MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Sub: In the matter of petition filed under Section 86(1)(e), and Section 86(1)(a) read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005.

Petition No. 38/2018

ORDER

(Date of Hearing: 09th October, 2018)
(Date of Order: 29th November, 2018)

M/s. Narmada Sugar Private Limited,
Vill : Pondar, Sali Chouka,
District : Narsimghpur (M.P.) - **Petitioner**

Vs.

The Managing Director,
M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd.,
Block No. 7, Shakti Bhawan, Rampur, Jabalpur – 482008 - **Respondent No. 1**

New and Renewable Energy Department,
Government of Madhya Pradesh,
Main Road No. 2, Urja Bhawan,
Near 5 No. Bus Stop, Shivaji Nagar, Bhopal – 462016 - **Respondent No. 2**

Shri Aditya K. Singh, Advocate and Shri Vaibhav Maheshwari, Representative appeared on behalf of the petitioner.

Shri Deepak Chandela, DGM (Com) appeared on behalf of Respondent No. 1

None appeared on behalf of Respondent No. 2.

2. The instant petition has been filed by the petitioner under Section 86 (1) (e), Section 86 (1) (f) and Section 86 (1) (a) of the Electricity Act, 2003 read with Regulation 10 of "Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18. 18.19 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 seeking directions to interpret and comply with Section 42 of the Electricity Act, 2003 in letter and in spirit and to declare void ab initio all actions being undertaken by Respondent No. 1 while misinterpreting Section 42 of the Electricity Act and Regulation 13 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005. The petitioners have broadly prayed to the Commission to:

i. Admit the Present Petition;
ii. In the interim, direct Respondent No. 1 to restore HV 7.1 connection of the Petitioner and issue directions restraining Respondent No. 1 from taking any coercive action till disposal of this Petition;

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iii. Direct Respondent No. 1 to not impose cross subsidy and additional surcharge on self consumption of the electricity by the Petitioner from its own generating station by bagasse based cogenerating stations;

iv. Declare that all actions being undertaken by the Respondent No. 1 in regard to imposition of cross subsidy surcharge and additional surcharge on the Petitioner is void ab initio and further direct to Respondent No. 1 for refund of all amount paid by the Petitioner for Cross Subsidy Surcharge and Additional Surcharge; and

v. Pass any such other or further order(s) as the Commission may in the facts and circumstances of the present case, may deem fit and proper.

3. The case was listed for motion hearing on 28.08.2018. During the motion hearing, the Commission admitted the petition and directed to the petitioner to serve a copy of the petition to the respondents within a week's time. The Commission also directed to respondents to file their reply in hard copy by 18.09.2018, with a copy to the other parties. The case was listed for next hearing on 25.09.2018.

4. Respondent No. 1 submitted the reply on 20.09.2018. During the hearing held on 25.09.2018, the petitioner sought one week's time for filing the rejoinder in the matter. The Commission considered the request and directed to the petitioner to submit the same in hard copies by 05.10.2018 with copy to the other parties. Further, the Commission enquired from the petitioner about earlier status of its plant in respect of the electricity supply arrangements. The petitioner requested the Commission to allow some time for submission in this regard. The Commission accepted the request and directed the petitioner to submit the response by 05.10.2018 with copy to the other parties. The case was listed for hearing on 09.10.2018.

5. During the hearing the petitioner and respondents argued the matter at length in favour of their submissions. The petitioner reiterated that the respondent No. 1 has imposed cross subsidy surcharge and additional surcharge on auxiliary consumption by the power plant and consumption by the co-located and co-owned sugar plant of the petitioner despite of the fact that the Petitioner made various representation to East Discom explaining that Section 42(4) stipulates that these charges would be applicable only on such consumers who have been allowed to avail open access and Petitioner is not an open access consumer, therefore, the petitioner is not liable to pay open access charges. Further, the respondent has been mistakenly relying on VIIth

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Amendment and imposed Cross Subsidy and Additional surcharge on consumption of electricity by the Petitioner from its own generating station based on cogeneration process. The petitioner has further submitted that the Respondent No. 1 has arbitrarily imposed additional surcharge and cross subsidy on the Petitioner and has relied on various statutory provisions in support of its submission. The Respondent has not countered any of the statutory provisions cited by it or the Respondent has not demonstrated which statue/regulation/act empowers them to impose such surcharges on the entity which were/is/will never consumer of the distribution agency and has been generating electricity in co generating process. While the respondent contested the petitioner's views stating that Discom has acted in accordance with the law. Once it is established that plant is not a captive generating plant, levy of Cross Subsidy Surcharge is mandatory and automatic in accordance with the Section 10(2) read with Section 42(2) of the Electricity Act, 2003. The respondent requested the Commission to dismiss the petition being devoid of merit. The respondent's counsel also submitted a brief submission on 09.10.2018. The petitioner requested the Commission for submission of a written note of argument within a week's time. The Commission considered the request. The petitioner submitted its written note of arguments vide submission dated 15.10.2018.

6. The petitioner in the petition, rejoinder dated 04.10.2018 and subsequent submission of 15.10.2018 stated that respondent No. 1 has arbitrarily imposed cross subsidy on the Petitioner and has relied on various statutory provisions in support of its submission. The Petitioner has submitted that no reasonable justification has been provided by the Respondent No. 1 for imposition of additional surcharge and cross subsidy on the self consumption of such electricity by the sugar plant, which it generates during the process of sugar production and within the plant. The Petitioner has stated that the petitioner is compelled to file this petition against unprecedented and possibly only one case in entire India wherein a bagasse based cogenerating unit has been asked to pay cross subsidy and additional surcharge for its self-consumption of its own electricity. The petitioner has broadly submitted as below:

i. The Petitioner is a company incorporated under the Companies Act, 1956 and is operating a bagasse based power plants relying on cogeneration process. The Petitioner has installed a sugar factory in the year 2005 and this factory has been consuming power from its own co generating unit located in the same premises. Sugar industry is highly regulated industry and if any producer will not comply with the standard procedure being followed by others than it will have a sustainability challenges. Cross subsidy and

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additional surcharge are open access surcharge and it can only be imposed in terms of statutory provisions and it's interpretation by judicial forums.

ii. The Petitioner had installed 800 TCD pressure boiling sugar plant (Semi Sugar Plant) in 2002 by installing 750KW Turbine set and taken load of 150 KVA from Respondent No. 1 for off season repair and maintenance purposes. In 2005-06 the Petitioner, converted its pressure Boiling Sugar plant in to vacuum sugar plant of 2000 TCD with 2 MW power plant and disconnected 150 KVA load from 01.02.2006. The petitioner was not drawing any power from the respondent No.1. In 2013-14 the Petitioner had aviled a load of 85 HP on LT line for off season repair and maintenance purposes. During 2015-16 under the expansion from 2000 TCD to 5000 TCD it installed 3.00 MW turbine. Post this expansion, capacity of sugar plant became 5000 TCD and boiler capacity became 75 TPH at 21 KG/CM and power generation was around 5 MW. With the advent of new technology without increasing capacity of the plant, petitioner increased the electricity output of the plant by increasing capacity of boiler and turbine. Due to this production of the electricity got extended to 6 times. This power plant is partial part of the sugar plant and situated within the premises. New system clearly spells that by upgrading the technique, the Petitioner is capable to generate surplus power. The petitioner has further submitted that

   i. The Petitioner has never used electricity of the Respondent No. 1 for the production of the sugar;
   ii. There is not a loss of revenue till date of the Respondent No. 1 by using modern technology in the generating plant.

   The figures of our revenue from the electricity sale and sugar sale:
   Sales of sugar – 150.69 Crore
   Sales of Power - Rs. 11.05 Crore

iii. Petitioner has installed 30 MW bagasse based cogeneration project at Village Pondar, Salichouka, Distt Narsinghpur in the state of Madhya Pradesh. Members were using the electricity generated from this cogeneration plant for their own consumption. Sugar industry has been traditionally practicing cogeneration by using bagasse as a fuel. With the advancement in the technology for generation and utilization of steam at high temperature and pressure, sugar industry can produce electricity and steam for their own requirements. It can also produce significant surplus electricity for sale to the grid using same quantity of bagasse. The sale of surplus power generated through optimum cogeneration would help a sugar mill to improve its viability, apart from adding to the power generation capacity of the country.

iv. Madhya Pradesh Electricity Regulatory Commission ("MPERC") vide its April, 2013 order ("Bagasse Tariff Order") determined tariff for Bagasse based cogeneration power

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plant. Para 9.4 of this tariff order is reproduced below which obliges MP Power Management to procure electricity from bagasse based cogeneration plants:

i. *"The energy generated by the bagasse based cogeneration projects will be procured centrally by the M.P. Power Management Co. Ltd. at the rates specified in this order. The energy so procured will be allocated by M.P. Power Management Co. Ltd. to the three distribution licensees on the basis of actual energy input in the previous financial year. Accordingly, the Power Purchase Agreements will be signed between the developer and the M.P. Power Management Co. Ltd. The M.P. Power Management Company Limited, Jabalpur, in turn, will have back to back power supply agreement with the Distribution Licensees. The agreements will be for exclusive sale of electricity for a period of 20 years from the date of commissioning of plant. The developer may execute agreement with M.P. Power Management Co. Ltd. before commissioning of plant and the Commissioning Certificate may form a part of the agreement. The M.P. Power Management Company Limited, Jabalpur is directed to develop the model agreement accordingly."*

v. Petitioner is connected to grid as a generator for supplying power to third party and for drawal of power in terms of Regulation 10 of MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I). Prior to VIIth amendment of aforementioned Regulation, Clause 12.2 reads as under:

2. Wheeling charges, Cross subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time. Captive consumers and Open Access Consumers shall be exempted from payment of Open Access charges in respect of energy procured from Renewable Sources of Energy.

Post VIIth amendment of MPERC RE Regulation, Clause 12.2 reads as under ("VIIth Amendment"):

"12.2 Wheeling charges, Cross subsidy surcharge and additional surcharge on the wheeling charges etc. as decided by the Commission from time to time under Section 42 of the Electricity Act, 2003 shall be applicable."

vi. Such open access consumer which were drawing power from renewable energy sources were not liable to pay wheeling charges, cross subsidy and additional surcharge prior to VIIth amendment and this amendment withdrew such exemption from such open access consumers. East Discom, mistakenly relying on this VIIth Amendment imposed Cross Subsidy on consumption of electricity by the Petitioner from its own generating station based on cogeneration process relying on bagasse as a fuel. Petitioner is not disputing that whoever will be consumer of the Respondent, they will be necessarily liable to pay

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such charges but Petitioner which were never a consumer of the East Discom will not be liable to pay such charges.

vii. East Discom imposed cross subsidy surcharge on auxiliary consumption of the power plant and consumption of the co-located and co-owned sugar plant. Section 42(3) and 42(4) of the Electricity Act, 2003 stipulate imposition of cross subsidy surcharge and additional surcharge on open access consumers at the rate determined by the Commission. Para 5.8.3 of the Electricity Policy, 2005 stipulates that cross subsidy is a compensatory charge to compensate distribution licensee for loss of revenue from migration of the customer. Tariff Policy also stipulates this as a compensatory charge.

viii. Petitioner made various representation to East Discom explaining following:

Section 42(4) in clear terms stipulates that these charges will be applicable only on such consumers who have been allowed to avail open access and Petitioner is not an open access Consumer, therefore it is not liable to pay open access charges.

Cross Subsidy is a compensatory charge which is liable to be paid by all subsidising consumers to compensate losses of the distribution licensee by supplying power to subsidised consumers even after such subsidising consumer ceases to be a consumer of the distribution licensee till date it is located within area of such distribution licensee.

ix. It is undisputed fact that Petitioner procures power from distribution licensee as a generation station for its auxiliary consumption in strict compliance of the Regulation 10 of MPERC RE Regulation. The Petitioner has been drawing electricity from distribution licensee only for off season repair and maintenance purposes and have never used electricity for tuning our own sugar plant and this fact has been admitted by Respondent Number 1 also**.**

x. The Petitioner is generating energy by cogeneration process using bagasse as a source of fuel which is a renewable energy source and illegal burden of cross subsidy surcharge will compel Petitioner to close the generating station and the same would have cascading impact on other bagasse projects also and instead of the much needed boost to the renewable energy sector and developer, the default would act as deterrent for not just the Petitioner but also other developers who are developing/ are proposing to develop bagasse based renewable power projects in the State of Madhya Pradesh. Imposition of illegal charges on self-consumption of electricity by the Petitioner undermines the mandate of the Electricity Act, 2003 to promote renewable sources of energy (Sections 61 (h), (i), 86 (1) (e), para 5.12.1 and 5.12.2 of the National Electricity Policy and paras 4 (e) and 6.4 of the Tariff Policy).

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xi. From reading of the relevant regulations it would be concluded that cross subsidy shall be applicable in following cases:

   i. Section 42 (2) of the Electricity Act stipulates imposition of the cross subsidy to take care of the requirements of current levels of cross-subsidy.
   ii. Paragraph 5.8.3 of the Electricity Policy in very unambiguous terms stipulate mandatorily imposition of cross subsidy on all such consumers who avails supply under open access by switching from distribution licensee.
   iii. Paragraph 8 of Tariff Policy clearly demonstrates that Cross Subsidies are being levied on consumers who are permitted open access or if consumers are availing open access and in very unambiguous terms demonstrate that the open access consumers will have such payment.

xii. From reading of the relevant regulations it would be concluded that additional surcharge shall be applicable in following cases:

   i. Section 42 (4) of the Electricity Act stipulates imposition of additional surcharge on the charges of wheeling to meet the fixed cost of distribution licensee arising out of his obligation to supply.
   ii. Therefore, it is crystal clear that additional surcharge is a surcharge on the charge of wheeling and it is undisputed fact that wheeling charges are imposed only on the wheeling of the electricity.
   iii. Para 5.8.3 stipulates imposition of additional charges in such cases whereas any consumer is allowed open access and distribution licensee is not able to meet fixed costs.
   iv. Para 8.5.4 of the Tariff Policy stipulates imposition of addition surcharge as per Section 42 (4) (this Section stipulates imposition of this surcharge on wheeling charge) and only when it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded.
   v. Regulation 13.g of the Open Access Regulation require imposition of open access regulation on a yearly basis.

xiii. There are various judicial precedents dealing with these surcharges. Supreme Court of India in "Sesa Sterlite Limited Vs. Orissa Electricity Regulatory Commission" has dealt this issue at paras 25 to 28. The Hon'ble Supreme Court termed it as a compensatory charge and opined that cross subsidy surcharge shall be payable by all consumers who will take electricity from the distribution licensee if the present open access will be discontinued. This Judgment was followed by APTEL in "Steel Furnace Association of India" and Hon'ble Tribunal observed as follows:

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> *"This Tribunal in a number of judgments has held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access the consumer would have taken electric supply from the Distribution Licensee and in the result the consumer would have paid the tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.".*

xiv. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts one, on its ability to cross-subsidize the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects. The Petitioner who had never been a consumer of the distribution licensee therefore consumption of electricity by the Petitioner from its cogenerating plant would not be considered as an exit of the consumer of the distribution licensee. The law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source. But, these surcharges will never be applicable on plants like Petitioner who will face closure of its sugar plant if any policy compels them to become consumer of the distribution licensee.

xv. The cross subsidy surcharge is a compensatory charge. When a subsidizing consumer takes supply from any other source by seeking Open Access, the amount of cross subsidy it was paying to the licensee would also be lost. This would put burden on remaining consumers particularly the subsidized consumers. In order to mitigate the loss of cross subsidy, the legislature has introduced the concept of Cross Subsidy Surcharge. In fact,

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the Cross-Subsidy Surcharge is required to compensate the subsidized consumers of the distribution licensee.

xvi. Cross subsidy and additional surcharge both are in the nature of surcharge. Hon'ble Supreme Court of India in "Birsa Stone Lime Co. v. Orissa State Electricity Board" defines Surcharge as follows:

> *"11. The word surcharge is not defined in the Act, but etymologically, inter alia, surcharge stands for an additional or extra charge or payment (see Shorter Oxford English Dictionary). Surcharge is thus a super-added charge, a charge over and above the usual or current dues. Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff.*"

Further, cross subsidy and additional surcharge provisions are akin to fiscal statute provisions and for that in "Mathuram Agrawal Vs. State of Madhya Pradesh [(1999) 8 SCC 667]," Hon'ble Supreme Court of India provides cardinal principal of law for interpreting taxing (fiscal) statutes:

> *"..The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."*

Bare reading of the applicable provisions reflects that Petitioner is not liable to pay cross subsidy and additional surcharge for electricity drawn for its self-consumption.

xvii. Respondent is trying to make monetary benefits which it is not legally entitled to by imposition of illegal additional surcharge and cross subsidy surcharge. The same clearly

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amounts to unjust enrichment. It is a settled law that the Courts and Tribunals must prevent unjust enrichment.

xviii. There is no direct precedent dealing with the instant issue because not a single state has till date charged cross subsidy on the sugarcane unit and this commission will have an opportunity to decide this matter judiciously keeping in mind view of other states regulator and intent of the imposition of cross subsidy to compensate losses of DISCOM wherein it needs to be demonstrated that there is loss to the distribution licensee.

7. The respondent No. 1 in the reply dated 19.09.2018 received on 20.09.2018 stated that the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or inconsistent with what is stated herein the petition. The respondent has broadly submitted as below:

i. The respondent No. 1 is a "distribution licensee" as per the definition u/s 2(17) of the Electricity Act, 2003 and has been vested function of distribution and retail supply of electricity in the eastern region of the State of Madhya Pradesh. The petitioner is a "generating company" as per the definition of Section 2(28) of Electricity Act, 2003 and having 100% ownership of bagasse based 30 MW co-generation plant which is located in the distribution area of the respondent No.1 The Petitioner has constructed a 30 Mega Watt Bagasse based co-generation plant and out of the total electricity generated through the said plant 8 to 9 Mega Watt (about 26% to 30% of the total energy generated Sugar Plant) of the electricity is consumed by their Sugar Plant through "dedicated transmission line" and the rest of the energy /electricity was "supplying" to third party through grid connection as "generator." Further, the petitioner as "generating company" has made request for grid connectivity and short term open access for injection of power generated from its 30 MW co-generation plant which was granted vide letter No. CE/JR/HT/H-1/5595 dated 2/1/2018. While granting grid connectivity and open access, respondent No. 1 has made it clear that the power consumed by the Sugar Plant of the petitioner would be subject to cross subsidy surcharge and additional surcharge.

ii. The Petitioner is trying to merge the identity of the sugar plant with identity of Bagasse based co-generated plant, whereas, for the purpose of Electricity Act, 2003, both constitute separate and different entities. The co-generation plant of petitioner squarely falls within definition of "generating company" whereas their sugar plant falls within definition of "Consumer" as the electricity consumption of the Sugar Plant cannot be treated as a consumption of "generating station". Further, Bagasse based co-generated plant of the petitioner does not fulfill the requirement of captive generating plant as defined in Section 2(8) of the Electricity Act, 2003 read with Rule 3(1)(a) of the

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Electricity Rules, 2005 as they only consume nearly 26% to 30% of electricity generated from the said plant with their 100% ownership whereas legal requirement is not less than 51% of the aggregate electricity generated on annual basis in a financial year for captive use. The petitioner vide letter dated 6/11/2017 had declared that it would use 8 to 9MW of power in the said sugar plant and the balance 22 to 21 MW power would be available for sale.

iii. The power consumption of sugar plant of the petitioner from its co-generated plant cannot be termed as captive consumption and therefore, the supply to Sugar Plant is the supply to consumer and the sugar plant of the petitioner falls within the legal definition of consumer as defined under Section 2(15) of the Electricity Act, 2003. In the present case, co-generation plant is engaged in the business of supplying electricity to the public under Electricity Act, 2003 and the sugar plant is receiving supply of electricity for production on sugar, thus, it falls within the definition of consumer.

iv. The second issue raised by the petitioner is that since supply of the electricity is through dedicated transmission line and they have not availed the facility of open access from the distribution system of the respondent No. 1, they are not liable to pay the CSS and additional surcharge on the said supply. Hon'ble APTEL in the matter of Chhattisgarh State Power Distribution Company Limited v. Aryan Coal Beneficiation Private, (2010) APTEL 11 held that if a generator is found to be not qualified as captive generating plant, can transfer power generated by which for its own use to its own coal washeries through its own dedicated line without license or open access, however, such transfer of power from a generating plant to its own coal washeries would be subject to Cross Subsidy Surcharge. Relying upon the said decision in the matter of M/s DLF Utilities Limited Vs. Haryana Electricity Regulatory Commission and another (Appeal No. 193/2011), the Hon'ble appellate Tribunal for electricity has re-affirmed that for levy of cross subsidy "open access is not precondition" and even if the transfer of energy is availed through dedicated transmission line, cross subsidy is leviable upon in favour of the distribution licensee as a compensatory charge. Therefore, a generating company using dedicated transmission line can go upto any transmission lines or sub-stations or generating stations or the load centre.

v. By referring to the Section 9, Section 10 and Section 42 (2) with their provisos the respondent No. 1 stated that both the generation company and captive power plant can supply electricity to the end users through dedicated transmission lines and Section 10(2) clearly provides that supply to any consumer even through dedicated transmission lines is subject to sub- section (2) of Section 42 of the Act, and Section 42(2) refers to cross subsidy. Open access, though it is commonly presumed to have co-relation with cross

subsidy, even though open access may not be used by a generation company cross subsidy is leviable upon it in favour of a distribution licensee as a compensatory charge.

vi. The order dated 25.04.2014 of the Hon'ble Supreme Court in Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission (2014) 8 SCC 444 where the Hon'ble Court had considered the scheme and objective of surcharge on both aspects, cross-subsidy surcharge and Additional Surcharge as obligation to supply and held that the mechanism of such surcharge is meant to compensate the Distribution Licensee for the exit of a consumer. The relevant extracts of the above judgment in this regard read as under:

> ***"(3) Cross-Subsidy Surcharge (CSS) – Its rationale***
>
> *25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the Additional Surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption normally is that generally the bulk consumers would avail of open access who also pay at relatively higher rates. As such their exist would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts – one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.*
>
> *26. Though this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.*
>
> *27. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provisions of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for: (a) current level of cross-subsidy to be*

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gradually phased out along with cross-subsidies; and (b) obligation to supply."

vii. The MP State Electricity Regulatory Commission in its Retail Supply Tariff order for FY 2017-18 & 2018-19 has computed the additional surcharge by considering the average monthly fixed rate of surrendered power, which is based on daily least fixed rate of the generating station in the surrendered power. The Tariff Policy notified by GOI on dated 28 January, 2016 prescribes the following: -

> *"8.5.4 The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."*

With shift of consumers from Discoms, the power remains stranded and the Discom's have to bear the additional burden of capacity charges of stranded power to comply with its Universal Supply Obligation. The Additional Surcharge compensates the Discom for the additional burden of capacity charges of stranded power to comply with its Universal Supply Obligation.

viii. Hon'ble Supreme Court in the matter of Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and others (2014) 8 SCC 444 has concurred with the view that cross subsidy surcharge and additional surcharge being compensatory in nature are not dependent upon the use of transmission network of the distribution licensee. The Hon'ble Supreme Court in para-28 and 29 has held as under:

> *"28. Therefore, in the aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for*

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its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay cross-subsidy surcharge under the Act. Thus, cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

(4) Application of the Cross-Subsidy Surcharge principle

29. In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate within the area of supply of Wesco. It is seeking to procure its entire requirement of electricity from Sterlite [an independent power producer (IPP)] (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude Wesco of the cross-subsidy that Wesco would otherwise have got from it if Wesco were to supply electricity to the appellant. In order to be liable to pay cross-subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the aforesaid definition."

ix. It is settled preposition of law that cross-subsidy surcharge and additional surcharge is compensatory charge payable to the distribution licensee which has a statutory obligation to supply the electricity to all without any discrimination. It is the social obligation, therefore, any one availing energy from other sources has to bear a part of the said obligation in form of CSS and additional surcharge which will also give a fair play and balance in the distribution and in supply of electricity.

x. The cross subsidy surcharge and additional surcharge are compensatory charges payable to the Distribution Licensee by a person having premises within the area of Distribution Licensee when it receives supply of electricity notwithstanding that no part of the Distribution Licensee network is used.

xi. The issue of exemption from CSS payment as promotion of Renewable Power Sector u/s 61(4) of Electricity Act, 2003 r/w 86(4) of the Act and validity of 7th Amendment in Open Access Regulation has already been challenged in Bunch of petition lead by W.P.

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9870/2018 M/S Pratibha Syntex v. MPERC and others and pending for adjudication before Indore Bench of Hon'ble High Court of M.P. therefore it would not be appropriate for this Hon'ble Commission to embark upon the adjudication of Ground I (A to D) and Ground II (A to M) of the present petition as Hon'ble High Court of Madhya Pradesh has taken cognizance of the said objection and already adjudicating same.

xii. The allegation of petitioner that recovery of Cross Subsidy Surcharge and additional surcharge will be result in unjust enrichment of the answering respondent is also misconceived as admittedly these charges are compensatory in nature and utilized strictly to meet statutory obligation of answering respondent and in fact the liability of cross subsidy is taken by class of consumers and consumer like petitioner wants to enjoy exemption at cost of other class of consumers.

xiii. The Section 56 of Electricity act 2003 is reproduced here as under:

> *"Section 56. (Disconnection of supply in default of payment): -- (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:*

xiv. Further, as per M.P. Electricity Supply Code, 2013 clause 9.14 " If a consumer fails in payment of any bill in full, without the approval of the authorised Officer, by the due date, the service connection of the consumer will be liable to be disconnected on temporary basis after giving not less than fifteen clear days' notice in writing to such consumer." Also as per clause 9.15 of supply Code 2013 "After temporary disconnection, the supply shall be restored only after the consumer pays the outstanding charges/dues/ amount of installment fixed along with disconnection-reconnection charges." In view of the foregoing, it is requested to direct the petitioner to make payment of demand of Cross subsidy charges and additional charges in full for restoration of power supply.

Sub: In the matter of petition filed under Section 86(1)(e), and Section 86(1)(a) read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005.

xv. Thus the issue involved in the present petition has already been adjudicated and answered by the Hon'ble Supreme Court and APTEL. The legal position has already been settled therefore the present petition sans merit and liable to be dismissed.

8. On behalf of the respondent No. 2, Commissioner, New and Renewable Energy, vide letter dated 25.09.2018, received in the Commission after completion of the hearing in the matter on 26.09.2018, submitted that the issues raised by Narmada Sugar Private Limited (Petitioner in the instant case) are representing the common challenges presently being faced by Bagasse based cogeneration power producer industry in the State of Madhya Pradesh. Respondent No.2 submitted as below:

i. Bagasse based cogeneration projects make use of the energy left out in the byproduct of the associated sugar factory to produce electricity. However, cogeneration based power projects are distinct in their configuration as compared to other RE based power projects.

ii. For cogeneration projects, associated sugar factory is the primary source of feedstock to operate. There can be no bagasse based cogeneration project without having a sugar factory associated with it. Accordingly, sugar factory is an integral part of cogeneration power producing activity.

iii. It is natural for the power plant that some part of its produced electricity is consumed in the activities that enable production of the electricity. Only surplus energy beyond such consumption can be exported for external use.

iv. In the given case of Narmada Sugar Private Limited, out of 30 MW produced from the cogeneration power project, 8-9 MW would be consumed by co-located sugar factory, which provides for the feedstock to the power plant. Beyond such self-consumption, the surplus of 22-21 MW is proposed to be exported for external consumption.

v. Such 'self-consumption' is natural to the configuration for any co-generation based power project; it should not be confused with 'captive' consumption.

vi. In captive arrangement, power generation is an independent activity and power so produced would support the associated industry. The dependency is from power plant to the industry. However, the cogeneration projects, the industry is independent and it supports the associated power plant. The dependency is from the industry to the power plant.

vii. Therefore, it is inappropriate to expect self-consumption from a cogeneration based power plant to meet those conditions required by any captive power plant to define its character.

viii. We request the Hon'ble Commission to recognize this key difference and if needed kindly undertake the study in this regard.

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ix. We request you to clarify to the industry in this regard. This will define the future of cogeneration industry in the state of Madhya Pradesh.

From the aforesaid submissions, the Commission has noted that the comments are not in line with the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 and Regulations framed thereafter.

9. Section 2(8) of the Electricity Act 2003 provides the definition of the Captive Generating plant as below:

*2(8) "**Captive Generating plant**" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association."*

10. The Electricity Rules, 2005 further provides:

"3. Requirements of Captive Generating Plant.

(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless

(a) in case of a power plant

(i) not less than twenty six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that xxxxxxxx

Provided further that xxxxxxx

(b) in case of xxxxxx

(2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company."

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11. The key word in Section 2(8) to be noted is "primarily for his own use". It means majority of the power generated by the captive power plant is to be used for captive consumption. Accordingly Sub rule (1)(a)(ii) of Rule 3 of the Electricity Rules, 2005 provides that not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use.

12. The Commission has noted that the total installed capacity of the petitioner's plant is 30 MW while it is consuming only 8-9 MW power in its sugar factory leaving remaining power to be sold through energy exchange. Thus his own consumption is less than 30% of its generating capacity and, therefore, does not fulfill the criteria of minimum 51% consumption as specified in Sub rule (1)(a)(ii) of Rule 3 of the Electricity Rules, 2005. Further as per Sub rule (2) of Rule 3, if the consumption by a captive user is less than percentage mentioned in Sub clause (a) and (b) of Sub rule (1) above, then in such case the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Thus, this is a case of supply of electricity by a Generating Company to any consumer or a person and that consumer/person is being supplied electricity through its own line. The consumer could be in the same premises or located elsewhere. In a similar case, Hon'ble APTEL vide para 17 of its order dated 09.02.2010 in Appeal No. 119 & 125 of 2009 provided as under:

" 17. The cross subsidy surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee's line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. On this principle it has to be held that the cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not."

13. The Hon'ble Supreme Court in para 29 of its judgment in the matter of Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and others (2014) 8 SCC 444 has concurred with the view that cross subsidy surcharge being compensatory in nature is not dependent upon the use of transmission network of the distribution licensee and has held as under:

Sub: In the matter of petition filed under Section 86(1)(e), and Section 86(1)(a) read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005.

> *" (4) Application of the Cross-Subsidy Surcharge principle*
>
> *29. In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate within the area of supply of Wesco. It is seeking to procure its entire requirement of electricity from Sterlite [an independent power producer (IPP)] (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude Wesco of the cross-subsidy that Wesco would otherwise have got from it if Wesco were to supply electricity to the appellant. In order to be liable to pay cross-subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the aforesaid definition."*

14. The contention of the petitioner that the cross subsidy surcharge is not charged by other States on the sugarcane unit and, therefore, this Commission is to decide the matter keeping in view of the other States' Regulators, is not tenable as the levy of all statutory charges is governed under the extant provisions of the Electricity Act, 2003, the Electricity Rules, 2005 and related Regulations.

15. In view of above analysis as per the provisions of the Electricity Act, 2003 and the Electricity rules, 2005, the Commission is of the view that the petitioner has not been able to establish that its co-generation plant can be considered as captive power plant and his consumption as captive consumption, to qualify for exemption under proviso 4 of Section 42(2) of the Electricity Act, 2003. Therefore, all the statutory charges / surcharges as determined by the Commission from time to time shall be leviable on the petitioner by the concerned distribution licensee.

16. In view of the above, petition no. 38/2018 stands disposed of.

Ordered accordingly.

(Anil Kumar Jha)	(Mukul Dhariwal)	(Dr. Dev Raj Birdi)
Member	**Member**	**Chairman**