

**IN THE HON'BLE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

C.W.P.No._____ of 2014

MEMO OF PARTIES

Open Access Users Association (Regd.), A-49, 2nd Floor, Dwarka Sector-8, New
Delhi – 110077 through its Vice President, Sh. Navjeet Singh Kalsi.

.... Petitioner

VERSUS

1. State of Haryana, Haryana Civil Secretariat, Chandigarh through,
Principal Secretary, Power Department.
2. Haryana Vidyut Prasaran Nigam Limited, Shakti Bhawan, Sector 6,
Panchkula through Managing Director.
3. State Load Dispatch Centre, Haryana Vidyut Prasaran Nigam Limited,
Shakti Bhawan, Sector 6, Panchkula through its Superintending
Engineering.
4. Haryana Electricity Regulatory Commission, Bays No. 33-36, Sector 4,
Panchkula through its Secretary.
5. Indian Energy Exchange Ltd. Corporate Office: 100A/1 Ground Floor,
Capital Court, OLOF Palme Marg, Munirka, New Delhi-110067, India
through its Managing Director.

...Respondents

PLACE: CHANDIGARH

(TUSHAR SHARMA) Advocate

DATE: 22.05.2014

COUNSEL FOR THE PETITIONER

IN THE HON'BLE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

C.W.P.No. _____ of 2014

Open Access Users Association (Regd.).

.... Petitioner

VERSUS

State of Haryana and others

...Respondents

CIVIL WRIT PETITION under Article 226/227 of the Constitution of India for issuance of an appropriate writ, order or direction in the nature of certiorari to quash and set aside the Notification dated 14/05/2014 (Annexure P-10) issued by the Government of Haryana under Section 37 of the Electricity Act, 2003;

AND FURTHER issue an appropriate writ, order or direction in the nature of prohibition to restrain the Respondents No. 1 to 3 for taking action in blocking short-term open access contrary to the provisions of the Electricity Act, 2003 and the Regulations framed by the State Commission and the Central Electricity Regulatory Commission;

AND FURTHER issue a writ or writs in the nature of mandamus directing the Respondent No. 2 to consider

and dispose of the open access applications of the members of the Petitioner Association strictly in terms of the Regulations framed by the State Commission and the Central Electricity Regulatory Commission;

AND/OR FURTHER pass any other appropriate writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;

MOST RESPECTFULLY SHOWETH:

1. That the Petitioner is an association primarily of high power intensive industries of Haryana. The Petitioner Association has been formed under Section XXI of Societies Registration Act 1860. The list of members of the petitioner association taking electricity of open access, the quantum and the period for which open access is taken is attached hereto and marked as **Annexure P-1**. The petitioner association thus being a juristic person is competent to invoke the extra-ordinary writ jurisdiction of this Hon'ble Court under Article 226/227 of the Constitution of India. The present writ petition is being filed by the petitioner association through its Vice-President Mr. Navjeet Singh Kalsi who is authorised in this regard in terms of Clause 29 read with Clause 12(II) of the Rule and Regulations of the petitioner association. Clause 29 of the said rules provides that the petitioner society can sue and be sue in its name through its President or Secretary and clause 12(II) provides that in absence of the President, the Vice President of the Society shall perform all his duties and all powers of the President shall

vest with him. A copy of the Memorandum of Association alongwith the Rules and Regulations are being annexed herewith as **Annexure P-2**.

2. That the challenge in the present writ petition is to the action of the respondent State, whereby, it has issued impugned notification dated 14.05.2014 (Annexure P-10) under Section 37 of the Electricity Act, 2003 seeking to restrict short-term open access in the State of Haryana for import of electricity.
3. That before referring to the merits of the present writ petition it would be apposite to first narrate a brief factual background leading to the present controversy: -
 - a. That the Electricity Act, 2003 which came into force on 10/06/2003 enacted by the Parliament of India has consolidated and provided for a comprehensive legislation in the matters relating to generation, transmission or distribution and supply of electricity throughout the country. Electricity falling List III of Schedule VII to the Constitution of India, namely in the concurrent list, the Union Parliament has exercised its powers to provide for a comprehensive legislation dealing in all matters relating to the electricity sector.
 - b. That Respondent No. 2 is the transmission licensee in the State of Haryana. The Respondent No. 2 is also the State Transmission Utility and also discharges the statutory function of the system operator, namely, the State Load Dispatch Centre. The Respondent

No. 3 is the State Load Despatch Centre. The Respondents No.2 and 3 form part of the same legal entity.

- c. That Respondent No. 4, Haryana Electricity Regulatory Commission (hereinafter called the '**State Commission**') has been vested with the regulatory powers in relation to determination of tariff, regulation of supply, transmission and distribution of electricity within the State of Haryana.
- d. That Respondent No. 5, Indian Energy Exchange Limited is a power exchange established pursuant to the authorisation given by the Central Electricity Regulatory Commission. The Respondent No. 5 provides an access platform for purchase and sale of electricity on spot basis. Presently, the authorisation given to the transaction over the Respondent No. 5 is for contracts within a period of 11 days.
- e. That one of the primary features and provisions of the Electricity Act, 2003 is the concept of open access which has been provided. Open access is the right available to the consumer to source electricity from 3rd parties, apart from the distribution licensee in the area of supply. The open access is the option to get electricity by use of the transmission and distribution system and source electricity from 3rd parties.
- f. That Open access under the Electricity Act is governed under Section 42 which provides that *the State Commission shall introduce open access in such phases and subject to such conditions as may be specified.*

- g. That in terms of Sections 38, 39 and 40 of the Electricity Act, it is the duty of the transmission licensee to provide non-discriminatory use of the transmission system for open access.
- h. That the primary intention behind the concept of open access evolved under the provisions of the Electricity Act is to promote competition. When the consumers have the option and freedom of taking electricity from 3rd parties and not from the distribution licensee in the area of supply, there arises competition between the multiple sources of supply including that of the distribution licensee which ultimately benefits the consumers at large. It is for this purpose that the Electricity Act seeks to do away with the concept of monopoly and provides the freedom of choice to consumers, subject to conditions as may be laid down by the State Commission under Section 42 of the Electricity Act and open access being provided in a phased manner.
- i. That in terms of the National Electricity Policy, the State Commissions were mandated to provide a framework and notify the necessary Regulations by June, 2005 to enable open access in the distribution system of the distribution licensee for consumers whose maximum power drawal at any time exceeds 1 MW. The National Electricity Policy and the National Tariff Policy laid great emphasis on open access to be provided and competition to be promoted in the electricity sector. A copy of the National Tariff Policy and National Electricity Policy framed and notified by the

Government of India under Section 3 of the Electricity Act is attached hereto and marked as **Annexure P-3 and P-4** respectively.

- j. That open access is generally divided by various State Commissions and also the Central Electricity Regulatory Commission as (a) short-term open access which is on a monthly basis or generally for a period not exceeding 3 months by a single transaction; (b) medium-term open access which is generally between 3 months to 3 years; and (c) long-term open access which is generally for a period exceeding 3 years.
- k. That if the transaction of purchase of electricity over the power exchange is on a day head or week ahead basis, the purchase of electricity is through short-term open access. Further, there are various transactions even on a bilateral basis for direct negotiations between consumers and generators where the power is sold on a fortnightly or monthly basis and therefore the power is sourced through short-term open access.
- l. That an open access consumer is required to pay the transmission/wheeling charges for use of the system of purchasing electricity, the cross subsidy surcharge as may be determined by the State Commission in terms of proviso to Section 42(2) and also the additional surcharge that may be determined by the State Commission under Section 42(4). These charges are paid to the transmission/distribution licensee apart from the consideration paid to the generator for purchase of electricity.

- m. That under the provisions of the Electricity Act, 2003, the State Commission has framed and notified the Haryana Electricity Regulatory Commission (Terms and Conditions for grant of Connectivity and open access for intra-State Transmission and Distribution system) Regulations, 2012 (hereinafter called the '**State Open Access Regulations**') on 11.01.2012 followed by 1st Amendment to the Regulations on 03.12.2013. Copy of Regulation and first amendment Regulation is annexed herewith as **Annexure P-5 & P-6**. The State Open Access Regulations framed by the State Commission deal with the intrastate open access, namely the use of the transmission and distribution system of the state utilities within the state of Haryana for transaction of purchase and sale of electricity within the state of Haryana.
- n. That with regard to the use of the transmission and distribution lines, when the transactions of purchase and sale involving the territories of 2 states, the open access is regulated by the Central Electricity Regulatory Commission under Section 79 of the Electricity Act. Interstate open access is defined in the Electricity Act to include the use of any transmission line which is used for or is incidental to the supply of electricity from one state to another. Thus, in cases where the electricity is procured by the consumers from other states or through the energy exchange, the use of the transmission and distribution lines of the state utilities is incidental to the procurement of electricity by the consumers through interstate open access and therefore is governed by the

terms and conditions of the open access regulations framed and notified by the Central Electricity Regulatory Commission. The Central Commission has framed and notified the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations of 2008 (hereinafter called the '**Central Open Access Regulations**') as amended from time to time, a copy of which is attached hereto and marked as **Annexure P-7**.

- o. That as per the procedure prescribed under the Central Open Access Regulations as well as the State Open Access Regulations, the State Transmission Utility, the Respondent No. 2 in the present case has been designated as the Nodal Agency for consideration and grant of open access. The Regulations further provide for the manner and procedure including the time lines within which the applications for open access are to be considered.
- p. That electricity being a commodity which cannot be stored and has to be consumed simultaneously with generation, the consideration and decision on open access within the prescribed time period is very essential. It is for this purpose that the Central Open Access Regulations and also the State Open Access Regulations provide for the time lines for consideration of open access. The regulations provide that in case there is no reply or response from the nodal agency, the open access shall be deemed to have been granted. Further the regulations also provide the limited aspects which open access can be denied, namely, identified system constraints which would make it impossible for electricity to flow in the

particular transmission line or for reasons of default on the part of the open access applicant.

- q. That the Regulations specifically mention that where existence of necessary infrastructure and availability of required capacity in the transmission and/or distribution network has been established, the State Transmission Utility shall convey its concurrence or no objection or prior standing clearance as the case may be, to the applicant by e-mail or fax, in addition to any other usually recognized expedient mode of communication within 3 working days of the submission of application, in case the application has been found to be in order and when the State Transmission Utility refuses to give concurrence or no objection or standing clearance, as the case may be on the grounds of non existence of necessary infrastructure or unavailability of required capacity in the transmission and/or distribution network, such refusal shall be communicated to the applicant by e-mail or fax, in addition to any other usually recognized mode of communication, within the period of three (3) working days or seven (7) working days, as the case may be, from the date of receipt of the application along with reasons for such refusal. Provided that where the State Transmission Utility has not communicated any deficiency or defect in the application within two (2) working days from the date of receipt of application or refusal or concurrence or 'no objection' or standing clearance, as the case may be, within the specified period of three (3) working days or seven (7) working days, as

applicable, from the date of receipt of the application, concurrence or 'no objection' or standing clearance, as the case may be, shall be deemed to have been granted.

- r. That in case the applicant is connected to the distribution system, the State Transmission Utility shall make a reference to the distribution licensee and the said distribution licensee shall convey its consent or otherwise within (3) three working days of receipt of reference from the State Transmission Utility. For embedded open access consumers, the distribution licensee shall verify only that the consumer meets the eligibility criteria, as laid down in Regulation 8, before conveying the consent. In case the distribution licensee has not communicated refusal or consent within the specified period of (3) three working days from the date of receipt of the reference from State Transmission Utility, consent shall be deemed to have been granted.
- s. That in the above background, the Members of the Petitioner Association have been availing short term open access on month to month basis subject to payment of all charges for purchase of their electricity needs. The Members have been availing of open access from November 2011 onwards without any difficulty whatsoever. However, suddenly on 06/05/2014, several Members received a letter from the Respondent No. 2 stating as under-

".....It has been observed that you have been availing Short Term Open Access for drawal of power for more than last 3

Months by applying and getting approval for Short Term Open Access for 1 Month repeatedly.

As per HERC Regulation No. HERC/25/2012 (Terms and Conditions for grant of connectivity and open access for intra-state Transmission and distribution system) any use of the intra state Transmission and distribution system for a period exceeding 3 months shall be covered under Medium Term Open Access. As such if you want to avail open access for a period exceeding 3 months, you should apply for medium term open access as per HERC open access regulation.

Accordingly, your application for short term open access is not feasible for acceptance."

Copy of the letter dated 06/05/2014 of the Respondent No. 2 is attached hereto and marked as **Annexure P - 8**.

- t. That it is stated that the Members of the Petitioner Association were quite shocked to receive the above communication since as per the Regulations; it is the choice of the consumer whether to opt for short-term or medium-term or long-term open access. So long the consumers are taking open access from time to time and paying the relevant charges and there being no issue on the marginal transmission capacity available for short-term open access, there can be no question of forcing the consumers to take only medium term open access and not short-term open access. In so far as the

application for open access is made for up to a period of one month, the same is categorized as short-term open access only.

- u. That to the knowledge of the Petitioner Association, some of the consumers have challenged the communications dated 06/05/2014 before this Hon'ble Court as well as before the State Commission, which are pending consideration.
- v. That when the matter came up before the State Commission, the State Commission took a serious view of the same and issued a letter dated 06/05/2014 to the Respondent No. 2 and 3 as under-

"It has come to the notice of the Commission that NOC is not being issued to the Open Access Consumers and the SLDC is not using the provision of deemed approval in accordance with the time-line/procedure specified by the Commission for the purpose.

The Commission has taken a very serious note of the above violation of its order/regulations and reiterates that withholding NOC will make the officer concerned amenable to action under section 142 of the Act by this Commission. Simultaneously, if any officer of the SLDC does not invoke deemed approval provision when prescribed time limited has passed, he shall be liable to action under section 142 of the Act and the Commission shall impose harsh penalties to such officers for deliberate violation of provisions of the law.

Further the names of the officers of the SLDC who have not invoked the deemed approval provision even after three days have been passed be sent to the Commission so that they can be asked to explain their reasons for violating the law."

Copy of the letter dated 06/05/2014 issued by the State Commission is attached hereto and marked as **Annexure P - 9**.

- w. That in the above background, and evidently with a view to overcome the provisions of the Regulations in regard to grant of open access and the directions of the State Commission, the Respondent No. 1 has issued the Notification dated 14/05/2014 purportedly under Section 37 of the Electricity Act, 2003 restricting the short-term open access to any person in the State of Haryana for import of power. The Notification, inter-alia reads as under-

"In exercise of power under section 37 of the Electricity Act, 2003, the Government of Haryana based on the information and data placed by the state Load Dispatch Centre, Haryana on the operational constraints in the power system not facilitating the import of power from outside sources, including the quantum of power banked by Haryana Utilities with Madhya Pradesh for repatriation during summer months to meet the increased demand and further considering the significant increase in the demand from 5119 MW in February 2014 to 6320 MW in may 2014 which is expected to increase further to the region of above 8200 MW and considering the major constraints in 765

KV Gwalior - Agra Transmission line leading to non-availability of open access to government of Haryana hereby directs the State Load Dispatch Centre, Haryana as under:

- a) To take appropriate measures to maintain smooth and stable transmission and supply of Electricity in the state.*
- b) To restrict the Short Term Open Access to any person in the state to import power till further order.*
- c) Not give NOC for any Short Term Open Access to any person till further orders.*

In regard to the above the following are relevant

- 1) The open access applied by Haryana Utilities (HPPC) for repatriation of power banked to the extent of 250 MW vide application dated No. 1/2014/HPPC/25-Mar-2014 to NRLDC was denied on account for system constraint in the above 765 kV Gwalior Agra Line (WR-NR corridor) by letter No. NRLDC/OA/APR-14/AP-24004 dated 07.04.2014.*
- 2) There has been frequent automatic opening of power supply lines to Palwal and Mewat area on account of operation of Special Protection S Scheme as a result of the system constraint."*

A copy of the notification dated 14/05/2014 issued by the Government of Haryana under Section 37 of the Electricity Act is attached hereto and marked as **Annexure P-10**.

- x. That the Notification dated 14/05/2014 is vague, unsubstantiated and is a clearly a colourable exercise only to prohibit the short term open - access to consumers throughout the State and to push the consumers back to the days where the Distribution Licensees enjoyed a monopoly status. The Notification dated 14/05/2014 which has supposedly been issued under Section 37 of the Electricity Act, 2003 is without any basis whatsoever and is only with the intention of blocking the open access to consumers in the State.
- y. That Section 37 of the Electricity Act, reads as under –

"37. Directions by Appropriate Government.

The Appropriate Government may issue directions to the Regional Load Despatch Centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State."
- z. That it is stated that the exercise of powers under Section 37 is in extra-ordinary circumstances when it becomes incumbent for taking measures for maintaining smooth and stable transmission and supply of electricity to any region or State. The purpose of exercise of such power is to ensure smooth transmission of electricity to a particular region. In the present case, it is stated that the entire exercise of power under Section 37 is a colourable exercise to prevent open access and to ensure that the consumers

take supply only from the distribution licensees and not from competing third party sources.

- aa. That the petitioner association has also come to know that the above notification has been challenged by some of the industries before the Haryana Electricity Regulatory Commission and vide order dated 20.05.2014, the Commission has stayed the operation of the notification dated 14.05.2014 and all subsequent actions/communications of the respondent State. A copy of the said order dated 20.05.2014 passed by the learned commission is being annexed herewith as **Annexure P-11**.
- 4. That it is stated that the exercise of powers under Section 37 by the Government of Haryana in the form of notification dated 14.05.2014 (Annexure P-10) is illegal, untenable, contrary to law, a colourable exercise and is liable to be set aside on the following, amongst other,

GROUNDS

- i. BECAUSE the notification dated 14/05/2014 issued by the Government of Haryana is contrary to the very scheme object, purpose and the provisions of the Electricity Act, 2003 and has been issued at a colourable exercise to defeat the right of the consumers to take supply of electricity from competing sources. The entire purpose of the notification under Section 37 of the Electricity Act is to prevent the consumers from taking supply of electricity through short-term open access and particularly from the energy exchange wherein the electricity is available only to

short-term open access. As a result, the open access consumers would be forced to take supply of electricity from the distribution licensee, which is the ulterior object of the notification being issued and the short-term open access being blocked.

- ii. Because the purported exercise of power under section 37 of the Electricity Act is not in terms of the purpose for which the power has been vested with the State Government. The State Government under Section 37 is entitled to issue directions in regard to transmission of electricity only when the circumstances warrant and the supply of electricity is to be maintained to a particular region or state. With regard to the power of the State Government, directions can be issued only to the State Load Despatch Centre with regard to maintaining the transmission system within the state. The perversity in the impugned notification issued by the State Government is evident from the fact that the reason given for blocking short-term open access for import of power to the state is the alleged transmission constraints in the 765kv Agra-Gwalior line, which neither comes within the jurisdiction of the State Load Dispatch Centre or otherwise falls within the State of Haryana for the State Government to assume jurisdiction and issue directions.
- iii. Because the impugned notification issued by the State Government is contrary to the provisions of the Electricity Act, 2003. The State Load Despatch Centre under Section 32 of the Electricity Act is responsible for scheduling and dispatch of electricity within the state and not for matters falling outside the state of Haryana. The

open access sought for procurement through the power exchange is interstate open access governed and regulated under the directions of the Central Electricity Regulatory Commission. The import of electricity into the state through the interstate transmission lines does not fall within the jurisdiction of the State Load Despatch Centre, nor does the same in any manner affect the operations of the State Load Despatch Centre. In the circumstances, the reasoning given is clearly for a colourable exercise to prevent competition for the procurement of electricity by the consumers.

- iv. Because the impugned notification has been issued only for the purpose of blocking the consumption of electricity by consumers by availing short-term open access and to benefit the distribution licensees in the State, which is contrary to the scheme and object of the Electricity Act. The same is evident from the fact that the State Load Despatch Centre took the decision to stop all short-term open access in the State and did not respond to the open access applications filed by the consumers, though in terms of the State Open Access Regulations as well as the Central Open Access Regulations the disposal of the open access applications was to be in a time bound manner. The State Commission had also passed directions dated 06/05/2014 directing the strict adherence to the time limits prescribed for consideration of open access applications, failing which the officers would be liable to be prosecuted in terms of Section 142 and other applicable provisions of the Electricity Act, 2003. To overcome this issue and to achieve

the desired object to blocking all short-term open access in the State, the impugned notification has been issued purportedly in exercise of the statutory powers of the State Government, which is clearly contrary to the provisions of the Electricity Act.

- v. BECAUSE the impugned notification being a colourable exercise is evident from the fact that the Respondent No. 2 and 3 had previously taken the position that it was not open to the consumers to take short-term open access on a month to month basis and the consumers were required to take open access for three months or more at a time, which would be medium term open access. However realizing that such action would be contrary to the provisions of the State Open Access Regulations and also the Central Open Access Regulations, the impugned notification has been issued to achieve the same objective of blocking all short-term open access in the State of Haryana.
- vi. Because the impugned order is perverse and bad in law as is evident from the fact that while transmission constraint outside the State of Haryana is given as the reason to block all short-term open access, no such constraint would affect medium term open access being availed by the consumers in the State of Haryana even as per the version of the State Government. There is no intelligible differentia whatsoever in the above distinction sought to be made by the Government as system constraint does not mean that it is possible for consumers to take supply of electricity to open access for 3 months or more but not for less than 3 months. Constraint in

the system does not depend upon the time period for which the electricity is to be conveyed through open access. This system is the same for both medium-term and short-term open access and there cannot be any system constraint when it comes from the for short-term open access while there being no system constraint for the purposes of medium-term open access.

- vii. Because the impugned notification issued by the State Government travels beyond the very jurisdiction of the State Government to regulate and interfere with matters with regard to open access being taken. The purpose of the Electricity Act being framed was to distance the regulatory and tariff determination process from the governmental functions and to vest the same in an independent regulatory authority, the State Commission in the present case for the state of Haryana and the Central Electricity Regulatory Commission for the country as a whole. The impugned notification goes contrary to the very object and purpose of the Electricity Act to minimize the interference by the Government in the electricity sector and to ensure level playing field among all the stakeholders and also to promote competition in the sector. The exercise of powers of the State Government is given only in extraordinary circumstances such as the case of Section 11 in case of generation of electricity and section 37 for the purposes of transmission of electricity. Exercise of such power by the State Government for the only purpose is of ensuring that the consumers do not take electricity from short-term open access is clearly a colourable

exercise to achieve an object which cannot be achieved directly and is liable to be quashed and set aside.

- viii. Because the State Government ought not to be permitted to interfere in the matters of open access being sought for by the consumers, which regulatory power is vested exclusively with the Electricity Regulatory Commissions constituted under the provisions of the Electricity Act, 2003. It is for the State Regulatory Commissions as expert bodies to implement the open access in a phased manner and subject to such terms and conditions as may be necessary. The open access at present has been implemented for all consumers taking electricity over 1 MW. The open access is available for consumers in all the states. Merely an alleged transmission constraint in an interstate transmission line cannot and does not in any manner affect the import of power in the state of Haryana by the open access consumers. If there is any transmission constraint on one particular line, the flow of electricity on such line through open access would automatically be curtailed by the Regional Load Dispatch Centre. However, merely because there is a transmission constraint on one particular line in the country does not mean that all open access transactions in the country would come to a complete standstill. The contention of the State Government if accepted would lead to a situation where any transmission constraint on one particular interstate transmission line would result in all open access transaction is being blocked. This itself establishes the perversity

in the impugned notification issued and the same is liable to be quashed and set aside.

- ix. Because the illegality in the action of the State Government is evident from the fact that while short-term open access constitutes about 250 - 300 MW of power in a system which can admittedly handle about 8000 MW of power, the same has been prohibited citing purported transmission constraints. Copy of the extracts of the filing of ARR of the Respondent No. 2 indicating the above transmission capacity can be produced before this Hon'ble Court during the course of hearing. The above it will clearly establishes that there is no transmission constraint whatsoever within the state of Haryana to import electricity and the reason given by the State Government for the imposition of directions under Section 37 of the Electricity Act is clearly within a period motive of only preventing consumers from taking supply of electricity through open access and preventing competition in the electricity sector to the benefit of the distribution licensee.
- x. Because for over the 2 years, the short-term open access has continuously been given to all consumers without there being any transmission constraint or other system issue. However, suddenly one attempt after another is being made to somehow prohibit the short term open access and also to prevent any enquiry by the State Commission, a statutory power is sought to be invoked under Section 37 of the Electricity Act, 2003. The impugned notification

has been issued with the sole object of preventing consumers from taking supply of electricity through sought open access and particularly over the power exchange wherein the electricity can be procured only by way of short-term open access.

- xi. Because the perversity of the impugned notification is evident by the fact that while the reason given for the exercise of power under Section 37 is that there is a transmission constraint on the 765 KV Agra - Gwalior transmission line, there was no issue with regard to short-term open access being taken the other States in the country including in the neighbouring state of Haryana. In case there was really a transmission constraint for import of electricity on account of one interstate transmission line being affected, the same would affect all the states in the region and not only the state of Haryana. This itself establishes that the impugned notification has been issued only for the purposes of blocking short-term open access to benefit the distribution licensees states are to prevent competition which is contrary to the very object and scheme of the Electricity Act, 2003.
- xii. Because the impugned notification only seeks to overcome the mandate given under the National Electricity Policy and National Tariff Policy of promoting open access which has the effect of increasing competition and also benefiting the consumers. Open access is to be brought in a phased manner with the ultimate

objective of providing the freedom of choice to all the consumers to take electricity from any source of their choice upon payment of the requisite charges. The distribution licensees have huge inefficiencies in their operation and are not presently in a position to compete with other sources of supply, due to their own acts of commission or omission. To overcome the inefficiencies of the distribution licensees, attempts are being made to stop open access. The impugned notification has been issued to serve the above purpose of the distribution licensees of preventing competition and ensuring that the consumers do not have the choice of taking supply of electricity through short-term open access and particularly over the power exchange.

- xiii. Because the impugned notification is particularly aimed at blocking the transactions of the consumers in the State of Haryana of procuring electricity over the power exchange. Over the past few years, the power exchanges have become a very popular platform for procurement of electricity wherein the electricity is available on real time basis based on bids received and bids submitted by seller and purchaser, akin to a stock exchange. Substantial competition has arisen on account of the power exchange being available as a platform to the consumers for procurement of electricity. The impugned notification has been issued by the State Government with the sole objective of stopping the procurement of electricity by the consumers at large through the power exchanges

and ensuring that the consumers do not have choice of procurement of electricity.

xiv. Because the reasons purported to be given in the notification, namely that the open access for 250 MW power banked with the State of Madhya Pradesh has been denied to the State of Haryana or that there is any constraint in the Agra - Meerut line are completely fallacious and without any merit. Even if there is some transmission constraint (without admitting the same) on a particular line, it cannot be that no short term open access at all can be granted on any line across the State of Haryana. Further, the Respondent No. 2 is an intra-state entity and is not concerned with what may be the constraints in the system outside the State of Haryana. If indeed there is such a constraint, then even if No - Objection/concurrence is granted by the Respondent No. 2, the consumers will not be able to purchase power because of the constraint in the regional system. This cannot be a ground for simply prohibiting the short term open access throughout the State of Haryana.

xv. BECAUSE existence of any transmission constraint cannot be a reason for stopping all short term open access in the State of Haryana. The transmission constraint claimed in the present case namely the constraint in the interstate transmission line can in no circumstances be the reason for the State Load Despatch Centre or

the State Government refusing permission for procurement of electricity to open access. If at all there is a transmission constraint in the interstate transmission system, the same is within the sole jurisdiction of the Regional Load Dispatch Centre, the Central Electricity Regulatory Commission and the Central Government. Further, any such transmission constraint in the interstate transmission system would result in the interstate open access being denied by the Regional Load Dispatch Centre. This is the particular reason why the procurement of banked electricity has not been allowed on account of the transmission constraint on the line which is to be used for procurement of electricity from the State of Madhya Pradesh to the State of Haryana. However the transmission constraint on one particular line cannot mean that no short-term open access can be used for procurement of electricity and all the consumers of the State have to necessarily procure electricity only from the distribution licensee or through other sources and not through short-term open access.

- xvi. Because transmission constraints are always restricted to individual lines and when no such line is to be used for procurement of electricity, there cannot be any issue of transmission constraint being used for blocking open access to the consumers. The maximum effect of there being transmission constraint would be that when open access is sought for those particular lines or transmission systems where there is a

constraint, the open access for such cases would be denied by the concerned Load Dispatch Centre, namely, Regional Load Despatch Centre for the inter-state lines and State Load Despatch Centre for the intra-state lines. However, transmission constraint in one particular inter-state transmission line cannot be the ground for blocking all short term open access in the State and that too by the State Government and the State Load Despatch Centre.

xvii. Because the effect of the impugned notification is that the consumers taking supply of electricity through short term open access would now be constrained to take supply of electricity from the distribution licensees itself. In such an event, the distribution licensee would also procure the electricity and supply the same to the consumers through the same transmission and distribution system. The system constraint would not be resolved in such a circumstances. This itself establishes that the impugned notification is only aimed at blocking short term open access and to act in an anti-competitive manner and over-reach the directions of the State Commission.

xviii. The Petitioner crave leave to add to the grounds mentioned above and submits that the contentions are in the alternate and without prejudice to one other.

5. That the following question of law arise out of the present writ petition for a kind consideration of this Hon'ble Court: -

- i. Whether the action of the respondent State in issuing the notification dated 14.05.2014 (Annexure P-10) is arbitrary, illegal and unsustainable in law?
 - ii. Whether the notification dated 14.05.2014 (Annexure P-11) is violative of the provisions of the Electricity Act, 2003?
6. That the Petitioner has not filed any other petition or initiated any other proceeding against the same cause of action in this Hon'ble Court or before the Hon'ble Supreme Court of India.
7. That the Petitioner does not have any other alternate and efficacious remedy before any other forum apart from approaching the Hon'ble Court. The action of the Respondent No. 1 is contrary the provisions of the Electricity Act and to oust the jurisdiction of the State Commission and other Regulatory Authorities in regard to the short-term open access to be allowed for the consumers in the State of Haryana. In the circumstances, the Petitioner does not have any other alternate and efficacious remedy apart from invoking the jurisdiction of the Hon'ble Court under Article 226 and 227 of the Constitution of India.

PRAYER

In the facts and circumstances mentioned above, it is respectfully prayed that the Hon'ble Court may be pleased to:

- (a) issue an appropriate writ, order or direction in the nature of certiorari to quash and set aside the Notification dated 14/05/2014 (Annexure P-10) issued by the Government of Haryana under Section 37 of the Electricity Act, 2003;

- (b) AND FURTHER issue an appropriate writ, order or direction in the nature of prohibition to restrain the Respondents No. 1 to 3 for taking action in blocking short-term open access contrary to the provisions of the Electricity Act, 2003 and the Regulations framed by the State Commission and the Central Electricity Regulatory Commission;
- (c) AND FURTHER issue a writ or writs in the nature of mandamus directing the Respondent No. 2 to consider and dispose of the open access applications of the members of the Petitioner Association strictly in terms of the Regulations framed by the State Commission and the Central Electricity Regulatory Commission;
- (d) AND/OR FURTHER pass any other appropriate writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;
- (e) service of advanced notices on the respondents be dispensed with;
- (f) costs of the petition may kindly be awarded in favour of the petitioner;
- (g) Exemption from filing the certified copies of the Annexures and filing of photocopies, dim print copies and single space copies of the Annexures be permitted;