the Electricity Act, 2003. Section 16 of the Orissa Electricity Reform Act, 1995 provides as follows:

“16. Exemption from the requirement to have a licence. - (1) The Commission may make regulations to grant exemption from the requirement to have a licence, but subject to compliance with such conditions, if any, as may be specified in the regulations :

Provided that the Commission shall not any under such regulations, grant any exemption except with the consent.

- (i) *in any case where electricity is to be supplied in any area for which a local authority is constituted, of that local authority;*
- (ii) *in any case where electricity, is to be supplied in any area forming part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or any building or place in the occupation of the Central Government for defence purposes, of the Central Government;*
- (iii) *in any area falling within the area of supply of a licence of that licensee;*

Provided further that, except in a case falling under Sub-clause (ii) no such consent shall be necessary if the Commission is satisfied that such consent has been unreasonably withheld.

(2) An exemption may be granted to a particular person or to a particular category of persons and for a definite period and every such exemption shall be published in such manner as the Commission considers appropriate for bringing it to the attention of that person or persons of that category and of the public in general.

(3) The exemption granted may be revoked, by the Commission at any time for reasons to be recorded in writing.

(4) An exemption, unless previously revoked, shall continue in force for such period as may be specified in or determined by or under the exemption.”

35. From the perusal of above provisions in the Electricity Act, 2003, Orissa Electricity Reform Act, 1995 and OERC Regulations, 2004 it is clear that Odisha Electricity

Regulatory Commission has full jurisdiction to decide the matter of exemption of any applicant from licence. This is also in conformity with the clarification of Ministry of Power dated 06.05.2014 which confirms that their clarification may be read with other applicable provisions of the Electricity Act, 2003 and policies made thereunder. Hon'ble APTEL in their order in Appeal No. 206/2012 dated 03.05.2013 in Vedanta Aluminium Ltd. Vrs. OERC & Others has observed as follows:

- “47. *The perusal of the notification dated 3.3.2010 would make it evident that the legislation's intention for declaring the developer in SEZ area as deemed distribution licence, is confined only to clause-b of Section 14 of electricity Act, which deals with the grant of license by the appropriate State Commission to any person for distribution of electricity. The said notification has not curtailed the power of State Commission so far as the applicability of other provisions is concerned. The interpretation of various relevant terms was necessary prior to grant of deemed distribution licence by the State Commission. Therefore, the State Commission rightly acted upon those provisions. As a matter of fact, by the said amendment by inserting another proviso to Section 14(b), the context has not been changed as claimed by the Appellant.*
48. *The State Commission, being the apex State Regulatory Authority, has got every power to examine whether the Appellant is adequately equipped to act as a distribution licensee in consonance with other provisions of law.”*

In view of the above discussion and observation of Hon'ble APTEL it is clear that nobody becomes deemed distribution licensee by operation of law only. It is to be examined by the State Commission whether the person is equipped properly to discharge the onerous responsibility of filing tariff application and catering to the requirement of proposed consumers etc. Deemed Distribution Licensee status is not an empty formality. In fact Railways and OPTCL have approached us for declaring Railways as deemed distribution licensee by admitting our jurisdiction. Accordingly, the first question relating to the jurisdiction of this Commission to decide the deemed distribution licensee status is answered.

36. Let us discuss about the second question i.e. Whether Railways (ECoR and SER) are deemed distribution licensees in the State of Odisha in view of third proviso to Section 14 of the Electricity Act, 2003?

Section 173 of the Electricity Act, 2003 provides as follows:

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

Section 175 of the Electricity Act, 2003 provides thus:

“The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”

From conjoint reading of above the provisions of Electricity Act it is clear that the **Railways Act, 1989 has superior applicability over Electricity Act, 2003**. Any provision in the Electricity Act is in addition to Railways Act and not in derogation to it. We fully agree with the contention of Respondent Railways in this regard.

37. Since the Railways Act, 1989 has superior applicability over Electricity Act we mention the provisions in the Railway Act, 1989 at Section 11 (g) which deals with the subject as follows:

“11. XXXXXXXX A Railway Administration may for the purposes of constructing or maintaining a Railway

(a) xxxxxxxxxxxx (f)

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

Railways Act, 1989 is a special enactment relating to Railways and the functioning of the Railways is governed under the said Act.

In General Manager, Northern Railways represented by Union of India Vs. Uttar Pradesh Power Corporation Ltd. & Others, (2012) 3 SCC 329, the Hon’ble Supreme Court had also considered the status of the Railways under Railways Act and not under Electricity Act. The Hon’ble Court held as under:

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

Working of the Railways as far as electricity is concerned is thus limited to transmission and use of electricity for traction purpose.

38. Due to aforesaid provision in the Railways Act and later observation of Hon’ble Supreme Court Railways have got rightful exemption from Section 54 of Electricity Act, 2003 which reads as follows:

“(1) Save as otherwise exempted under this Act, no person other than the Central Transmission Utility or a State Transmission Utility, or a licensee shall transmit or use electricity at a rate exceeding two hundred and fifty watts and one hundred volts –

(a) in any street, or

(b) in any place,-

(i) in which one hundred or more persons are ordinarily likely to be assembled; or

(ii) which is a factory within the meaning of the Factories Act, 1948 (63 of 1948) or a mine within the meaning of the Mines Act, 1952 (35 of 1952); or

(iii) to which the State Government, by general or special order, declares the provisions of this sub-section to apply,

without giving, before the commencement of transmission or use of electricity, not less than seven days’ notice in writing of his intention to the Electrical Inspector and to the District Magistrate, or the Commissioner of Police, as the case may be, containing particulars of the electrical installation and plant, if any, the nature and the purpose of supply and complying with such of the provisions of Part XVII of this Act, as may be applicable:

Provided that nothing in this section shall apply to electricity used for the public carriage of passengers, animals or goods, on, or for the lighting or ventilation of the rolling stock of any railway or tramway subject to the provisions of the Railways Act, 1989 (24 of 1989).

(2) Where any difference or dispute arises as to whether a place is or is not one in which one hundred or more persons are ordinarily likely to be assembled, the matter shall be referred to the State Government, and the decision of the State Government thereon shall be final.

(3) The provisions of this section shall be binding on the Government.”

39. Therefore, Railways can transmit electricity through traction wires which is more than 250 watts and 100 volts in rating without obtaining a transmission licence or related licence condition. In fact Railways have been carrying on these transmission activities without a licence even after enactment of Electricity Act, 2003 which requires a licence for carrying on such activity for others. In that context **Railways is a deemed transmission licensee** under proviso three of Section 14 of the Electricity Act. Since Railways are transmission licensee by operation of law, they are not required to obtain licence from the Commission. Since the Commission has not granted any licence to Railways it cannot give them any condition under Section 16 of the Electricity Act to operate that licence. Distribution activities are clearly distinct from transmission activities and are recognised in the Electricity Act, 2003 as follows:

*“2.(73) **“transmission licensee”** means a licensee authorised to establish or operate transmission lines;*

*(74) **“transmit”** means conveyance of electricity by means of transmission lines and the expression “transmission” shall be construed accordingly;”*

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

*(19) **“distribution system”** means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;”*

40. There is no definition available in the Railways Act regarding transmission and distribution activities. It is only available in the Electricity Act, 2003 which is a specialised Act in the electricity sector. As per Section 175 of the Electricity Act, 2003, the provisions of this Act are in addition to and not in derogation of any other law for the time being in force. Therefore, from the harmonious readings of the Section 11 of the Railways Act which deals with construction and maintenance of work of Railways and definition of activities mentioned as ‘transmission’ and ‘distribution’ in the Electricity Act it is crystal clear that Railways is engaged in the transmission activity in addition to self consumption of electricity. Railways have admitted in their Petition that they are not distributing electricity to the public, therefore, no licence condition is required for them. The contention of Railways that transmission activities can be stretched to distribution activity is misplaced. If at all the Railway is recognised as a deemed distribution licensee under Electricity Act, 2003 several other provisions in the Electricity Act which relate to distribution licensee such as Section 2, 12, 13, 14, 15, 16, 17, 42, 50, 61-65 etc. shall be inoperative and shall create a chaotic situation in the sector and shall render deemed distribution licensee status meaningless. It will also not be sustainable under Electricity Act under which they seek such declaration. These provisions are not in contradiction to any provision in the Railway Act, therefore, valid under Section 175 of the Electricity Act. Licence concept in the electricity sector is as old as Indian Electricity Act, 1910. Section 3 of Indian Electricity Act, 1910 deals with the matter of grant of licence.

“Grant of licenses

3 (1) The State Government may, on application made in the Grant, prescribed form and on payment of the prescribed fee (if any), grant to any person a license to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy,”

From the above, it is clearly understood that the licence under Indian Electricity Act, 1910 covers both supply and transmission activity. When Railways Act, 1989 was enacted the Indian Electricity Act, 1910 was very well in force. In spite of that Railway Act allowed Railways only to transmit energy which is also confirmed by Hon'ble Supreme Court considering nature of handling of energy by Railways. The Railways Act, 1989 does not allow the Railways to supply electricity. The report of Parliamentary Standing Committee on Energy (2002) 31st Report on the Electricity Bill, 2001 has also been brought before us by GRIDCO which clarifies the intention of the Legislature. The relevant extract of the report of the Committee is given below:

“6.42 xxxxxxx

The Committee do not find any justification for the requirement of a licence for Railways for transmitting electricity provided under Section 12 of the Bill, if such transmission lines are not connected to the grid and erected for their own use only.

xxxxxx

20.32

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After considering the arguments of these organisations, the Committee feel that DVC has a strong case for exemption from the Bill. Accordingly, the Committee recommend that DVC should be exempted from the Bill under Clause 168 or any other similar Clause. The Committee have taken note of the request of the Ministry of Railways for exemption from the provisions contained in Clauses 12, 42, 47, 67, 68 and 179. The Committee desires that the Ministry of Railways be exempted from licensing for erecting, maintaining and transmission of electricity, subject to the condition that the transmission network is outside the grid and erected for their own use. The licence would be insisted upon for grid operation. As regards the request of BBMB, the Committee feel that the case of BBMB has no merit to be considered for exemption from the provisions of the Bill.”

From the above observation in the Parliamentary Standing Committee Report it is abundantly clear that the Parliament has never accepted the Railway's Stand as deemed distribution licensee, rather they have recognised Railways as deemed licensee as far as transmission of electricity is concerned

41. Conferment of the Deemed distribution licensee status without licence condition under Section 16 of the Electricity Act is not tenable. A licence must contain rights and obligation of a licensee such as area of operation, nature of consumers, distribution or transmission voltage etc. otherwise the licence shall be incomplete and shall stand inoperative. The contention of Railways for granting them a licence without licence condition cannot be accepted because it will remain in designation only without having any traction to be implemented. Regarding transmission licence,

the Railways Act has superior applicability as we have already discussed. As such they have been carrying out that business without a licence or licence conditions in view of their superior position by virtue of Railways Act, 1989 and Section 54 of the Electricity Act. There is no mention of Railways' carrying out of distribution activity in the Railways Act, 1989. They are only authorised to erect, operate, maintain or repair the network and the installation in connection with the working of the Railways. At the cost of repetition we are reproducing the relevant provision of the Railway Act.

“11. XXXXXXXX A Railway Administration may for the purposes of constructing or maintaining a Railway

(a) xxxxxxxxxxxx (f)

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

Therefore, if Railways are interested for distribution activity they must seek exemption from obtaining the licence from the State Regulatory Commission under relevant Regulations. Further on the issue of exemption of obtaining distribution licence by any Government Department for carrying out distribution activity there is another provision in the Electricity Act under Section 184 which empowers the Central Government to notify the Ministry or Department of Central Government similar in nature with that of the Department dealing with Defence and Atomic Energy to whom the provision of Electricity Act shall not apply. At the time of enactment, Electricity Act has granted such exemptions to the Department of Defence and Atomic Energy and not to Railways. No such notification has been made by the Central Government in respect of Railways under this provision till date. This is because this Section deals with complete exemption from the Act as has been the case with Ministry of Defence and Atomic Energy and not for Railways which seeks partial exemption from the Act for licence only and accordingly has been suitably dealt with under Section 54 of the Electricity Act, 2003. Section 54 of the Electricity Act, 2003, considering provisions of Railways Act, 1989 which has superior applicability, has empowered Railways to transmit and use electricity without obtaining a transmission licence. Whatever Ministry of Power has done is a

clarification only on the third proviso of Section 14 of the Act to be read with other provisions of the Electricity Act as per such clarification.

42. In summary, we are not agreeable to declare Railways a 'deemed distribution licensee' either under the provisions of Railways Act, 1989 or under the Electricity Act, 2003. The Ministry of Power has declared Railways a 'Deemed Licensee' not a 'Deemed Distribution Licensee'. They are 'deemed licensee' for the purpose of transmission licence and not for distribution licence. They can carry on transmission activity without obtaining a transmission licence in addition to consuming power like a normal consumer due to their special and superior status under the Railways Act, 1989 in contrast to the provisions of the Electricity Act, 2003. As a consumer under Electricity Act, 2003 they have full right to avail open access under relevant Regulation made under Electricity Act, 2003.
43. With the above observations, the case is disposed of.

Sd/-
(S. K. Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson