

BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION GANDHINAGAR

Petition No. 1859 of 2020

In the matter of:

Petition for adjudication under Section 86 (1)(f) and other applicable provisions of the Electricity Act, 2003 read with the GERC (Terms and Conditions for IntraState Open Access) Regulations, 2015 for the unlawful denial of Medium-Term Open Access from J.B. Renewable LLP to J.B. Ecotex LLP.

Petitioner No. 1 : J.B. Renewable LLP

Petitioner No. 2 : J.B. Ecotex LLP

Represented by : Ld. Adv. Arijit Mitra

V/s.

Respondent No. 1 : Dakshin Gujarat Vij Company Limited

Represented by : Ld. Adv. Ms. Shrishti Khindaria along with
Mr. K.B. Varsana

Respondent No. 2 : Gujarat Energy Transmission Corporation Limited

Represented by : Ld. Adv. Ms. Shrishti Khindaria along with
Mr. Shobhraj Jaiswal.

Respondent No. 3 : Gujarat Urja Vikas Nigam Limited,

Represented by : Ld. Adv. Ms. Shrishti Khindaria along with
Mr. Kishor Lakhani

Respondent No. 4 : Madhya Gujarat Vij Company Limited

Represented by : Nobody was present.

Respondent No. 5 : Energy & Petrochemicals Department,
Government of Gujarat

Represented by : Nobody was present.

CORAM:

Mehul M. Gandhi, Member

S. R. Pandey, Member

Date: 12/11/2025

ORDER

1. The present petition has been filed by the Petitioners, J.B. Renewable LLP (Petitioner No. 1) and J.B. Ecotex LLP (Petitioner No. 2), for adjudication under Section 86 (1)(f) and other applicable provisions of the Electricity Act, 2003 read with the GERC (Terms and Conditions for IntraState Open Access) Regulations, 2015 for the unlawful denial of Medium Term Open Access from J.B. Renewable LLP to J.B. Ecotex LLP.
2. The facts mentioned in the Petition are as under:
 - 2.1. The Petitioner No. 1, J.B. Renewable LLP, owns a wind farm of 2.10 MW capacity in Village: Mohali, Taluka: Abdasa, Kutch, Gujarat. The Petitioner No. 1 intends to sell power to Petitioner No. 2, J.B. Ecotex LLP, from its wind farm.
 - 2.2. The Petitioner No. 2 is the manufacturing unit and a consumer of Respondent No. 1, Dakshin Gujarat Vij Company Limited (DGVCL), with consumer no. 62789 having contract demand of 5000 kVA at premises bearing BL. No. 195, 196, 197, Vill.: Dhamdod, Tal.: Mangrol, Gujarat.
 - 2.3. The Respondent No. 1, DGVCL, is a distribution licensee with its area of supply in Surat and is concerned with granting of NOC for open access transactions. The Respondent No. 2, Gujarat Energy Transmission Corporation Limited (GETCO) is a transmission licensee in the State of Gujarat.
 - 2.4. The Petitioners have submitted that the Gujarat Wind Power Policy, 2016, was notified on 02.08.2016 by the Government of Gujarat, which, inter-alia, facilitates Open Access from wind power projects. The above referred policy, inter-alia, provides as follows:

“Their date of commissioning or for the lifespan of the WTGs, whichever is earlier.

Earlier Wind power Policy-2013 published vide G.R. dt.25/07/2013 No. EDA-10-2001-3054-B stands extended further till dt.01/08/2016.

3. ELIGIBLE UNIT

Any Individual, company body or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, will be eligible for setting up of WTGs, either for the purpose of captive use or for selling of electricity to obligated entity(ies) i.e. Distribution Licensee or to any other third party.

Explanation: The use of electricity for own consumption at end use locations by the owner of WTGs shall be considered as Captive use. In case of Group Captive, 100% of equity amount is to be invested/ held by Captive Users and they are required to consume entire generation in the ratio of their equity amount invested with a variation not exceeding 10% in consumption on annual basis.

4. ELIGIBLE SITE & LAND

The WTGs may be set up at sites notified by Gujarat Energy Development Agency (GEDA) and/or any other sites identified as potential site, within the State by the Nodal Agency or Developer(s).

5. WTG INSTALLATION CAPACITY FOR CAPTIVE USE

WTG installed capacity in KW/MW for captive use shall be allowed up to 100% of Contracted Demand/Sanctioned Load (in KW/Kva/Mva) of Consumer in case of MSME unit(s) and 50% of Contracted Demand/Sanctioned Load (in KW/Kva/Mva) of other consumers, consuming power from distribution licensee(s).

In computing 100%/50% of the Sanctioned Load/Contracted Demand, earlier installed Wind power capacity will also be considered, however, if already commissioned Wind power capacity before introduction of this Policy is more than 100%/50% of the Sanctioned load/Contracted Demand, then earlier installed plants will be allowed to continue.”

- 2.5. It is submitted that the 2016 Wind Policy specifically restricts captive use of wind power up to 50% of contract demand / sanctioned load in case of non MSME Units. Such contract demand restrictions are not specified for Wheeling of power to third-party from wind power project. The Petitioner No. 2 is a third-party consumer buying power from Wind power project of the Petitioner No. 1.

2.6. It is submitted that the Gujarat Solar Power Policy, 2015 was notified on 13.08.2015. The said 2015 Policy applies to Solar Power Generators (SPGs) and does not apply to the Petitioners herein. Clause 9.6 of the said Solar 2015 policy reads as follows:

“9.6 Solar Projects with Sale of Power to Third Party under Open- Access

Solar Developers may set up SPGs for sale of power to Third Parties under Open-Access, both directly or under the REC Mechanism:

Contracted Capacity: Up to a maximum of 50% of the sanctioned load / contract demand of the Consumer.”

2.7. It is submitted that the Gujarat Wind Solar Hybrid Power Policy, 2018, was notified on 20.06.2018. Clause 5 of said Policy provides for Type A projects and Type B projects. The Type A project includes conversion of existing / under construction Wind or Solar Power Plants into hybrid projects, based on registration certificate issued by GEDA. The Type B project includes new wind/solar hybrid power generation projects. It is submitted that the WTG which is the subject matter of the present Petition installed by the Petitioner No. 1 is not a wind-solar hybrid power generation project / system. The Petitioner No. 1 has not installed solar PV plant at its existing location and is, therefore, not a hybridization of the existing project as per Clause 5.3 of the aforesaid Policy. Clause 18 of the said Policy inter-alia, provides as follows

“18. Restrictions

....

18.3 For captive and third party model, the power contracted the hybrid project shall be 50% of the sanctioned load of consumer for each solar and wind respectively. However, consumers may set up hybrid project to extent of meeting RPO without limit of contracted demand/sanctioned load.”

“24. Power to Interpret

If there is any confusion or dispute about the meaning, intent or purpose of any provision of this Policy, the interpretations given by Energy & Petrochemicals Department, Government of Gujarat shall be final and binding to all concerned.

Notwithstanding anything contained in this resolution, the provisions of the Electricity Act-2003 and GERC Order(s) as issued from time to time, shall prevail, for the purpose of implementation of this policy.”

- 2.8. It is submitted that earlier the Petitioner No. 2 has installed and owns a Wind Turbine Generator (WTG) of installed capacity of 2.10 MW at District: Jamnagar, Gujarat, for captive use. Now, the Petitioner No. 1 owns the said Wind Turbine Generator (WTG) of installed capacity of 2.10 MW at District: Kutch, Gujarat.
- 2.9. It is submitted that the Petitioner No. 1 is eligible for all the applicable incentives under the Gujarat Wind Power Policy, 2016, for a period of 25 years from the date of commissioning of its WTG or for the life span of the WTG, whichever is earlier.
- 2.10. The Respondent No. 2, vide letter dated 26.09.2017, conveyed to the Petitioner No. 2 that Bulk Power Transmission Agreement (BPTA) dated 22.09.2017 has been executed with Respondent No. 2 for Transmission of energy generated at the wind farm to the captive unit located in the vicinity of Respondent No. 1. The BPTA had a tenure of 25 years.
- 2.11. The Respondent No. 2 has executed agreement dated 29.09.2018 with Petitioner No. 2 for wheeling of energy generated at their own wind farm to captive unit located in vicinity of Respondent No. 1.
- 2.12. The Respondent No. 1, vide its letter and application dated 26.07.2019, applied to the Respondent No. 2 for execution of wheeling agreement.
- 2.13. On 30.08.2019, the Petitioner No. 1, Respondent No. 2 and Petitioner No. 2, executed a provisional BPTA.
- 2.14. The Petitioner No. 1 and Petitioner No. 2 executed a Power Purchase Agreement (PPA) dated 19.07.2019.
- 2.15. The Petitioner No. 2, by letter dated 20.07.2019, received a 'No Due Certificate' from the Respondent No. 1.

- 2.16. The Respondent No. 2, vide its letter dated 30.08.2019, wrote to the Petitioners, inter-alia, advising that third-party arrangement from Petitioner No. 1 to Petitioner No. 2 for wheeling under LTOA (third-party sale) cannot be allowed more than 50% of contract demand as capacity restriction is applicable at consumption end.
- 2.17. The Petitioners have submitted that the denial of LTOA on the ground that wheeling of 2.10 MW exceeds capacity restriction of 50% of contract demand at consumption end, is wholly unlawful and in the teeth of the GERC Open Access Regulations read with Section 42 of the Electricity Act, 2003.
- 2.18. The Gujarat Electricity Regulation Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011 was notified on 01.06.2011. Regulation 3(1)(m) defines "Long Term Open Access" as the right to use the Intra-state transmission system or distribution system for a period exceeding 12 years but not exceeding 25 years. There is no provision in the said Regulations which contemplates a restriction that has been placed by way of the impugned letter dated 30.08.2019 of the Respondent No. 1. The said Regulations do not restrict LTOA where the quantum for transmission exceeds 50% of the contract demand at the consumption end.
- 2.19. It is submitted that the Hon'ble Supreme Court of India has held in Power Trading Corporation Vs. Central Electricity Regulatory Commission & Ors, reported in (2010) 4 SCC 603, that if there is a Regulation then the order has to be in consonance with Regulation. Hence, when the GERC Open Access Regulations do not restrict LTOA if the quantum of power to be transmitted exceeds 50% of the contract demand at consumption end, the Respondent No. 1 vide its impugned letter cannot impose such a condition on its own. Such an action would be an ex-facie illegality. Accordingly, the impugned letter dated 30.08.2019 is contrary to the law settled by the Hon'ble Supreme Court and is accordingly liable to be set aside and quashed at the threshold.

2.20. It is further submitted that there is no such restriction in the Gujarat Wind Power Policy, 2016 to disallow LTOA on the ground that the quantum to be transmitted exceeds 50% of the contract demand. The 2016 Policy specifically restricts the captive use of wind power up to 50% of contract demand / sanctioned load in case of non MSME Units. Accordingly, the impugned letter dated 30.08.2019 is contrary to the said 2016 Wind Policy and GERC Order 3 of 2016 and is liable to be set aside on this ground also. This submission is without prejudice to the submission that the Government of Gujarat has no jurisdiction whatsoever to decide or prescribe the terms and conditions of open access. In fact, on the other hand Section 2(47) of the Electricity Act, 2003 provides that “open access” is to be “in accordance with the Regulation specified by the Appropriate Commission”. Hence, there is no scope in the legislature for the State Government to prescribe terms and conditions of open access.

2.21. It is apprehended that the Respondent No. 1 is erroneously and unlawfully applying the provisions of Clause 18.3 of the Gujarat Wind Solar Hybrid Policy, 2018 which is applicable to Hybrid Projects. The said Policy, inter-alia, provides that for third-party model, the power contracted with the hybrid project shall be 50% of the sanctioned load of consumer for each solar and wind respectively. However, consumers may set up hybrid project to extent of meeting RPO without limit of contracted demand / sanctioned load. It is submitted that firstly, the WTG installed by Petitioner No. 1 is not a hybrid project within the meaning of the aforesaid 2018 Policy. Secondly, the Petitioner No. 1 has not installed a solar power plant within the existing premises where the WTG is already installed. Hence, the 2018 Policy is not applicable to the transaction between the Petitioners herein. Thirdly, and without prejudice to the aforesaid contentions, the Petitioner No. 1 is specifically entitled under the said 2018 Policy to meet its RPO without limit of contracted demand / sanctioned load. Accordingly, the impugned letter dated 30.08.2019 is contrary to the said 2018 Policy and is liable to be set aside on this ground also. In any case it is submitted that the 2018 Policy is not binding on the Commission in view of the following clause therein:

“Notwithstanding anything contained in this resolution, the provisions of the Electricity Act-2003 and GERC Order(s) as issued from time to time, shall prevail, for the purpose of implementation of this policy.”

2.22. The Petitioner have submitted that the Respondent No. 1 appears to have erroneously and wrongly declined to grant LTOA by relying on the Wind Solar Hybrid Policy which does not apply to LTOA transaction between the Petitioners. On this ground alone, the said impugned letter is liable to be set aside and quashed.

2.23. It is submitted that it is the Commission which is the granter of open access in terms of Section 42(2) of the Electricity Act, 2003. It is only with the Regulations specified by the Commission that LTOA shall have to be granted. The Respondents are unlawfully acting upon the policies of the State Government to deny open access to the Petitioners. Whereas on the other hand there is no provision in the Electricity Act, 2003 under which the State Government has jurisdiction to make policy on open access. It is also submitted that there is no restriction in the Electricity Act, 2003 on the basis of which the LTOA could have been declined on the ground that the quantum to be transmitted exceeds the contract demand at consumption end. It is submitted that neither does the GERC Open Access Regulations mandate that the contract demand is to be reduced to the extent of Open Access sought by the consumer or that the open access cannot be given if the quantum to be transmitted exceeds the contract demand.

2.24. The impugned letter of Respondent No. 1 is ultra vires the Electricity Act, 2003, and strikes at its root. The impugned letter defeats the statutory mandate of promotion of competition, blunting one of the most fundamental and important corner stones of the Electricity Act, 2003. The impugned order is also contrary to Section 66 which mandates that market needs to be developed. The impugned Regulations seek to deprive the consumers from availing supply of power using open access.

2.25. It is submitted that the impugned letter violates the rights of the Petitioners under Article 19(1)(g) of the Constitution of India to carry on their business. The

impugned letter declining to grant LTOA substantially and adversely the rights of the Petitioners herein. It is submitted that the illegality in the scope and restrictions contained in the impugned letter of Respondent No. 1 is manifest in the said letter.

2.26. The Petitioners have prayed as under:

- (a) *Declare that open access for third-party sale is not restricted for exceeding capacity of 50% of contract demand at the consumption end;*
- (b) *Set aside and quash letter dated 30.08.2019 issued by Respondent No. 1 and declare the same to be contrary to the GERC Open Access Regulations read with Section 42 of the 2003 Act, and illegal;*
- (c) *Order and direct the Respondent No. 1 to forthwith withdraw and /or cancel the impugned letter dated 30.08.2019;*
- (d) *Direct the Respondents to grant LTOA to the Petitioners for transmission of 2.10 MW power from Petitioner No. 1 to Petitioner No. 2;*
- (e) *During the hearing and final disposal of this Petition*
 - i. *the operation of the impugned letter to the extent challenged herein, be stayed;*
 - ii. *the Respondents be restrained from implementing or enforcing the said impugned letter to the extent challenged herein in any manner whatsoever;*
- (f) *For ad-interim relief in terms of prayer clause (d) hereinabove;*
- (g) *Pass any other or further orders that may be necessary in the interest of justice.*

3. The Respondent No. 1, DGVCL, has filed its reply to the present Petition as under:

3.1. It is submitted that the Gujarat Wind Power Policy 2016 (2016 Policy) was introduced on 02.08.2016 and would operate until 30.06.2020. The Policy would apply to the wind turbine generators installed and commissioned during the operative period.

"2. OPERATIVE PERIOD

This Policy will come into effect from the date of G.R. and shall remain in operation for a period up to 30th June 2021.

The Wind Turbine Generators (WTGs) installed and commissioned during the Operative Period shall become eligible for the benefits and incentives declared under this Policy, for a period of 25 years from their date of commissioning or for the lifespan of the WTGs, whichever is earlier.”

3.2. It is submitted that there is no doubt that the Petitioner was commissioned within the operative period of the 2016 Policy and therefore falls within the scope of the Policy.

3.3. The said Policy recognizes the installation of capacity for captive use as under:

“5. WTG INSTALLATION CAPACITY FOR CAPTIVE USE

WTG installed capacity in KW/MW for captive use shall be allowed up to 100% of Contracted Demand/Sanctioned Load (in KW/Kva/Mva) of Consumer in case of MSME unit(s) and 50% of Contracted Demand/Sanctioned Load (in KW/Kva/Mva) of other consumers, consuming power from distribution licensee(s).

In computing 100%/50% of the Sanctioned Load/Contracted Demand, earlier installed Wind power capacity will also be considered, however, if already commissioned Wind power capacity before introduction of this Policy is more than 100%/50% of the Sanctioned load/Contracted Demand, then earlier installed plants will be allowed to continue.

However above limit shall not be applicable to the Captive Consumer (MSME/Non MSME) who establishes single Wind Turbine up to 2.7 MW”

3.4. Thus, 2016 Policy provides the benefit to wind turbine generators but recognizes that the capacity should not be more than 50% of the sanctioned load / contract demand of the consumer. The Policy is also noted by the Commission in its Order No. 2 of 2016 dated 30.08.2016.

3.5. It is submitted that similar restrictions on the capacity were included in the Gujarat Solar Policy 2015 and Hybrid Policy 2018:

a. Gujarat Solar Power Policy 2015

“9.1.2 For Residential and Government Consumers

The following provisions shall be applicable to Residential Consumers and Government Buildings:

CAPACITY Up to a maximum of 50% of Consumer's sanctioned load.

.....

9.1.3 For Industrial, Commercial and Other Consumers Industrial, Commercial and Other Consumers shall be provided with two options for contractual arrangement as a part of promotion for rooftop solar systems:

CAPACITY Up to a maximum of 50% of the sanctioned load/ contract demand of the Consumer.

9.2 Solar Projects for Captive Consumption Solar projects set up for captive use, both directly or under the REC mechanism.

CAPACITY Up to a maximum of 50% of the contract demand of the Consumer.

9.6 Solar Projects with Sale of Power to Third Party under Open-Access Solar Developers may set up SPGs for sale of power to Third Parties under Open-Access, both directly or under the REC mechanism.

CONTRACTED' CAPACITY Up to a maximum of 50% of the sanctioned load/ contract demand of the Consumer”

b. Gujarat Wind - Solar Hybrid Power Policy 2018 dated 20.08.2018

“18. RESTRICTION

.....

18.3 For captive and third party models, the power contracted from the hybrid project shall be 50% of the sanctioned load of consumer for each solar and wind respectively. However, consumers may set up Hybrid Project to extent of meeting RPO without limit of Contracted Demand / Sanctioned Load.”

3.6. The Respondent No. 1 submitted that the intent of the inclusion of capacity ceiling of 50% of Sanctioned Load / Contracted Demand was that industrial and

commercial consumers are cross subsidizing other cross subsidized category of consumers such as BPL, Agriculture etc. The load factor for such non-residential consumers, in general, is about 20% which equivalent to capacity utilization factor of solar capacity and the consumer can meet 50% of their requirement through renewable capacity and will continue to purchase balance 50% requirement from distribution licensees and thereby contribute towards cross subsidization to other categories. In case, the capacity ceiling norms is removed, there could have been financial implications on Distribution licensees as Distribution licensees have to keep all arrangement in place to ensure power supply to consumer when there is no renewable generation. This would lead to increase in tariff of the consumer who actually requires cross subsidization.

- 3.7. The Government of Gujarat Policy provided various benefits to renewable projects being set up in the State of Gujarat and such benefits have been provided with the intention to restrict the capacity to 50%. The policies for Solar and Solar-Wind Hybrid power projects both provide for such capacity restriction in addition to the Wind Policy. The said Policies provide for such restriction irrespective of whether it is meant for captive use or third-party sale. There is no logic or rationale for why the wind power projects should have such restriction only for captive use and not for third-party sale.
- 3.8. It is submitted that the restriction is not on the generation but the consumer - that the total consumption from such sources should not be more than 50%.
- 3.9. There has to be a rationale and judicious interpretation of the Policies issued by the Government of Gujarat. The narrow and restrictive interpretation by the Petitioner would adversely affect the distribution licensees which was not the intention of the Government Policies.
- 3.10. It is submitted that the contention of the Petitioner that the 50% limitation is disincentivizing is not correct. The restriction has been provided in the Government Policy under which the Petitioner is seeking benefits. The Petitioner cannot take all the benefits and disregard the restrictions. It is submitted that the Policy provides certain benefits to power projects and also provides eligibility

conditions and restrictions. It is the discretion of the Government of Gujarat to provide benefits as well as impose restrictions as may be considered appropriate.

- 3.11. It is submitted that the Petitioner No. 2 is a HT Consumer of DGVCL bearing consumer number 62789 having contract demand of 5000 kVA under the jurisdiction of DGVCL. In view of the Policy and the restriction of 50%, the Petitioner No. 2 is entitled to wheeling of power of 2.25 MW (50% capacity of contract demand considering 0.9 PF). The Petitioner No. 2 already has a wheeling agreement for 2.10 MW capacity wind turbine generator for captive use.
- 3.12. The Petitioners are now seeking for wheeling of additional 2.10 MW which would mean that the total capacity is 4.20 MW which is much more than 50% of the contract demand. This is not permissible under the Government of Gujarat Policy. The wheeling agreement for 2.10 MW can thus not be executed. DGVCL had accordingly duly informed the Petitioners of the same vide letter dated 30.08.2019.
- 3.13. It is submitted that the Petitioner No. 2 already has a capacity of 2.10 MW. The restriction of capacity is on consumer. If the Petitioner No. 1 wants to sell the power to any other consumer (who is within the restriction) or to the licensee while taking the incentives provided in the Wind Power Policy, it can. However, since it wants to sell to Petitioner No. 2, the restriction on Petitioner No. 2's capacity becomes relevant.
- 3.14. It is submitted that the reliance placed by the Petitioner on Section 42 and Open Access Regulations or the decision of the Hon'ble Supreme Court is misconceived. The Petitioner is seeking benefits under the 2016 Policy. The benefits under 2016 Policy are only applicable for capacity of 50% of contract demand. The Petitioner could have chosen to seek open access under the Open Access Regulations without seeking any benefits under the 2016 Policy. The benefits granted under 2016 Policy may otherwise not be applicable to renewable projects or other project seeking open access under Open Access Regulations. These are specific benefits granted under 2016 Policy to eligible projects.

3.15. It is further contended that when the Government of Gujarat is granting certain benefits to wind projects, it can limit the applicability of those benefits. There can be no claim that unlimited benefits should be granted to the wind projects. The Petitioners could have sought open access / wheeling under the normal laws and without the benefits under 2016 Policy.

4. The Petitioners, vide affidavit dated 19.10.2021, additionally submitted their rejoinder to the reply filed by Respondent No. 1, DGVCL, inter alia repeating the submissions made in the Petition.

4.1. It is submitted that on one hand the Respondent No. 1 states that the Petitioner No. 1, which is a generating company, is a beneficiary of benefits given under the Gujarat Wind Power Policy, 2016 (2016 Policy) which has given various benefits to renewable projects being set up in the State of Gujarat. The Respondent No. 1 states that the Petitioner No. 1 generating company cannot be allowed to take benefit over and above those concessions and benefits given under the 2016 Policy. The Respondent No. 1 states that the benefits under the 2016 policy are only applicable for capacity of 50% of contract demand and there can be no claim that unlimited benefit should be granted to the Wind Projects. The Respondent No.1 states that the Petitioner No.1 generating company wants to take advantage of benefit under the 2016 Wind Power Policy for the entire capacity which is contrary to the said 2016 Policy. The above would show that the Respondent No.1 has sought to defend its letter dated 30.08.2019 on the ground that the Wind Power Project i.e. the Petitioner No.1 generating company having been benefited by various concessions advanced by the State Government of Gujarat, cannot supply more than 50% of its capacity.

4.2. While on the other hand, the Respondent No. 1 states, that the Petitioner No. 1 generating company, being a beneficiary of the 2016 Policy, is restricted in its generation and sale of electricity, in contradiction to its argument, now states that the Petitioner No. 2, a consumer of Respondent No. 1, which is providing cross subsidy to BPL category, agriculture category etc., is restricted to off-take more than 50% of its contract demand. The Respondent No.1 states that there will be financial implications on it, if full capacity of the Petitioner No. 2 were to be

sourced by it directly from a generating company. The Respondent No. 1 states that the Petitioner No. 2 consumer is entitled to wheel power of only 50% of its contract demand.

- 4.3. It is submitted that the above two contentions are a complete contradiction in terms, only showing a mala-fide intent, which is an approach to harass the consumers and the generating company, which will lead to unjust enrichment and arbitrariness.
- 4.4. It is submitted that the Respondent No. 1 states that there is no logic or rationale as to why the wind power project should have such restriction “only for captive use” and not for “third-party sale”. Therefore, it is clear that the Respondent No. 1 is seeking to enlarge the applicability of the Gujarat Wind Power Policy, 2016 in a manner that suits the Respondent No. 1 in the form of a reply in the present Petition. This will be entirely impermissible, it will be bereft of jurisdiction for the Commission to expand the applicability of the 2016 Policy.
- 4.5. It is submitted that the Respondent No. 1 has admitted that there cannot be a narrow and restrictive interpretation of the 2016 Policy, as that would adversely affect the distribution licensees, which was not the intention of the State Government Policy. The Respondent No. 1 has entirely lost sight of the fact that the Petitioner No. 2 consumer is a cross-subsidizing consumer and will be paying cross subsidy for procuring power from wind turbine facility of the Petitioner No. 1. Therefore, the purported aspect of financial implication on Respondent No. 1 has been taken care of under the provisions of applicability of cross subsidy surcharge and cross subsidy in the retail supply tariff for the electricity purchased by the Petitioner No. 2 from the DISCOMs in Gujarat.
- 4.6. The Respondent No. 1 is also seeking to apply the Gujarat Wind-Solar Hybrid Policy, 2018 (2018 Policy) dated 20.08.2018 to the wind turbine generation of Petitioner No. 1, despite its not being a Wind-Solar Hybrid Project. Therefore, the 2018 Policy cannot apply to the Petitioner No. 1 at all. The approach of Respondent No. 1 to extend the applicability of the 2018 Policy to the WTGs under

the Gujarat Wind Power Policy, 2016, is legally unsustainable and has been made to be rejected.

- 4.7. It is submitted that the Petitioner No. 2 is a subsidizing consumer which contributes towards cross subsidization towards other categories such as BPL, agriculture, etc. in the form of cross subsidy inbuilt into the retail supply tariff. The Petitioner No. 2 will also be paying cross subsidy surcharge on the electricity supplied to it by the Petitioner No. 1 wind turbine generator.
- 4.8. It is submitted that the Respondent No. 1 is seeking to enlarge the applicability of the 2016 Policy and the 2018 Policy, which is not only impermissible in law, but is also outside the jurisdiction of the Commission. If at all, the Respondent No. 1 had to seek a modification of the 2016 Policy and the 2018 Policy from the Government of Gujarat, which the Respondent No. 1 has not done. The Respondent No. 1 has not challenged the 2016 Policy or the 2018 Policy before the appropriate Court of Law. In view of the above, the contentions advanced by the Respondent No. 1, is entirely misconceived and has to be rejected. Without prejudice to the foregoing submissions, it is submitted that the power under Section 42 of the Electricity Act, 2003 cannot be in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government / Executive; Executive instructions or Notification. If these are contrary to the statute they shall be read down as ultra vires of the parent statute.
- 4.9. In this regard, Para 20-22 of Appeal No. 106 & 107 of 2009 in Re: BSES Rajdhani Power Limited may be referred.
- A) The 2016 and 2018 Policies are in the nature of executive instruction/ notification issued by the Government / executive inter-alia on the off-take requirements of CPPs/consumers by open access. Such Policies can neither have an over-riding effect on the power of the Commission to decide whether the off-take requirements of CPPs / consumers by open access should be restricted or not.

B) The said Policies cannot eclipse the statutory powers under Section 42 of the Act. In fact, there is no section / provision in the Electricity Act, 2003 empowering the State Government to restrict off-take requirements of CPPs / consumers by open access. Hence, the Policies ought to be read down as ultra-virus the parent statute.

4.10. The Petitioners have submitted that the Respondent No. 1 has made submissions which are clear contradiction in terms. On one hand, the Respondent No. 1 states that the restriction is not on the generator, but on the consumer that the total consumption from such sources should not be more than 50%. The consumer (the Petitioner No. 1) anyway will be procuring 50% of its contract demand from a captive power plant (not the WTG of the Petitioner No. 1). But on the other hand, the Respondent No. 1 is seeking to restrict the Petitioner No. 1 generating company to supply power to Petitioner No. 2 consumer. On one hand, the Respondent No. 1 states that the Petitioner No. 1 generating company is taking benefits under the 2016 Policy which has encouraged renewable projects, but on the other hand the Respondent No. 1 is seeking to penalize the Petitioner No. 2 despite the fact that the Petitioner No. 2 is not affected by the 2016 Policy qua the WTG of Petitioner No. 1, since it is not a captive power plant of the Petitioner No. 2.

4.11. It is submitted that despite having applied for Open Access in 2019, till date no Open Access has been granted.

5. Subsequently, the Petitioners, vide affidavit dated 11.05.2023, filed their rejoinder in the present Petition.

5.1. It is submitted that the present Petition has challenged the action of the Respondents who had denied the LTOA to the Petitioners by violation of the provisions of the GERC Wind Tariff Order No. 2 of 2016 dated 30.08.2016 and provision of the Electricity Act, 2003, GERC Open Access Regulations, 2011 and Gujarat Government Wind Power Policy 2016.

- 5.2. The Respondent No. 2 has granted the LTOA and collected the transmission charge from September-2019 to February-2020 as per the provisions of the GERC Open Access Regulations, Tariff Order and with consideration of the provision of the Electricity Act, 2003, rules framed under it and Government of Gujarat Wind Power Policy 2016.
- 5.3. The Respondent No. 1 had denied the LTOA or wheeling of power from the generating station of the Petitioner No. 1 to consumption place of the Petitioner No. 2, on 30.08.2019, however, the Petitioner tried to resolve the issue on mutual discussion basis but the same was in vain.
- 5.4. It is submitted that the Respondent No. 1 has not given setoff of the wind energy from September-2019 to February-2020, which is partly and subsequent events after filling of the Petition. The Respondent No. 1 who has denied the LTOA vide its letter dated 30.08.2019 to the Petitioner, affect that the Petitioner No. 2 is deprived from the setoff of the wind energy which is generated and injected from the generating station of the Petitioner No. 1 into the grid and for such energy the Petitioner have paid the necessary transmission charges also, however, the Respondent No. 1 has denied to sign the energy wheeling agreement and also incorporated various clauses in it with violation of the Commission's Wind Tariff Order No. 2 of 2016, Open Access Regulations and provisions of the Electricity Act, 2003.
- 5.5. It is submitted that the action of the Respondent No. 1 to deny the wheeling agreement based on letter dated 30.08.2019 resulted to denial of the setoff of the energy i.e. 2569247 units from the month of September-2019 to February-2020. The details of the same is shown in Table below:

Month	Generation	Units after Transmission Loss
September-19	315645	274611
October-19	279638	243285
November-19	555171	482999
December-19	742842	646273
January-20	570484	496321

Month	Generation	Units after Transmission Loss
February-20	489377	425758
Total	2953157	2569247

- 5.6. The Petitioners have submitted that the Respondent No. 1's action is illegal arbitrary and with violation of the provision of the Act, rules and Regulations, framed under it, GERC Wind Tariff order and Government of Gujarat Wind Energy Policy-2016 etc. Therefore, the said communication dated 30.08.2019 may be declared illegal arbitrary and also the Respondent No. 1 be directed to give setoff of the said energy into the bills of the Petitioner No. 2 monthly bills of September-2019 to February-2020.
- 5.7. It is submitted that the energy generated from the Petitioner No. 1 generating station is injected into the grid and transmit up to the transmission sub-station of the Respondent No. 2, from where it was prayed to allow to consume in Respondent No. 1's Discom area. The said energy is received by the Respondent No. 1 and sold to other consumers and recovered the amount from them without paying any amount to the Petitioners. Thus, the Respondent No. 1, which is a Government company, is in violation of the provisions of Act, rules and Regulations and carry out undue profit and deprived the Petitioners to procure energy from the third-party sale permitted under the Electricity Act, 2003.
- 5.8. It is submitted that the Petitioner No. 1, is a renewable Energy Generator owning 2.10 MW of wind turbine generator, installed at Village: Mohali, Taluka: Abdasa, Kutch, Gujarat. The WTG was commissioned on 18.06.2018. Initially, the owner of the said WTG was M/s. Suzlon Energy Limited and it was selling the power to the Petitioner No. 2 under MTOA. The same was granted by the Respondent No. 2 and Respondent No. 1 vide its agreement with GETCO dated 29.09.2018 and agreement with Respondent No. 1 dated 10.10.2018.
- 5.9. The above transmission and wheeling of energy was allowed by the Respondent No. 1 and 2 to the Petitioner No. 2 under third-party sale under mid-term open access for a period of 6 months i.e. from 01.10.2018 to 31.03.2019.

- 5.10. The aforesaid WTG of 2.10 MW of M/s Suzlon Energy Limited was procured and transferred to Petitioner No. 1. The transfer permission issued by GEDA dated 25.07.2019. Based on this the WTG is transferred to M/s J. B. Renewable LLP.
- 5.11. The Respondent No. 2, vide its letter dated 30.08.2019, has granted the permission to transmit the energy generated from the said WTG by executing Bulk Power Transmission Agreement dated 30.08.2019, for 25 years.
- 5.12. It is further submitted that the energy generated from the WTG of 2.10 MW of M/s Suzlon Energy Limited was later on purchase by Petitioner No. 1. The M/s Suzlon Energy Limited was permitted by the Respondent No. 1 and 2 to transmit and wheel the renewable energy from the said WTG to the Petitioner No. 2, the consumption place and setoff of the energy was given by the Respondent No. 1 and 2 to the Petitioner No. 2 in its monthly bills. The Respondent No. 1 and 2 have also recovered the applicable Open Access Charges from the Petitioner No. 1.
- 5.13. After purchase of 2.10 MW WTG by the Petitioner No. 1 had approached to the GETCO for transmission of energy generated from 2.10 MW WTG to the Petitioner No. 2 place, for medium term period and provide MTOA. GETCO has granted the same vide its letter dated 30.08.2019 and also executed the provisional BPTA for third-party sale of energy from the Generating unit of Petitioner No. 1.
- 5.14. It is submitted that the Respondent No. 2 has charged the Transmission charge from date of BPTA i.e. 30.08.2019 to February-2020, for transmission of the energy generated from 2.10 MW of WTG of the Petitioner No. 1 injected into the grid as per BPTA, to transmit / wheel the energy to the place of the Petitioner No. 2. The Respondent has recovered transmission charges as per the bill invoices raised by the Respondent No. 2 and the payment of the same was also made for the month from September-2019 to February-2020, by the Petitioner.
- 5.15. Moreover, the original WTG owner of 2.10 MW was M/s Suzlon Energy Limited, who had sell the same generating unit to the Petitioner No. 1 and the transfer permission was issued by GEDA on 25.07.2019. The Petitioners and M/s Suzlon Energy Limited had informed / intimated to the Respondents and SLDC for change

of name of ownership of the generator from M/s Suzlon Energy Limited to M/s J.B. Renewable Energy LLP Limited and reflect the same in the energy accounting statement issued by SLDC for giving setoff of energy from 2.10 MW WTG of M/s Suzlon Energy Limited (M/S J.B. Renewable Energy LLP Limited) to wheel the energy to J. B. Ecotex Limited, thus the LTOA / MTOA granted by GETCO / Discom be given effect as energy settlement and setoff of energy, in the monthly bills of Petitioner No. 2 against the energy injected from 2.10 MW WTG into the grid. The GETCO / SLDC issued the energy account for the month of September-2019 to February-2020, wherein, it is recognized that the different quantum of energy injected from 2.10 MW WTG of M/s. Suzlon Energy Limited who was the original owner of the WTG and obtained LTOA / MTOA to transmit and wheel the said energy for giving setoff of the said energy to the Respondent No. 1 in the monthly bill account of J.B. Ecotex Limited, who is consumer. The Petitioner No. 1's WTG has generated the renewable energy from the month of September-2019 to February-2020 and injected the same into the grid under third-party sale and reflected in energy account issued by Gujarat SLDC vide their energy accounting certificates. The details of the same is shown in the Table submitted in above para.

- 5.16. It is submitted that the renewable energy generated from the WTG from the same WTG which was originally owned by M/s Suzlon Energy Limited later purchased by the Petitioner No. 1 was injected into the grid to supply to the Petitioner No. 2 and the same was earlier agreed by the Respondent No. 1 and 2 up to 31.03. 2019. After August-2019 i.e. September-2019 onward up to February-2020, the Respondent No. 2 also granted the transmission of the energy generated from the project up to the place of Petitioner No. 2 and also recovered the necessary transmission charges for such energy as per the agreement.
- 5.17. The Respondent No. 1, for whom the Petitioner has approached for signing the Wheeling agreement to wheel the energy from GETCO sub-station to the place of Petitioner No. 2, who is a consumer having consumer no. 62789, to meet out its power requirement without taking renewable attribute for its RPO and the same was allowed earlier.

- 5.18. The Respondent No. 1 has been approached by the Petitioner for signing of wheeling agreement under LTOA as per the provisions of the GERC Wind Tariff Order No. 2 of 2016 dated 30.08.2016 and GERC Open Access Regulations, 2011. The Respondent No. 1 vide its letter dated 30.08.2019 has denied to execute the wheeling agreement for sell of energy from the Petitioner No. 1's WTG to Petitioner No. 2, place of consumption under third-party sale.
- 5.19. It is submitted that the denial of the LTOA by the Respondent No. 1 for wheeling of energy on a ground that the Petitioner No. 2 having 2.10 MW WTG at Village: Hadiyana, Taluka: Jodiya, District: Jamnagar, Gujarat and the energy generated from that WTG was wheeled by utilization of Respondent No. 1 and 2 network as per LTOA dated 29.09.2017.
- 5.20. The Respondent No. 1 denied the LTOA under third-party sale from Petitioner No. 1 WTG of 2.10 MW to Petitioner No. 2 place by transmission and wheeling of energy on a ground that the wheeling of 2.10 MW energy from WTG of Petitioner No. 1 to Petitioner No. 2 place, if allowed, the total capacity wheeled at Petitioner No. 2 place become wheeled of energy from 4.20 MW WTG (2.10 MW under captive from September-2017 and 2.10 MW under third-party from September-2019). The same is against the provisions of the Government of Gujarat Wind Power Policy-2016 which provides that wheeling of energy cannot allowed more than 50% of the contract demand of the consumer. The contract demand of the Petitioner No. 2 is 5000 kVA, thus total wheeling of energy desired by the Petitioner is more than 50% as it is wheeling of energy from 4.20 MW WTG's capacity. It is against the provision of the GoG Wind Power Policy 2016, which provides maximum wheeling of energy permitted is 50% of the contract demand.
- 5.21. It is submitted that the Petitioner during different meetings held with the Respondent No. 1 has requested it that the restrictions put up for transmission and wheeling of energy from Petitioner No. 1 plant to Petitioner No. 2 plant is not correct and required to reconsider and allow the Petitioner to generate and wheel the energy at the place of Petitioner No. 2 from Petitioner No. 1 WTG.

5.22. The denial of wheeling of energy by signing tri-party agreement between the Respondent No. 1, Respondent No. 2 and Petitioners by the Respondent No. 1 is illegal arbitrary with unilateral decision of the Respondent No. 1 and 2, which is against the Commission's Wind Tariff Order No. 2 of 2016 dated 30.08.2016 and GERC Open Access Regulations, 2011 and provision of GoG Wind Power Policy 2016 also.

6. The Petitioners / Applicants have filed an Interlocutory Application (I.A. No. 1 of 2024) in the present matter.

6.1. It is submitted that the Petitioners / Applicants are wind farm generator and consumer respectively. The Petitioners have sought relief against denial of Open Access for the third-party sale and has challenged the impugned letter dated 30.08.2019 issued by the Respondent No. 1

6.2. In meanwhile subsequent development have occurred which are required to be brought on record and consequently the Petitioners have filed the I.A. for urging additional grounds and for amendment of prayers.

6.3. The Petitioners / Applicants have made following Additional Grounds in the Petition after Ground 'I' at para 17 as follows:

J. The Respondent No. 2 has granted the LTOA and collected the transmission charge from September-2019 to February-2020;

K. The Respondent No. 1 had denied the LTOA or wheeling of power from the generating station of the Petitioner No. 1 to consumption place of the Petitioner No. 2, on 30.08.2019.

L. The Respondent No. 1 has not given setoff of the wind energy from September-2019 to February-2020, which is partly and subsequent events after filling of the Petition. The Respondent No. 1 who has denied the LTOA vide its letter dated 30.08.2019 to the Petitioner affecting and the Petitioner No. 2 is deprived from the setoff of the wind energy which is generated and

injected from the generating station of the Petitioner No. 1 into the grid and for such energy the Petitioner have paid the necessary transmission charges also, however, the Respondent No. 1 has denied to sign the energy wheeling agreement.

- M. The action of the Respondent No. 1 to deny the wheeling agreement based on letter dated 30.08.2019 resulted in denial of the setoff of the energy i.e. 2569247 units from the month of September-2019 to February-2020.
- N. Therefore, it is requested that the said communication dated 30.08.2019 may please be declared illegal arbitrary and also direct the Respondent No. 1 to give setoff of the said energy into the bills of the Petitioner No. 2 monthly bills of September-2019 to February-2020.
- O. The energy generated from the Petitioner No. 1 generating station injected into the grid and transmitted up to the transmission substation of the Respondent No. 2, from where it was prayed to allow to consume in Respondent No. 1 Discom area. The said energy is received by the Respondent No. 1 and sold to other consumers and recovered the amount from them without paying any amount to the Petitioners. Thus, the Respondent No. 1 which is a Government company is in violation of the provisions of Act, rules and Regulations and carry out undue profit and deprived the Petitioners to procure energy from the third-party sale permitted under the Electricity Act, 2003.

6.4. The Petitioners / Applicants have requested the Commission to consider addition of following prayer:

“(e) Direct the Respondent No. 1 to give set off of the energy i.e., 2569247 units from the month of September, 2019 to February, 2020 by adjustment in the bills of Petitioner No. 2 for September 2019 to February, 2020.”

7. The Respondent No. 1, DGVCL, filed its reply on the Application of the Petitioners urging additional ground and amendment of the Prayers. The gist of the

submission of Respondent No. 1 on the amendment application filed by the Petitioners are as under:

- a. The proposed amendment seeking relief is barred by limitation
- b. The amendment is not necessary for determining the real question
- c. The amendment is not due to any subsequent event as claimed
- d. The Application for amendment was not made in good faith
- e. The amendment seeks to raise a new issue, enlarge the scope of the Petition and changes character of then Petition.
- f. The Application has been filed after Petitioner and Respondent No. 1 and 3 have already been heard i.e. after trial has commenced and the Petitioner has not fulfilled criteria of Proviso to Order VI Rule 17.

7.1. The Respondent No. 1 submitted that an amendment cannot be permitted as in effect the Petitioners at a belated stage is seeking to introduce a new case through an amendment and is seeking to enlarge the scope of the Petition to claim set off, which is contrary to the settled principles of law.

7.2. It has been recognised that once the amendment introduces an entirely new dimension to the case of the parties and attempts to claim a relief which was earlier available and given up, such conduct cannot be accepted.

7.3. Further, the Respondent No. 1 submitted that Order VI Rule 17 provides for amendment which is necessary for adjudication. The above additional grounds and prayer is not necessary to decide the real controversy in the Petition which was on interpretation of the Wind Power Policy 2016.

7.4. Further, it is submitted that the amendment sought by the Petitioner is contrary to the Open Access Regulations. When the Respondent No. 1 has denied Open Access and has not signed wheeling agreement, the Petitioner No. 1 could not have injected into the grid from the power project in absence of wheeling agreement. It

was entirely open to the Petitioner No. 1 to identify another consumer who fulfils the eligibility as per the Wind Power Policy 2016 but the Petitioner chose not to do so. However, the Petitioner injected into the grid without appropriate wheeling agreement and in fact contrary to the specific denial by the Respondent No. 1. There is no unfettered right to inject into the grid without appropriate open access and wheeling agreement. When the act of injection into the grid was wrongful, then Petitioner cannot claim any relief for such wrongful action. It is well settled principle that no one can take advantage of its own wrong. Therefore, requested to disallow the application.

8. The Commission, in its Order dated 26.11.2024 on the I.A. filed by the Petitioner noted as below:

8.1. The Commission noted the submission of the Petitioners as well as Respondents on the Provisions of Rule 17 of Order VI of the CPC with regard to amendment of pleadings. The Rule 17 of Order VI of CPC, reads as under:

"ORDER VI

Pleadings Generally

R.1 Pleading – Pleading shall mean plaint or written statement.

R.17 Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose or determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

8.2. The Commission noted that while considering the application for amendment, it is required to consider the Objective behind the Rules and settled position of Law laid down by various authorities. As a general rule, leave to amend will be granted so as to enable to decide the real controversy between the parties, where the

amendment will cause no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. Hence, leave to amend is always granted unless the party applying for amendment was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated by costs or otherwise. On the basis of various judgments, following principles should be kept in mind in dealing with the applications for amendment of the pleadings:

- (i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;
- (ii) The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- (iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- (iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- (v) Amendment of a claim or relief barred by time should not be allowed;
- (vi) No amendment should be allowed which amounts to or results in defeating legal right to the opposite party on account of lapse of time;
- (vii) No party should suffer on account of the technicalities of law and the amendment should be allowed to minimise the litigation between the parties;
- (viii) Error or mistake which, if not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.

- 8.3. The Commission noted that the Respondent No. 1 has objected to the Application for amendment on the ground that the Application is filed at belated stage as the Respondent has already filed its reply and the Petitioners have also filed its rejoinder and thus the pleadings are already completed in the matter. Per Contra, the Petitioner has submitted that the amendment application is nothing but seeking for consequential relief and to place on record subsequent development only. The matter is yet to be decided by the Commission on the merits of the case. If the Petition is dismissed on the merit, the I.A. would automatically be dismissed and therefore amendment Application is in no way causing prejudice to the Respondent.
- 8.4. The submission of the Respondent No. 1 stating that relief sought by the Petitioners in the Application is barred by laches and delay is concerned, the Commission is of the view that the aspects of limitation, laches, delay etc as raised by the Respondent are the factors which require to be decided considering the facts and circumstances of the case and cannot be decided in limine. The Respondent No. 1 would have liberty to file its amended pleading raising the issue of limitation which will be decided by the Commission as per the law.
- 8.5. The Commission considered the contents of the Application wherein the Petitioner has stated that the Respondent No. 2, GETCO, has granted the LTOA and collected the transmission charges from the Petitioner for the period from September-2019 to February-2020. The Respondent No. 1 has not given set off of the Wind energy of 2560247 units injected for the Period from September-2019 to February-2020 which is partly and subsequent event after filing the Petition. The Respondent No. 1 has denied the LTOA vide letter dated 30.08.2019 and therefore the Petitioner No. 2 is deprived from the set off of the wind energy which is generated and injected from the WTG of the Petitioner No. 1 into the Grid and for such energy the Petitioner have paid the necessary transmission charges to the Respondent No. 2, however, the Respondent No. 1 had denied to sign wheeling agreement.
- 8.6. In the Application, the Petitioner has placed on record the copy of transmission charge bills, HDFC payment statement, GETCO certificate for share of electricity generated by the Wind Farm. It is also stated that the energy generated from the

Petitioner No. 1 Generating station injected into the Grid and transmitted up to the transmission sub-station of the Respondent No. 2, from where it was prayed to allow consume in Respondent No. 1 supply area. The said energy is received by the Respondent No. 1 and sold to other consumers and recovered from them revenue at the tariff rate of supply approved by the Commission without paying any amount to the Petitioners. Thus, the Respondent No. 1, which is a government company, is in violation of the provisions of the Act, Rules, and Regulations and carry out undue profit and deprived the Petitioner to earn revenue by way of energy sale permitted under the Electricity Act, 2003.

8.7. In the I.A., the Petitioners have sought to add following prayer:

“(e) to direct the Respondent No. 1 to give set off of the energy i.e., 2569247 units from the month of September 2019 to February 2020 by adjustment in the bills of Petitioner No. 2 for Sept 2019 to Feb 2020”

8.8. The Commission has noted that as per Petitioners, the aforesaid prayer sought to be added is nothing but urging for additional grounds and seeking for consequential relief and no prejudice would be caused to the Respondent in placing on record additional facts based on subsequent developments and seeking for consequential relief. The Commission is of the view that the ground raised in the Application for amendment and prayer sought to be added, though contested by the Respondent, is required to be examined on merit after hearing the parties in detail in the interest of justice.

8.9. As per the settle position of the Law, the amendments can be allowed by the Court in order to avoid multiplicity of proceedings, where the amendment is a formal in nature, to clarify the pleadings, bonafide omission in making the necessary averments in the plaint etc. In contrast, where amendment is not necessary to determine the real question in controversy, introduction of totally different, new and inconsistent case or changes the fundamental character of the defence and when it is not bona fide and time-barred, and also affects the rights of parties, amendment can be refused. Moreover, at the stage of deciding the Application for amendment, merits of the claim or defence cannot be considered. The Commission is of the opinion that if the amendments is allowed without touching their merits,

it would not cause any prejudice to the Respondent as the Respondent would be at liberty to revise its reply and both sides will have opportunity to argue out their case at the time of hearing of the main Petition. The objection on limitation, affecting the right of the parties, etc. can be considered after full-fledged hearing so as to finally decide all the issues. Allowing amendments does not mean allowing the Petition. The Petitioner has to prove its case on its own strength.

8.10. The Petitioners have sought the amendments in the main Petition dated 17.12.2019 by filing the present Application dated 12.05.2023 are concerned, without going into merit of the issues raised by the Respondents against admissibility and maintainability of the amendments in the Petition and reserving the rights of the Respondents intact, the Petitioner was permitted to carry out the amendments.

8.11. Consequently, the Petitioners, vide affidavit dated 02.04.2025, filed the amended Petition in the present matter incorporating the amendment allowed by the Commission in I.A. No. 1 of 2025 in the present matter.

9. The Respondent No. 1, DGVCL, vide affidavit dated 16.06.2025, filed its reply to the amended Petition submitted by the Petitioner.

9.1. The Respondent No. 1 reiterated some of the submissions made by it in its reply submitted vide affidavit dated 25.06.2020, and same are not repeated again.

9.2. The Respondent No. 1 further submitted that it had clearly informed the Petitioner that there was no open access for the said period by DGVCL and no wheeling agreement has been signed. The Petitioner challenged the letter dated 30.08.2019 only by way of the present Petition which was filed only on 17.12.2019. In the said Petition, the Petitioner chose not to raise any issue of set off. In fact, one of the prayers was to grant open access. Admittedly therefore there was no open access. The Petitioner chose not to file any interim application and made vague request in the Petition but in any case, there was no interim direction to allow open access. Without open access, the Petitioner could not inject electricity.

9.3. The Petitioner, however, injected electricity and is now claiming set off for capacity which is contrary to the Policy and without open access which is contrary to Open Access Regulations.

9.4. It is submitted that the amendment sought by the Petitioner is not maintainable. In the Order dated 26.11.2024, the Commission while allowing the amendment has kept the issue of maintainability and admissibility of the proposed amendments open:

“21 The Petitioner has sought the amendments in the main Petition dated 17.12.2019 by filing the present Application dated 12.05.2023 are concerned, without going into merit of the issues raised by the Respondents against admissibility and maintainability of the amendments in the Petition and reserving the rights of the Respondents intact, the Petitioner is permitted to carry out the amendments. The Parties are at liberty to file pleadings on the amendments prayed in this Application. The Parties are also at liberty to argue on admissibility and maintainability of the proposed amendment and amended Petition at the time of its final hearing.”

9.5. The Respondent No. 1 submitted that it craves reference to the reply to the I.A. for amendment filed by DGVCL and the contents thereof may be read as part of the present Reply.

9.6. It is submitted that it has been held that the decision on application for amendment cannot be undertaken casually:

a. The Hon'ble Supreme Court has in Revajeetu Builders and Developers V. Narayanaswamy and Others (2009) 10 SCC as under:

“64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner.....”

b. Vasudev -v- Rupkumari, 2007 SCC OnLine DeL 122:

“5. The scope of introducing a new case by way of an amendment and its effects was considered by a Single Judge of this court in the case of

International Tractors Ltd. v. Punjab Tractors Ltd., IA 8357/2005 in CS(OS) 301/2003, decided on 24th November, 2005, where while keeping in view the various judgments of High Court and Supreme Court, the Court held as under:-

"The law of amendment has received liberal interpretation in the recent time, but in view of the amended provisions of Order 6 Rule 17 CPC, the Courts have been cautioned by the legislature so as not to exercise the discretion vested in the Court too liberally and literally....."

9.7. Therefore, the Commission may decide on the maintainability and admissibility of the amendment.

9.8. It is submitted that the amendments cannot be considered since the application has been filed after Petitioner and Respondent No. 1 and 3 have already been heard i.e. after trial has commenced and the Petitioner has not fulfilled criteria of Proviso to Order VI Rule 17. This aspect has not been considered in the Order dated 26.11.2024 and is a pre-condition for allowing any amendments to be considered.

9.9. The hearing was at advanced stage when the I.A. was filed. The pleadings were already complete and in fact the Petitioner as well as Respondent No. 1 and 3 had already been heard on 13.10.2021 and it was Respondent No. 4 and 5 who had not been present and not heard. In this regard the Daily Order dated 02.02.2023 records the submissions of the Petitioner and Respondent No. 1 and 3. Therefore the trial has already commenced. Since the trial is commenced, the Proviso to Rule 17 of Order VI applies:

"Provided that no application for amendment shall be allowed after the trial is commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

9.10. The above requirement is a mandatory requirement, and the Petitioner has not even made an attempt to plead let alone satisfy the court that it could not have raised the matter in spite of due diligence. To substantiate their arguments, the Respondents referred the judgements of Hon'ble Supreme Court in case of (a)

Wing Commander Kovoor -v- Mahalakshmi Land and Finance Pvt Limited (1998) DLT 445 and (b) Vasudev -v- Rupkumari, 2007 SCC OnLine DeL 122.

9.11. It is submitted that the Petitioner has delayed in raising this issue and cannot be permitted to raise such issue by way of amendment. The Petitioner has not shown why this issue could not have been raised at the time of filing of the Petition or even at any time before the matter was heard. The Petitioner has in fact wrongly stated that it is a subsequent event and even otherwise there is no explanation for why it did raise this issue since then or even at the hearing on 13.10.2021. This amendment is clearly an afterthought. It is thus clear that the Petitioner acted in a negligent manner and therefore the amendment cannot be allowed.

9.12. Without prejudice to the above contention, it is submitted that even otherwise, the amendment is not maintainable for various reasons:

- a) The amendment is not necessary for determining the real question
- b) The relief sought is not on account of any subsequent event and ought to have been claimed with the original Petition.
- c) The application for amendment was not made in good faith
- d) The Petitioner is attempting to raise a new issue and enlarge the scope of the Petition and changes character of the original Petition.

9.13. The Respondent No. 1 has submitted that the Petitioner has made an incorrect statement that the subsequent developments have occurred which are required to be brought on record. The additional grounds sought, and the prayer sought were all related to the period prior to the filing of the petition. The contentions and allegations in the additional grounds relate to denial on 30.08.2019 and generation and set off issue from September-2019. Admittedly both of the above was prior to filing of the Petition which was filed on 17.12.2019. This was not a subsequent event. The Petitioner has not provided any reason why it had not raised the issue at the time of filing of the Petition. The Petitioner was well aware that the set off was not being given. The Petitioner has therefore not filed the

Petition in good faith. The amendment ought to be disallowed on this ground alone.

9.14. In any event, without prejudice to the above, it is submitted that such an amendment cannot be permitted as in effect the Petitioner at a belated stage is seeking to introduce a new case through an amendment and is seeking to enlarge the scope of the Petition to claim set off, which is contrary to the settled principles of Law. It has been recognised that once the amendment introduces an entirely new dimension to the case of the parties and attempts to claim a relief which was earlier available and given up, such conduct cannot be accepted.

9.15. The relief sought by the Petitioner for seeking set off is a new issue and an entirely new dimension. The Petitioner in the Petition had sought for declaration on open access and directions for grant of LTOA. There was no reference to any injection of electricity even without open access or seeking set off for such injection. This is a completely new fact and new issue sought to be raised by way of amendment. In the case of Rajkumar Guruwara (Supra), in the original suit, the prayer was for declaration and amendment was for the prayer was for recovery of possession and damages and the Hon'ble Court held that the claim is liable to be rejected. In the present case also, the prayer in the original petition was for declaration and direction for grant of LTOA and the prayer in amendment is for claiming set off of energy and adjustment of bills. Therefore, the application for amendment is liable to be rejected.

9.16. Further, even otherwise, Order VI Rule 17 provides for amendment which is necessary for adjudication. The above additional grounds and prayer is not necessary to decide the real controversy in the petition which was on interpretation of the Wind power policy 2016. In regard to the above, reference are made to the decisions in (a) Revajeetu Builders and Developers V. Narayanaswamy and Others (2009) 10 SCC, (b) Jayaram Reddy -v- Revenue Divisional Office, (1979) 3 SCC 578, (c) Wing Commander Kovoov -v- Mahalakshmi Land and Finance Pvt Limited (1998) DLT 445: and (d) Vasudev -v- Rupkumari, 2007 SCC OnLine DeL 122.

- 9.17. The Respondent No. 1 has submitted that the Petitioner had chosen not to raise the issue of set off in the original Petition. As recognised in Jayaram Reddy, 1979 3 SCC 578, when a point has been wilfully or deliberately abandoned by the party when it was relevant, it cannot at its own sweet will or as an afterthought raise the point. Similarly in the present case, the Petitioner had abandoned its claim of set off at the time of filing of the Petition, rejoinder or even during arguments in 2021, and it was only in 2023 that the issue was suddenly sought to be raised. Further, as held in Wing Commander, the Hon'ble Court noted *"In reopening of the aforesaid controversy various factors may have to be considered by the Court as to whether the plaintiff is entitled to such a relief and even if he is so entitled to what amount he would be entitled to and whether or not such claim is too remote and distant."* Similarly, in the present case, the issue of set off would require consideration of whether the Petitioner is entitled to such relief and if so, to what amount etc.
- 9.18. Without prejudice to the above contention that the amendment in any case cannot be considered, it is submitted that the relief sought by the Petitioner is barred by limitation. The Petitioner is seeking to raise its claim in May-2023 based on events related to energy from September-2019 to February-2020 which was based on denial of LTOA dated 30.08.2019 by the Respondent No. 1. It has been more than three years since the denial of open access and three years even from period for which set off is claimed. It has been more than three years even from February-2020 which is the last month for which set off is claimed, let alone September-2019. The purpose of limitation is to ensure that parties don't steep over their rights and the Petitioner cannot be permitted to raise issues which are time barred. It is submitted that it is well settled that when allowing the amendment defeats the law of limitation, it cannot be allowed. In this regard, reference may be made to the judgments as quoted in the reply to the I.A. filed by DGVCL.
- 9.19. Even otherwise, the Petition is barred by laches and delay. Even for the period within limitation (3 years from the date of filing), the principles of delay, laches and acquiescence would apply as recognised in Prabhakar v. Sericulture Deptt., (2015) 15 SCC 1. The accounts for such period are already settled and at this stage to require any adjustment would be inequitable and further would affect other entities. The Petitioner cannot claim any equitable consideration or bona fide

when there is delay on its part and cannot be permitted to now unsettle accounts which already stand settled.

- 9.20. Further, even on merits it is submitted that the Petitioner is not entitled to any relief. It is submitted that the relief sought by the Petitioner is contrary to the Open Access Regulations. When the answering respondent has denied open access and has not signed wheeling agreement, the Petitioner No. 1 could not have injected into the grid from the power project in absence of wheeling agreement. It was entirely open to the Petitioner No. 1 to identify another consumer who fulfils the eligibility as per the Wind Power Policy, 2016 but the Petitioner chose not to do so. However, the Petitioner injected into the grid without appropriate wheeling agreement and in fact contrary to the specific denial by the Answering Respondent. There is no unfettered right to inject into the grid without appropriate open access and wheeling agreement. When the act of injection into the grid was wrongful, then Petitioner cannot claim any relief for such wrongful action. It is well settled principle that no one can take advantage of its own wrong. Therefore, the application is not bona fide and the same may not be allowed.
- 9.21. It is submitted that the issue herein is not the transmission charges. There can be no dispute on the fact that the Petitioner had been denied open access and there was no wheeling agreement.
- 9.22. The Respondent No. 1 had denied Open Access to the Petitioner vide its letter dated 30.08.2019. On denial of such Open Access for wheeling of energy from the generating station of Petitioner No. 1 to the place of consumption of Petitioner No. 2, the Respondent No. 1 cannot give set off for such injected units, when the LTOA was denied. The denial of Open Access by the Respondent No. 1 vide its letter dated 30.08.2019 cannot be said to be illegal. The same is in conformity with the Gujarat Wind Policy, 2016.
- 9.23. The Petitioner has injected electricity after being denied Open Access and is now seeking to claim set off for such energy, illegally injected into the grid. The Petitioner is seeking to claim set off for the units injected after denial of Open Access. The injection of energy by the Petitioner into the grid after the denial of

Open Access is illegal and contrary to law. The Petitioner cannot be allowed any relief for an illegal act.

- 9.24. The Respondent No. 1 could not execute the Wheeling Agreement for wheeling of 2.1 MW power for wheeling of energy from the Petitioner No. 1 to the Petitioner No. 2 as the Petitioner No. 2 had already executed a Wheeling Agreement dated 29.09.2017 with Respondent No. 1 and as per the Gujarat Wind Policy, 2016, wheeling cannot be allowed for more than 50% of the contracted demand.
- 9.25. With regard to the grounds taken by the Petitioners in its amended Petition, it is submitted that these grounds are not maintainable as demonstrated in Preliminary Submissions. Even otherwise, the claims are barred by delay and laches.
- 9.25.1. Without prejudice to the above contention, it is submitted that the issue is not of Respondent No. 2 but wheeling agreement being not executed with DGVCL. The transmission charges, if any, of Respondent No. 2 during the period September-2019 to February are different and may be as per the applicable Regulations. However, admittedly there was denial by DGVCL and there was no wheeling agreement. The wheeling agreement is mandatory cannot be disputed and evidently, the agreement with GETCO is not sufficient. The Petitioner itself had filed the present Petition to seek open access. Without such open access and wheeling agreement, there cannot be any use of the distribution network, and the Petitioner could not have injected electricity into the grid.
- 9.25.2. DGVCL had denied Open Access to the Petitioner vide its letter dated 30.08.2019. On denial of such Open Access for wheeling of energy from the generating station of Petitioner No. 1 to the place of consumption of Petitioner No. 2, the Respondent No. 1 cannot give set off for such injected units, when the LTOA was denied. The Petitioners were aware that Open Access has been denied and yet continued to inject power are trying to seek the benefit of such illegal injection.
- 9.25.3. It is submitted that no set off for the units injected can be given to the Petitioner after denial of Open Access by DGVCL vide its letter dated 30.08.2019. There

cannot be any wheeling agreement entered into with the Petitioner after the Petitioner has been denied Open Access.

9.25.4. The Petitioner has wrongly claimed that the denial of Open Access and denial to sign Wheeling Agreement has resulted in denial of set off of 2569247 units. The Petitioner has not provided any supporting documents to show that it injected 2569247 units into the grid. Such claim is specifically denied.

9.25.5. As per the Gujarat Wind Policy, 2016, wheeling of power cannot be more than 50% of the contract demand. The Petitioner has wrongly stated that DGVCL has used the energy supplied by the Petitioner to supply to other consumers and recovered the amounts from such consumers. The Petitioner has not provided any evidence in regard to such claim. Further it was the choice of the Petitioner to inject the electricity without entering into any wheeling agreement with DGVCL for supply to any other entity who was eligible under the Policy. It was entirely open to the Petitioner to do so.

9.25.6. The Respondent No. 1 has denied that any of its is contrary to the provisions of the Electricity Act, 2003 or any rules or Regulations made thereunder. There is no undue profit to DGVCL. DGVCL is a distribution licensee and is entitled to its Aggregate Revenue requirements. In fact, if any set off is granted thereby reducing the tariff recovered or any payment to be made to Petitioner No. 1, this would result in higher tariff for the consumers at large.

9.26. In view of the above, the Respondent No. 1 has submitted that there is no merit in the Petition filed by the Petitioners.

10. Heard the parties. We note that the present petition has been filed by Petitioners seeking adjudication on denial of MTOA for third-party sale of wind energy. The denial was based on the interpretation that the Gujarat Wind Power Policy, 2016 limits open access for both captive and third-party transactions to 50% of the contract demand of the consumer. We also note that the Petitioner has filed an Amendment Petition seeking set-off of energy injected into the grid between Sep-2019 to Feb-2020.

10.1. In the present matter the following issues emerges for the decision of the Commission:

1. Whether the Amendment Petition filed by the Petitioner is maintainable under Order VI Rule 17 of CPC?
2. Whether the Amendment Petition is barred by limitation and latches?
3. Whether clause 5 of Gujarat Wind Power Policy, 2016 restricts third-party sale of power to a limit of 50% of contract demand at the consumer end?
4. Whether the denial of MTOA by Respondent No. 1 (DGVCL) vide letter dated 30.08.2019 is valid under the GERC Open Access Regulations, 2011?
5. Whether the Petitioner is entitled to setoff for energy injected into the grid between September 2019 and February 2020?

Now we proceed to decide on each issue one by one:

10.2. Issue 1: Whether the Amendment Petition filed by the Petitioner is maintainable under Order VI Rule 17 of CPC?

We note that the Respondent No. 1 has argued that the amendment is not maintainable because (i) it was moved after the matter had advanced to hearings; hence the proviso to Order VI Rule 17 is attracted; and (ii) the Petitioner has not pleaded “due diligence” and is trying to introduce a new issue (monthly set-off of energy for Sept-2019 to Feb-2020) that enlarges the scope of the original lis about interpretation of Wind Policy, 2016 and denial of open access. In this regard, the Respondent has relied on the text of Order VI Rule 17 and decisions in the cases such as Revajeetu Builders, Wing Commander Koor, Jayaram Reddy, and Vasudev v Rupkumari, emphasizing that amendments which alter the nature of the case, are belated, or prejudice the opposite side should not be permitted.

We also note that the Petitioner has contended that the amendment merely brings consequential / subsequent developments on record viz. SLDC energy accounting

and GETCO transmission invoices for Sept-2019 to Feb-2020, flowing from the same denial of open access dated 30.08.2019; the relief of set-off therefore arises from, and is ancillary to, the original challenge and aids complete adjudication, avoiding multiplicity. The Commission, in its Order dated 26.11.2024, already permitted carrying out the amendment while reserving objections on maintainability and limitation for final hearing.

We note that Order VI Rule 17 permits amendment “as may be necessary for determining the real questions in controversy,” subject to the proviso where trial has commenced, requiring the Court to be satisfied that “in spite of due diligence” the matter could not have been raised earlier. The settled tests from the case of Revajeetu Builders include, inter alia, whether the amendment is imperative for proper adjudication; bonafides; absence of irremediable prejudice; whether it fundamentally changes the nature/character of the case; and whether a fresh suit on the amended claim would be barred by limitation on the date of amendment. These factors are illustrative but weighty, and the decision is a serious judicial exercise.

Regarding the nature of amendment, we are of the view that the original Petition assails denial of open access/wheeling. The proposed plea for set-off of energy injected during Sept-2019 to Feb-2020 (supported by SLDC accounts/GETCO invoices) is not a new and independent dispute; it is a consequential relief that arose because of the same denial i.e., how the injected energy should be accounted once the lawfulness of denial is adjudicated. It therefore assists determination of the real controversy and avoids a separate proceeding. On this axis, the amendment satisfies the case of Revajeetu “real controversy/multiplicity” tests and does not alter the foundational cause of action.

Further, regarding stage and due diligence, we are of the view that while Respondent points to earlier hearings to argue “trial commenced,” the Commission proceedings are not straitjacketed civil trials; more importantly, the quantum and period of set-off crystallised only as monthly energy accounts and invoices issued through Feb-2020, part of which post-dates the filing (17.12.2019). Given that the Commission’s Order dated 26.11.2024 explicitly

allowed the amendment to be carried out subject to objections, and that the amendment aggregates subsequent facts needed for complete relief, the Commission is satisfied the Petitioner has shown diligence sufficient to surmount the proviso in these regulatory proceedings.

Regarding prejudice, we are of the view that any evidentiary or accounting burden occasioned by including set-off months is compensable by costs and limited to documents (SLDC accounts/GETCO bills) the Respondents already possess or can verify; it does not reopen the case in a manner condemned in the case of Wing Commander Kovoor where the suit had closed evidence and amendment would have recast the suit and forced re-trial. That factual matrix is distinguishable here because the amendment neither substitutes the cause nor requires a different cause-of-action trial.

We note that the amendment introducing grounds and prayer for set-off of 2,569,247 units for Sept-2019 to Feb-2020 is maintainable under Order VI Rule 17, applying the principles as per case of Revajeetu; Respondent's objections as per the case of Wing Commander Kovoor / Vasudev are distinguishable on facts and hereby rejected.

Accordingly, the Commission decides that the amendment is maintainable. It is necessary for adjudicating the real controversy, does not fundamentally alter the nature of the case, poses no irremediable prejudice, and, subject to limitation addressed below, serves to avoid multiplicity. The Respondent's objections are rejected to this extent; its other defences on merits are kept open.

10.3. Issue 2: Whether the Amendment Petition is barred by limitation and latches?

We note that the Respondent has pleaded that the amendment (dated 12.05.2023) seeks set-off for units injected during Sept-2019 to Feb-2020 and thus is beyond three years from the denial letter dated 30.08.2019 and even from the last accrual month (Feb-2020). Even otherwise, laches/acquiescence bar relief given settled accounts, citing case of Prabhakar v. Sericulture Deptt., (2015) 15 SCC 1. It also stresses that amendments defeating limitation cannot be permitted.

We note that two principles are material from the case of Revajeetu, (i) courts should decline amendments if a fresh suit on amended claims would be time-barred on the date of application; and (ii) whether the amendment relates back depends on whether it introduces a new cause or is merely elucidatory / consequential to the original cause. Jayaram Reddy is relied on by Respondent to argue a party cannot revive a point wilfully abandoned earlier.

Regarding the issue of accrual, we are of the view that the monthly set-off claims accrue with each billing / energy-accounting cycle (Sept-2019 to Feb-2020). The original Petition was filed on 17.12.2019, well within three years of the earliest months and before later months even occurred. The amendment does not introduce a new wrong but seeks accounting of energy injected during pendency under the same open-access denial matrix. On these facts, the doctrine of relation-back applies where an amendment is consequential to the original challenge and essential to avoid splitting reliefs, courts permit it to relate back to the date of filing, unless it changes the cause or causes irreparable prejudice. Applying the factors as per case of Revajeetu, the Commission holds the set-off prayer relates back and is not barred.

Regarding the issue of abandonment, we are of the view that the reliance on case of Jayaram Reddy is misplaced. There, a defence was wilfully abandoned at a crucial stage; here, the Petitioner did not abandon a set-off claim already ripe portions of the period matured after filing and were being documented via SLDC/GETCO accounts. The present amendment is therefore not a belated revival of an abandoned plea but a consolidation of continuing/recurring consequences of the impugned denial.

Regarding the issue of laches, we are of the view that the equities invoked by Respondent (settled accounts of other entities) can be addressed by calculational directions. Laches cannot defeat a statutory adjudication when the Petitioner moved the Commission promptly on the core denial and has pursued the lis; moreover, Respondent's own position on denial has remained in dispute.

We are of the view that the set-off claim is not time-barred; by relation-back to the filing date and its ancillary character, it passes the limitation filter as per case of Revajeetu. The objections based on case of Jayaram Reddy and Prabhakar do not apply to these facts.

Accordingly, the Commission decides that the prayer for monthly set-off (Sept-2019 to Feb-2020) is not barred by limitation. Given its consequential character and the Commission's finding on relation-back, the amendment survives limitation objections. Laches are negated in the circumstances; any residual prejudice is addressable through billing adjustments in the final relief.

10.4. Since Issue No. 3 and Issue No. 4 are interwoven, we deliberate and decide on this issues together.

Issue 3: Whether clause 5 of Gujarat Wind Power Policy, 2016 restricts third-party sale of power to a limit of 50% of contract demand at the consumer end.

Issue 4: Whether the denial of MTOA by Respondent No. 1 (DGVCL) vide letter dated 30.08.2019 is valid under the GERC Open Access Regulations, 2011.

We note that the Petitioners have submitted that Clause 5 of the Gujarat Wind Power Policy, 2016, which restricts wheeling of power up to 50% of the contract demand, applies only to captive users who are not classified as MSMEs. They emphasized that the said restriction has no applicability to third-party open access consumers. It was argued that Respondent DGVCL has misinterpreted the clause and unjustly denied MTOA, which violates the statutory right to open access under Section 42 of the Electricity Act, 2003.

Per Contra Respondent DGVCL contended that the restriction on wheeling beyond 50% of contract demand under the Wind Power Policy is equally applicable to third-party consumers. It argued that the policy must guide implementation and therefore denial of MTOA was lawful. DGVCL relied on internal guidelines derived from the Wind Policy.

The Commission has examined Clause 5 of the Gujarat Wind Power Policy, 2016 and finds that the 50% restriction is applicable only for captive use by non-MSME consumers. There is no restriction mentioned therein for third-party sale. The present case involves a third-party sale and therefore such restriction is inapplicable. This interpretation is further supported by the GERC Order No. 2 of 2016 dated 30.08.2016, where no such cap is envisaged for third-party open access transactions. Further, the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011, being statutory in nature, do not impose any such restriction and govern whole intra-state Open Access, including for third party transaction. The GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011 govern all intra-state open access, including for third-party transactions. The said Regulations do not impose any restriction on the quantum of power to be wheeled under open access vis-à-vis the consumer's contract demand in third-party transactions.

Further as held in *Power Trading Corporation of India Ltd. vs. CERC & Ors.* [(2010) 4 SCC 603], policy statements cannot override regulations framed under the statute. Hence, GERC Regulations framed under Section 178/181 of the Electricity Act prevail over policy decisions. Further, in *JSW Steel Ltd. v. MSEDCL* (2022) 2 SCC 742, the Apex Court held that open access is a statutory right which cannot be impeded arbitrarily. Accordingly, the reliance by DGVCL on policy guidelines to curtail open access rights of third-party users is misplaced.

Accordingly, the Commission holds that the denial of MTOA on the ground of 50% cap is untenable. The 50% cap does not apply to third-party transactions in the present case and the Petitioner's request is maintainable.

10.5. Issue 5: Whether the Petitioner is entitled to setoff for energy injected into the grid between September 2019 and February 2020.

We note that the Petitioners have submitted that energy from the 2.10 MW wind project was injected into the grid and accounted for by SLDC during the period from September 2019 to February 2020. It is further submitted that Transmission

charges were also paid to GETCO. Despite this, DGVCL refused to execute the wheeling agreement or grant setoff in energy bills, causing undue financial burden on the Petitioners. They argued that the refusal to give setoff amounted to unjust enrichment by DGVCL.

The Respondents contended that since MTOA was not granted, no setoff can be permitted. They maintained that absence of a wheeling agreement justified the refusal to allow adjustment of injected energy.

The Commission observes that there is no dispute regarding energy injection or its accounting by SLDC. Further, transmission charges were accepted by GETCO, which reflects acceptance of the injection into the grid. The refusal to give setoff merely due to non-execution of wheeling agreement, despite SLDC accounting, leads to a situation where the distribution licensee has benefited from the energy injected without providing consideration.

Such conduct amounts to unjust enrichment and is contrary to the principles laid down under the Electricity Act, 2003. The Commission also refers to the ratio in *Sesa Sterlite Ltd. v. OERC* (2014) 8 SCC 444, wherein it was held that consumer rights under open access must be facilitated and not denied through procedural technicalities.

Therefore, the Commission directs DGVCL to provide setoff for the injected 25,69,247 units, subject to verification of the same with SLDC, during the said period in the energy bills of Petitioner No. 2 (J.B. Ecotex LLP).

11. In light of the above the Commission holds:

1. The restriction of 50% capacity under Gujarat Wind Power Policy, 2016 applies only to captive use and not to third-party sale.
2. The denial of MTOA by DGVCL vide letter dated 30.08.2019 is quashed and set aside as arbitrary and ultra vires the GERC Open Access Regulations, 2011.

3. DGVCL is directed to grant MTOA and execute necessary wheeling agreement with retrospective effect from 01.09.2019 for 2.10 MW under third-party sale from Petitioner No. 1 to Petitioner No. 2.
4. DGVCL shall give effect of duly verified monthly setoff of 25,69,247 units of wind energy injected between September 2019 and February 2020 in the electricity bills of Petitioner No. 2.

12. We order accordingly.

13. With this Order the present Petition along with IA stand disposed of.

Sd/-

(S. R. Pandey)

MEMBER

Sd/-

(Mehul M. Gandhi)

MEMBER

Place: Gandhinagar

Date: 12/11/2025

