MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION BHOPAL

Sub: In the matter of filing of petition under Section 86 (1) (f) read with Regulation 8.8 (x) of MPERC (Terms and Conditions for Intra State Open Access in State of Madhya Pradesh) Regulations, (Revision – I) 2021 seeking setting aside of Order dated 25.01.2022 passed by the Open Access Monitoring, Dispute Resolution and Decision Review Committee and consequent directions against MPPKVVCL qua its illegal and arbitrary demand from the Petitioner for units consumed from April 2015 to July 2017.

ORDER

(Hearing through Video Conferencing)
(Date of Order: 30 December' 2022)

M/s Prism Johnson Ltd.
305, Laxmi Niwas Apartments,
Ameer Pet, Hyderabad. - **Petitioner**

Vs

1. **The Managing Director,**
   M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd,
   Urja Parisar, GPH Campus, Pologround, Indore (M.P.) – 452003
2. **State Load Despatch Centre,**
   MP Power Transmission Company Ltd.,
   Nayagaon, Jabalpur (M. P.)-482008
3. **M/s Ujaas Energy Limited**
   Formerly M&B Switchgear Ltd.
   701 NRK Business Park, Vijay Nagar, Indore (M.P) 452015
4. **M/s SKP Bearing Industries**
   Through its Director,
   Survey No. 2127, Mulchand Road, Wadhwan City, - **Respondents**
   District Surendra Nagar (Gujarat) – 363035
5. **M/s Seattle Power Solutions Private Limited**
   Through its Director
   N - 3 , Saket Nagar, Indore (M.P)-452018
6. **M/s JK Minerals**
   Through its Director,
   Main Road, Balaghat (M.P) 481001
7. **M/s Ankit Gems Private Limited**,
   Through its Director,
   D tower, G Block, Bharat Diamond Bourse, BKC, Bandra (East),
   Mumbai, Maharashtra – 400051
8. **M/s Atul Sharma**
   Having Registered Office at 80, Civil Line,
   Jhansi (U.P.)

Shri Venkatesh Advocate, Shri Suhael Buttan Advocate and Shri Abhishek Nangia Advocate appeared on behalf of the petitioner.

Shri Sanjay Malviya, SE, Shri Prasanna and Shri Shailendra Jain appeared on behalf of Respondent No. 1.

Shri Anurag Mishra appeared on behalf of Respondent No. 2.
None appeared for Respondents No. 3 to 8.

The subject petition was filed under Section 86 (1) (f) read with Regulation 8.8 (x) of MPERC (Terms and Conditions for Intra State Open Access in State of Madhya Pradesh) Regulations, (Revision – I) 2021 seeking setting aside of Order dated 25.01.2022 passed by the Open Access Monitoring, Dispute Resolution and Decision Review Committee and consequent directions against MPPKVVCL qua its illegal and arbitrary demand from the Petitioner for units consumed from April 2015 to July 2017.

2. At the hearing held on 28th July' 2022, the petition was admitted and petitioner was directed to serve copy of the petition to the Respondents within seven days and report compliance of service to the Commission. The Respondents were directed to file their replies to the subject petition within two weeks and a copy of aforesaid reply be served to petitioner simultaneously. The petitioner was directed to file rejoinder within two weeks, thereafter. Case was fixed for hearing on 30th August' 2022.

3. At the hearing held on 30.08.2022, Commission observed the following:

(i) Representative who appeared for Respondent No. 1 stated that he had received copy of petition on 23.08.2022.

(ii) Representative who appeared for Respondent No. 2 stated that he has not received copy of petition till date.

(iii) None appeared for the Respondents No. 3 to 6.

4. Petitioner was directed to ensure that the copy of petition be served to all Respondents. The Respondent Nos. 1 and 2 were directed to file their replies to the subject petition within a week. The petitioner was directed to file rejoinder within a week, thereafter. Opportunity to file reply by Respondents No. 3 to 6 was closed. Case was fixed for hearing on 27.09.2022.

5. At the hearing held on 27.09.2022, the Commission observed the following:

(i) Respondent No. 1 filed reply to the subject petition on 02.09.2022.

(ii) Respondent No. 2 filed reply to the subject petition on 20.09.2022.

(iii) Ld. Counsel for the petitioner stated that he did not receive the copy of aforesaid replies filed by Respondents. He requested that the Respondents may obtain the correct postal address and e-mail IDs of the petitioner for service of their replies.

6. In view of the above, the petitioner was directed to share the correct postal address and its email-ID with the Respondents. The Respondent Nos. 1 and 2 were directed to ensure service of copy of their replies to the petitioner within a day, thereafter at the address informed by petitioner. As requested, the petitioner was allowed to file amended petition within 15 days and a copy of the aforesaid amended petition be served to all the Respondents simultaneously. The petitioner was directed to ensure service of its amended

petition to all Respondents and report compliance of the same to the Commission. The Respondents were directed to file their response on the aforesaid amended petition within a week, thereafter. Case was fixed for hearing on 27.10.2022.

7. The petitioner vide affidavit dated 19.10.2022 broadly submitted their amended petition as under:

> *"1. The present Petition has been filed by the Petitioner, i.e. Prism Johnson Limited ("**Prism**"/"**Petitioner**"), under Section 86(1)(f) of the Electricity Act 2003 ("**Act**") read with Regulation 8.8 (x) of the MPERC (Terms And Conditions For Intra State Open Access In State of Madhya Pradesh) Regulations, (Revision -I) 2021 ("**Open Access Regulations, 2021**") as well as in terms of the liberty granted by this Hon'ble Commission vide Order dated 18.12.2020 passed in Petition No. 19 of 2020, seeking setting aside of Order dated 25.01.2022 ("**Impugned Order**") passed by the Open Access Monitoring, Dispute Resolution and Decision Review Committee("**Committee**") along with quashing of the illegal and arbitrary demands raised by Madhya Pradesh Paschim Kshetra Vidyut Co. Ltd. ("**MPPKVVCL**") vide Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022.*
>
> *2. This Hon'ble Commission vide its Order dated 18.12.2020 had referred Petitioner's case to the Open Access Monitoring, Dispute Resolution and Decision Review Committee ("**the Committee**") and further granted liberty to the Petitioner to approach this Hon'ble Commission in case it is not satisfied with the decision rendered by the Committee. For ready reference, the relevant extract of the Order dated 18.12.2020 is reproduced hereunder:*
>
> > *"In view of the provisions as stated above and the order passed by the Hon'ble High Court Bench Indore, the petitioner is hereby directed to first approach the abovementioned Committee for resolution of the dispute. The Committee is directed to investigate the matter and submit its findings within a period of three months from the date when the petitioner approached the Committee. The Commission Secretary would provide all documents on record to the Committee. **In case the petitioner is aggrieved by the decision of the Committee, he shall be at liberty to approach the Commission under relevant Regulation**."*
>
> *3. The Petitioner through the present Petition is challenging the Impugned Order passed by the Committee whereby it rejected the Petitioner's Representation and directed the Petitioner to make payment of Rs. 2,56,26,841/- as demanded by MPPKVVCL vide its Demand Notice dated 27.12.2018 ("**Demand Notice**") and held as follows:*
>
> *(a) The amount claimed by MPPKVVCL from the Petitioner is due to the settlement of energy as per the regulatory provision and therefore, the same will not come under the purview of Section 56(2) of the Act*
>
> *(b) Demand raised by MPPKVVCL is not barred by limitation under*

*Section 56(2) of the Act in view of the Judgment passed by the Hon'ble Supreme Court in Civil Appeal No. 7235 of 2009 titled as Prism Cottex v. Uttar Haryana Bijli Nigam Limited and Ors. ("**Prism Cottex Judgment**").*

*(c) The Charges being claimed under the Demand Notice is in line with the Power Purchase and Wheeling Agreements ("**PP&WA**") entered between Respondent No. 4 to 8 with MPPKVVCL and Agreement executed by the Petitioner with Respondent No. 4 to 8.*

*(d) Earlier settlements are to be done in accordance with the Time of Day ("**ToD**") manner as prescribed in the Agreement and as approved by this Hon'ble Commission in Petition No. 35 of 2008 titled as Kalani Industries Private Limited & Anr. vs. MPPKVVCL & Ors.*

(e) The Petitioner is under a statutory obligation to pay the differential amount towards escaped/deficit billing in light of the Judgment of the Hon'ble High Court of Madhya Pradesh in W.P. No. 827 of 2003 titled as Kapoor Saw Manufacturing Co. vs. MPSEB & Ors. 2006 SCCOnLine MP 612

*A true copy of the Order dated 25.01.2022 passed by the Committee is annexed hereto and marked as **ANNEXURE P/1**.*

4. With great respect, it is submitted that the Committee while passing the Impugned Order has failed to appreciate that the Demand Notice dated 27.12.2018 issued by MPPKVVCL has no basis whatsoever as:

(a) The Demand Notice is barred by Section 56 (2) of the Act and the ToD method of accounting cannot be applied retrospectively, especially when from 17.11.2017 for the first time scheduling was directed to be carried by the RE Generators by this Hon'ble Commission.

(b) The letter dated 30.04.2014 which has been extensively relied upon by MPPKVVCL in its Demand Notice, was never provided to the Petitioner at the time and has not even been dealt with by the Committee in the Impugned Order.

(c) The PP&WA executed with Respondent No. 4-8 do not provide for ToD Method and Petitioner is not even a party to the Agreements entered by MPPKVVCL.

(d) All payments have already been made by the Petitioner for the period in question and no objection was ever raised by MPPKVVCL.

(e) No methodology/computation whatsoever has been provided by the Petitioner qua the demand raised by way of the Demand Notice.

*A true copy of the Demand Notice dated 27.12.2018 issued by MPPKVVCL is annexed hereto and marked as **ANNEXURE P/2**.*

5. In addition to the Demand Notice dated 27.12.2018, the Petitioner through the Petition is also challenging the Notices dated 18.10.2021 and 08.11.2021 issued by MPPKVVCL seeking Delayed Payment Surcharge amounting to Rs. 59,68,507/- charged on the demand raised by MPPKVVCL vide Demand Notice dated 27.12.2018 for the period from

2019 to 2021 approximately. True copies of the Demand Notices dated 18.10.2021 and 08.11.2021 are annexed hereto and marked as ***ANNEXURE P/3 (COLLY)****.*

6. *The present Petition was listed before this Hon'ble Commission on 26.07.2022. This Hon'ble Commission, vide its Daily Order for the said hearing, was pleased to issue notice in the present Petition and further directed the Respondents to file their respective Replies to the instant Petition following with the Rejoinder by the Petitioner. A true copy of the Daily Order dated 26.07.2022 passed by this Hon'ble Commission in Petition No.39 of 2022 is annexed hereto and marked as* ***ANNEXURE P/4****.*

7. *On 27.09.2022, the present Petition was listed before this Hon'ble Commission. During the hearing, the Petitioner submitted that subsequent to the filing of the present Petition certain facts have transpired that needs to be placed on record before this Hon'ble Commission. Vide the Daily Order dated 29.09.2022, this Hon'ble Commission granted liberty to the Petitioner to file the Amended Petition to place on record the additional facts. A true copy of the Order dated 27.09.2022 passed by this Hon'ble Commission in Petition No. 39 of 2022 is annexed hereto and marked as* ***ANNEXURE P/5****.*

8. *Accordingly, the Petitioner is filing the present Amended Petition.*

II. *DESCRIPTION OF THE PARTIES*

9. *The Petitioner i.e., Prism Johnson Limited is a company duly incorporated under the companies Act 1956. The Petitioner fulfils its power requirement by purchasing solar power from Respondent No. 4 to 8 through open access of the power system of MPPKVVCL.*

9.1 *The Respondent No. 1, i.e., Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited ("****MPPKVVCL****") is a wholly owned Company of the government of Madhya Pradesh and undertakes activities of distribution and retail supply for and on behalf of Madhya Pradesh State Electricity Board and is 'State' within the meaning of Article 12 of the Constitution of India.*

9.2 *The Respondent No. 2, i.e., State Load Dispatch Centre and is responsible for real time Load Dispatch function, O&M of SCADA system and Energy Accounting in the state of Madhya Pradesh. The Respondent No. 2 is established under Section 32 of the Act.*

9.3 *Respondent No. 3 i.e., M/s Ujaas energy Limited ("****Ujaas****") is a Solar RE Generating Company within the meaning of Section 2(28) of the Act.*

9.4 *The Respondent No. 4 to 8 i.e., M/s SKP Bearing Industries (****R/4****), M/s Seattle Power Solutions Pvt. Ltd. (****R/5****), M/s JK Minerals (****R/6****), M/s Ankit Gems Pvt. Ltd. (****R/7****), M/s Atul Sharma (****R/8****) are engaged in the business of generating electricity with installed solar power projects of District Agar (M.P) and also supply electricity to the Petitioner through Open Access of the power system of MPPKVCCL.*

III. *JURISDICTION OF THIS HON'BLE COMMISSION*

10. This Hon'ble Commission has requisite power under Section 86(1)(f) of the Act to adjudicate upon the present Petition and the dispute raised therein.

IV. *BRIEF FACTS*

*11. On 24.06.2005, this Hon'ble Commission notified MPERC (Terms and Conditions for Intra- state Open Access in Madhya Pradesh) Regulations 2005. ("**Open Access Regulations 2005**").*

15.1. On 21.12.2012, this Hon'ble Commission issued an Order constituting a Committee of Officers for monitoring and resolution of disputes of Open Access customers in terms of Regulation 18.9 of the Open Access Regulations, 2005.

*15.2. On 15.05.2014, Power Purchase and Wheeling Agreements ("**PP&WAs**") were entered into between M/s SKP Bearings Industries ("**SKP**") i.e., Respondent No. 4, M/s Seattle Solutions Private Limited ("**SPSPL**") i.e., Respondent No. 5, JKM i.e., Respondent No. 6 and H&R Johnson (purchaser) for sale of 100% electricity generated from 0.63MW capacity of solar farm. It is apposite to mention that **Clause 6.1.2 (d)** of the PP&WA provides that subsequent to the supply of units by the Solar generator, the billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge and the said meter shall be construed to be the billing meter for the third party. True copies of PP&WA for sale of electricity generated between M/s SKP Bearings Industries, M/s Seattle Power Solutions Private Limited, M/s JK Minerals and H&R Johnson dated 15.05.2014 have been annexed hereto and marked as **ANNEXURE P/6 (COLLY.)**.*

*15.3. On 27.05.2014, PP&WAs for supply of electricity was entered between M/s Atul Sharma i.e., Respondent No. 8 & H&R Johnson for sale of 100% electricity generated from 1.25MW capacity of Solar Farm. The said Project is being developed by Ujaas i.e., Respondent No. 3. A true copy of the PP & WA dated 27.05.2014 is hereby annexed and marked as **ANNEXURE P/7**.*

*15.4. The Petitioner has been sourcing from Respondent Renewable Energy ("**RE**") Generators and the Petitioner had been making payments to MPPKVVCL as well as Respondent No. 3 to 8 in terms of various invoices issued by MPPKVVCL. It is pertinent to mention herein that at no point in time did MPPKVVCL assert TOD adjustment or even noticed failure in Round the Clock ("**RTC**").*

*15.5. On 17.11.2017, this Hon'ble Commission notified the Seventh Amendment to the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 ("**RE Amendment Regulations**"). By way of the said amendment, generation of electricity from renewable sources such as solar was subjected to 'Scheduling' in terms of the provisions of Indian Electricity Grid Code, 2010 ("**IEGC**"). Therefore, from 17.11.2017 for the first time scheduling was directed to be carried by the RE Generators. Hence, if at all any ToD billing can be compelled with the sanction of this Hon'ble Commission post the basic requirement of scheduling which only introduced on 17.11.2017.*

15.6. On 27.12.2018, MPPKVVCL issued the Demand Notice/ Supplementary Bill for Rs 2,56,26,841/- (Rupees Two Crore Fifty Six Lakh Twenty Six

Thousand Eight Hundred Forty One) seeking the demand of the said amount towards the revised energy bills of the Petitioner for the period from April 2015 to July 2017. While making said Demand, MPPKVVCL did not rely upon any provision of the Agreement or the Act, Regulations, Orders passed by this Hon'ble Commission. MPPKVVCL solely relying upon its own internal communication dated 30.04.2014 sought to capriciously revise its earlier invoices which was never served upon the Petitioner at the time.

15.7. *On 05.01.2019, MPPMCL issued a letter to Ujaas wherein, inter alia, stated the following: -*

(a) *Clause 12.2 of the respective PP&WAs of the concerned beneficiaries does not prohibit energy accounting on TOD Basis.*

(b) *Further, regarding energy accounting procedure, this Hon'ble Commission, in its Order dated 03.10.2008 passed in Petition No. 35/2008 had held that energy accounting for RE Open Access consumers are based on TOD Manner.*

(c) *Clause 12.2 of the subsequent agreements provide TOD based energy accounting. Further, West DISCOM being signatory of the concerned agreements had circulated to all concerned vide letter dated 30.04.2014 regarding applicability of energy accounting on TOD Basis.*

(d) *In view of the above, Ujaas was requested to comply with the instructions of MPPKVVCL.*

A true copy of letter dated 05.01.2019 issued by MPPMCL to Ujaas is hereby annexed and marked as ***ANNEXURE P/8.***

15.8. *On 20.02.2019, the Petitioner, being aggrieved by the Demand Notice/ Supplementary Bill dated 27.12.2018 issued by MPPKVVCL, filed a Writ Petition being Petition No. 3834/2019 before the Hon'ble High Court of Madhya Pradesh, Indore. A true copy of Writ Petition No. 3834 of 2019 filed by Petitioner before Hon'ble High Court of Madhya Pradesh at Indore dated 20.02.2019 is annexed hereto and marked as* ***ANNEXURE P/9.***

15.9. *On 20.03.2019, the Hon'ble High Court of Madhya Pradesh, passed an Order in Writ Petition No. 3834/2019 and rejected the preliminary objections of MPPKVVCL regarding the availability of alternative remedy before the Commission under Section 86(1)(f) of the Act. A true copy of the Order dated 20.03.2019 passed by Hon'ble High Court of Madhya Pradesh in W.P. No.3834 of 2019 is annexed hereto and marked as* ***ANNEXURE P/10.***

15.10. *Subsequently, on 29.04.2019, MPPKVVCL being aggrieved by the Order dated 20.03.2019, filed an application being I.A. No. 1922 of 2019 for recall/ Review of the Order passed by the Hon'ble High Court of Madhya Pradesh and for further dismissal of Writ Petition. A true copy of Recall Application being I.A. No. 1922 of 20109 filed by MPPKVVCL before Hon'ble High Court of M.P. at Indore dated 29.04.2019 is annexed hereto and marked as* ***ANNEXURE P/11.***

15.11. *On 20.09.2019, the Hon'ble High Court of Madhya Pradesh vide its Order in I.A No. 1922 of 2019 recalled the Order dated 20.03.2019 on the ground that the Petitioner has an alternative remedy before this Hon'ble Commission. Accordingly, Writ Petition No. 3834/2019 was disposed of,*

and the Petitioner was permitted to avail the said alternative remedy. A true copy of the Order dated 20.09.2019 passed by the Hon'ble High Court of Madhya Pradesh bench at Indore in W.P. No.3834 of 2019 is annexed hereto and marked as ***ANNEXURE P/12****.*

15.12. On 22.10.2019, MPPKVVCL in light of the Demand Notice dated 27.12.2018, issued another notice to the Petitioner seeking payment of Rs 2,83,13,065/- (Rupees Two Crore Eighty Three Lakh Thirteen Thousand Sixty Five) as outstanding amount against the High Tensions (HT) supply towards energy supplied and also other charges for the month of September 2019 failing which it would be constrained to disconnect the HT Supply of the Petitioner. A true copy of the Demand Letter dated 22.10.2019 issued by MPPKVVCL to Petitioner is annexed hereto and marked as ***ANNEXURE P/13.***

15.13. On 05.11.2019, the Petitioner, in response to the Notice dated 22.10.2019, issued a detailed letter to MPPKVVCL and stated as follows:

- *(a) MPPKVVCL has raised monthly bills for electricity consumed by the Petitioner which also included solar power supplied by third party solar power generators. Based on bifurcation carried out by MPPKVVCL and the third party solar power generators, the Petitioner has diligently paid the bill amounts i.e., April 2015 to July 2017 without any default or delay.*
- *(b) The contents of the letter dated 22.10.2019 are vague and ambiguous as MPPKVVCL has not specifically mentioned the alleged outstanding amount to be paid by the Petitioner and the period it pertains to was not mentioned.*
- *(c) Since the Petitioner has already paid the bill amounts, the Petitioner also stated that they are willing to bear the differential outstanding amount, if any due and payable to MPPKVVCL. In conclusion, the Petitioner stated that without prejudice to its rights, remedies and contentions before this Hon'ble Commission/ Hon'ble Appellate Tribunal for Electricity ("****Hon'ble APTEL****") or any other appropriate forum and in order to avoid disconnection of electricity, it was willing to pay the disputed differential amount in 36 instalments under protest.*
- *(d) The said arrangement was proposed by the Petitioner without prejudice to its rights in law.*

A true copy of the letter dated 05.11.2019 issued by Petitioner to MPPKVVCL is annexed hereto and marked as ***ANNEXURE P/14****.*

15.14. On 08.11.2019, the Petitioner issued a letter to MPPKVVCL in reference to the meeting held on 07.11.2019 at MPPKVVCL's office wherein two options qua making the payment as sought by MPPKVVCL vide the Demand Notice under protest was deliberated upon. Vide the said letter, the Petitioner while reiterating the two options stated that the Petitioner would opt to make a payment of Rs 2,56,26,841/- in 25 equal instalments which starts from January 2019 and payment of 10 equal instalments amounting to Rs 1,02,50,736/- by 08.11.2019 and next 15 equal instalments will be deposited along with the monthly electricity bill. If this is to be done, then surcharge amounting to Rs 26,86,224/- would be waived off.

15.15. Pertinently, the Petitioner has already deposited 10 instalments for the period from January 2019 to October 2019, a total amount of Rs 1,02,50,736/- on 08.11.2019. The said option was opted by the Petitioner without prejudice to its rights in law. A true copy of letter dated 08.11.2019 issued by Petitioner to MPPKVVCL is annexed hereto and marked as ***ANNEXURE P/15****.*

15.16. Pursuant to the Order passed by the Hon'ble High Court of Madhya Pradesh, the Petitioner filed Petition No. 19 of 2020 before this Hon'ble Commission under Regulation 18.9 of the MPERC open Access Regulations 2005 seeking to set aside the Demand Notice/ Supplementary Bill dated 27.12.2018 issued by MPPKVVCL and direct MPPKVVCL to refund the amounts already deposited by Petitioner pursuant to Demand Notice dated 27.12.2018 along with interest. A true copy of Petition No. 19 of 2020 filed by Petitioner before Ld. MPERC dated 01.02.2020 is hereby annexed and marked as ***ANNEXURE P/16.***

15.17. On 18.12.2020, this Hon'ble Commission passed its Order in Petition No. 19 of 2020 directing the Petitioner to first approach the Committee for resolution of the dispute and in case the Petitioner is aggrieved by the decision of the Committee, Petitioner will be at liberty to approach this Hon'ble Commission. A true copy of the Order dated 18.12.2020 passed by this Hon'ble Commission in Petition No.19 of 2020 is annexed hereto and marked as ***ANNEXURE P/17****.*

15.18. In compliance to the directions passed by this Hon'ble Commission, on 16.07.2021, the Petitioner vide its letter made a formal representation before the Committee raising the same submissions made by the Petitioner in Petition No. 19 of 2020. A true copy of Petitioner Representation dated 16.07.2021 is hereby annexed and marked as ***ANNEXURE P/18.***

15.19. Even after knowing the Demand Notice dated 27.12.2018 was under challenge before the Committee, on 18.10.2021, MPPKVVCL issued a Supplementary Bill/Demand Notice seeking Delayed Payment Surcharge amounting to Rs. 58,94,823/- charged on the demand raised by MPPKVVCL vide Demand Notice dated 27.12.2018.

15.20. Thereafter, on 22.10.2021 & 27.12.2021 meeting of the Committee Constituted was convened.

15.21. On 27.10.2021, the Petitioner, in response to the Demand Notice issued by MPPKVCCL, issued a letter stating that the amount as sought has duly been deposited in MPPKVVCL's Account under protest. The Petitioner further highlighted that the matter is pending before the Committee and in case the Petitioner succeeds, MPPKVVCL shall be liable to repay the disputed amount with interest or adjust from the next electricity bill from the date of the Order. A true copy of letter dated 27.10.2021 issued by the Petitioner to MPPKVVCL is annexed hereto and marked as ***ANNEXURE P/19****.*

15.22. On 08.11.2021, MPPKVVCL issued another Invoice to the Petitioner seeking Delayed Payment Surcharge amounting to Rs. 73,684/- on the outstanding amount.

15.23. On 24.11.2021, Petitioner in response to the Invoice dated 08.11.2021, issued a letter to MPPKVVCL informing that the payment as sought has been duly made by the Petitioner under protest. It was also reiterated

that the matter is pending before the Committee and in case the Petitioner succeeds, MPPKVVCL shall be liable to repay the disputed amount with interest or adjust from the next electricity bill from the date pf the Order. A true copy of the letter dated 24.11.2021 issued by Petitioner to MPPKVVCL is annexed hereto and marked as ***ANNEXURE P/20****.*

15.24. On 14.12.2021, this Hon'ble Commission notified MPERC Open Access Regulations 2021 which superseded the Open Access Regulations 2005.

15.25. Aggrieved by the rejection of representation by the Review Committee and in terms of the liberty granted by this Hon'ble Commission vide Order dated 18.12.2020, the Petitioner has filed the present Petition.

15.26. The present Petition was listed before this Hon'ble Commission on 26.07.2022. This Hon'ble Commission, vide its Daily Order for the said hearing, was pleased to issue notice in the present Petition and further directed the Respondents to file their respective Replies to the instant Petition following with the Rejoinder by the Petitioner.

15.27. On 27.09.2022, the present Petition was listed before this Hon'ble Commission. During the hearing, the Petitioner submitted that subsequent to the filing of the present Petition certain facts have transpired that needs to be placed on record before this Hon'ble Commission. Vide the Daily Order dated 29.09.2022, this Hon'ble Commission granted liberty to the Petitioner to file the Amended Petition to place on record the additional facts. The facts are as follows:-

*(a) On 02.08.2022, MPPKVVCL issued a Demand Notice/Supplementary Bill to the Petitioner seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021 on account of Round-the-clock ("**RTC**") failure of solar generator meter due to which the bills were incorrectly raised by MPPKVVCL. Vide the said notice, MPPKVVCL intimated the Petitioner that the payment of the Supplementary Bills shall be made within 15 days from the date of the Bill otherwise action will be taken as per rules. A true copy of the Supplementary Bill/ Demand Notice dated 02.08.2022 issued by MPPKVVCL to the Petitioner is annexed hereto and marked as* ***ANNEXURE P/21****.*

(b) After receiving the notice dated 02.08.2022, the Petitioner was surprised that the RTC failure went un-noticed for a period of 6 years and 4 months. Further, the Petitioner vide letter dated 10.08.2022 sought the following in support of the demand raised by MPPKVVCL vide notice dated 02.08.2022:

i. The basis of calculation with evidence, including energy meter readings (MRI details) for bills revision summary as referred demand note.

ii. Frequency of meter testing and cross check by competent authority at solar generator side and whether solar generator has accepted the same.

iii. As MPPKVVCL is taking RTC readings on a monthly basis, therefore, since when RTC got changed.

In addition to the above, the Petitioner vide the said letter sought confirmation that the bills raised by MPPKVVCL from the month of August, 2021 are correct and if it so then how and who has

*corrected the meters. A true copy of the letter dated 10.08.2022 issued by the Petitioner to MPPKVVCL is annexed hereto and marked as **ANNEXURE P/22**.*

*(c) On the same day i.e., 10.08.2022, the Petitioner issued a letter to Respondent Nos. 3 to 8 intimating that according to the notice dated 02.08.2022, the Petitioner is going to make payment to MPPKVVCL, however, the Petitioner will recover the amount from the Solar generators i.e., Respondent No. 3 to 8 as it is solely on fault of the solar power vendor. True Copies of the letters dated 10.08.2022 issued by the Petitioner to Respondent Nos. 3 to 8 are annexed hereto and marked as **ANNEXURE P/23 (COLLY)***

*(d) Since no response was received by MPPKVVCL on the letter dated 10.08.2022, on 17.08.2022, the Petitioner issued a letter requesting MPPKVVCL to provide clarification on the letter dated 10.08.2022 and further requested MPPKVVCL to allow more time to the Petitioner to make the payment of Rs. 1,90,02,209/- raised by MPPKVVCL for the period from April 2015 to July 2021. A true copy of the letter dated 17.08.2022 issued by the Petitioner to MPPKVVCL is annexed hereto and marked as **ANNEXURE P/24**.*

*(e) On 20.08.2022, the Petitioner vide its letter intimated MPPKVVCL that the payment of Rs. 1,90,02,209/- has been made under protest and without prejudice to the rights and remedies available under the law of the land. A true copy of the letter dated 20.08.2022 issued by Petitioner to MPPKVVCL is annexed hereto and marked as **ANNEXURE P/25**.*

15.28. Being aggrieved by the Demand Notice/ Supplementary Bill dated 02.08.2022, it is requested before this Hon'ble Commission to kindly quash the said notice along with the Demand Notices/ Supplementary Bills dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022.

V. *GROUNDS*

Re. Bar under Section 56 (2) is applicable upon the Demand Notice issued by MPPKVVCL.

Re. Bills cannot be raised retrospectively.

12. The Committee while passing the Impugned Order held that the Demand Notice issued by MPPKVVCL is beyond the purview of Section 56 (2) of the Act as the amount claimed by MPPKVVCL from the Petitioner is due to settlement of energy. Further, the Committee also held that the demand raised by MPPKVVCL vide Demand Notice dated 27.12.2018 is well within the limitation period in terms of Section 56 (2) of the Act as MPPKVVCL had never raised any bill against which the limitation period could have kicked in.

12.1. It is most respectfully submitted that Demand Notices dated 27.12.2018 and 02.08.2022 should be quashed as the same falls under the purview of Section 56(2) of the Act. In support to the submissions made by the Petitioner the following is relevant: -

(a) Section 56(2) of the Act is a non obstante clause which specifies that that no sum due from any consumer, under the section shall be recoverable after the period of two year from the date when

such sum became first due. The only exception under which such recovery is permissible is that the said sum must have been shown continuously as recoverable as arrears. For ready reference, Section 56(2) of the Act has been extracted hereunder:

> *"Section 56. (Disconnection of supply in default of payment): -- (2)*
> *Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."*

(b) In the present instance, it is submitted that the Demand Notice dated 27.12.2018 pertains to the period beginning from April 2015 to July 2017 and Demand Notice dated 02.08.2022 pertains to the period beginning from April 2015 to July 2021. In terms of the aforementioned provision, MPPKVVCL can only recover the amount which are within two years from the date of bill i.e., until 27.12.2016 and 02.08.2022. With respect to bills prior to 27.12.2016 and 02.08.2022, MPPKVVCL can only recover that amount if the same were shown to be due continuously since the time the said amount became due.

(c) However, it is an admitted fact that in the present case no amount was being shown to be due and recoverable in the bills raised by MPPKVVCL. Accordingly, the claim of MPPKVVCCL before the period of 27.12.2016 and 02.08.2022 cannot be made.

12.2 The effect of a non obstante clause was explained by the Hon'ble Supreme Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447 wherein it was held as follows: -

> *"67. **A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause**. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."*
>
> ***(Emphasis Supplied)***

12.3 Moreover, it is submitted that MPPKVVCL vide Demand Notice dated

02.08.2022 has intimated the Petitioner that on account of RTC failure of the solar generator meter, the bills for the period from April 2015 to July 2021 were incorrectly raised by MPPKVVCL.

*12.4 In this regard, it is submitted that it is surprising that the RTC failure went un- noticed for a period of 6 years and 4 months. In fact, as per Clause 8.14 of the Madhya Pradesh Electricity Supply Code, 2013 ("**Supply Code, 2013**") it is the responsibility of the licensee i.e., Solar Generator to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose. Moreover, Clause 8.15 of the Supply Code, 2013 provides that the licensee shall also conduct periodical inspection/testing of the HT meters at least once in a year. The relevant extracts of the Supply Code, 2013 are reproduced hereunder:-*

> *"**Testing of Meters***
>
> *8.14 It shall be the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose.*
>
> *8.15 The licensee shall also conduct periodical inspection/testing of the meters as per the following schedule:*
> *(a) Single phase /three phase meters : at least once in every five years.*
> *(b) HT meters : at least once in a year.*
>
> *The CT and PT wherever installed, shall also be tested along with meters.*
>
> *If required, the licensee may remove the existing meter for the purpose of testing. The representatives of the licensee must, however, produce an authenticated notice to this effect and sign the document, mentioning his full name and designation, as a receipt, before removing the meter. The consumer shall not object to such removal."*

12.5 From the above, the following emerges for kind consideration of this Hon'ble Commission: -

(a) The licensee has failed to conduct the periodical inspection/testing of the HT meters once in a year.

(b) The licensee has failed to discharge its obligations as enshrined under the Supply Code, 2013.

(c) Therefore, without accepting the liability imposed by the Notice dated 02.08.2022 it is submitted that the Petitioner is being penalized for gross inaction committed by the Licensee and the Licensee as per its own admission has failed to adhere to the Regulations specified by the Hon'ble Commission. In light of the submission made, the Demand Notice dated 02.08.2022 is ex-facie illegal and liable to be set aside.

12.6 Further, the Committee while rendering its finding has placed strong reliance on the Prem Cottex Judgment wherein it has been held that the period of limitation will not kick in until an invoice is raised and there is a consequent negligence on the part of the consumer to pay the bill. However, the Committee while placing reliance on the said Judgment failed to appreciate the facts of the present case as:

(a) In the Prem Cottex Judgment, only the negligence on part of the licensee was pleaded by the Appellant therein and the amount was never disputed by the Appellant. Therefore, the only premise the Appellant therein had challenged the Demand notice was the negligence on part of the Licensee.

(b) Further, in the Prem Cottex Judgment, there was a show cause notice issued prior to the Demand Notice being issued to the Appellant therein. Whereas in the present case, there was no communication/ correspondence till 27.12.2018, i.e., the date of the issuance of the Demand Notice regarding adjustment of units in ToD manner. Moreover, the Renewable Energy Sources were subjected to scheduling on by way of Notification dated 17.12.2017.

(c) In the Prem Cottex's case, a wrong Multiplier Factor at the time which is specified by this Hon'ble Commission was billed to the Appellant therein. However, in the instant case, there was no obligation of ToD method of accounting until the notification dated 17.11.2017. Therefore, without any sanction from this Hon'ble Commission either in the form of a Regulation and/or Order MPPKVVCL cannot recover/adjust units on the basis of TOD consumption by the Petitioner.

(d) In fact, the letter dated 30.04.2014 basis which the Demand Notice was issued was never shared with the Petitioner and it is only during the proceedings before this Hon'ble Commission in Petition No. 19 of 2020, that the Petitioner was provided a copy of the said letter. Perhaps, if a prior intimation would have been given, the Petitioner would have accordingly altered its generation and minimized consumption of units which were consumed during peak hours.

(e) In the present case, no reason/rational was provided by MPPKVVCL for the demand.

12.7 Further, the Committee while passing the Impugned Order has failed to appreciate that the Petitioner at this stage cannot be made to pay for the revision of tariff which is being retrospectively applied as the same is against the settled principles of tariff recovery. It is submitted that MPPKVVCL cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on MPPKVVCL to issue a Demand Notice either expressly or by necessary implication

12.8 It is a settled position under law that MPPKVVCL cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on MPPKVVCL to issue a Demand Notice either

expressively or by necessary implication. In this regard reliance is placed on the following judgments of the Hon'ble Supreme Court: -

(a) Regional Transport Officer Chittoor Vs Associated Transport Madras (P) Ltd. 1980 (4) SCC 597, the relevant extracts of the judgment are reproduced herein below:

> ***"4. The legislature has no doubt a plenary power in the matter of enactment of statutes and can itself make retrospective laws subject, of course, to the constitutional limitations. But it is trite law that a delegate cannot exercise the same power unless there is special conferment thereof to be spelled out from the express words of the delegation or by compelling implication.*** *In the present case, the power under Section 4(1) does not indicate either alternative. The position has been considered by the High Court at length and there is no need for us to go through the exercise over again. Indeed, considerable reliance was placed by learned Counsel for the appellant on two circumstances. He argued that the impugned rule was framed in pursuance of a resolution passed by the legislature. The fact does not have any bearing on the question under consideration except for us to make the observation that the State Government should have been more careful in giving effect to the resolution and should not have relied upon its delegated power which did not carry with it the power to make retrospective rules. The second ground pressed before us by learned Counsel for the appellant is that the rules had to be placed on the table of and approved by the legislature. This was sufficient indication, in his submission, for us to infer that retrospectivity in the rule-making power was implicit. We cannot agree. The mere fact that the rules framed had to be placed on the table of the legislature was not enough, in the absence of a wider power in the section, to enable the State Government to make retrospective rules. The whole purpose of laying on the table of the legislature the rules framed by the State Government is different and the effect of any one of the three alternative modes of so placing the rules has been explained by this Court in Hukam Chand v. Union of India [(1972) 2 SCC 601, 606 : (1973) 1 SCR 896, 902] . Mr Justice Khanna speaking for the Bench observed: (SCC p. 606, para 13)*
>
> *The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act. It would appear from the observations on pp. 304 to 306 of the Sixth Edition of craies on statute law that there are three kinds of laying:*
>
> *(i) Laying without further procedure;*
>
> *(ii) Laying subject to negative resolution;*

(iii) Laying subject to affirmative resolution.

The laying referred to in sub-section (3) of Section 40 is of the second category because the above sub-section contemplates that the rules would have effect unless modified or annulled by the Houses of Parliament. The act of the Central Government in laying the rules before each House of Parliament would not, however, prevent the courts from scrutinising the validity of the rules and holding them to be ultra vires if on such scrutiny the rules are found to be beyond the rule-making power of the Central Government.

5. ***It is, therefore, plain that the authority of the State Government under the delegation does not empower it to make retrospective rules. With this position clarified there is no surviving submission for appellant's counsel. The appeals must be dismissed and we do so with costs (one set).***"

*[**Emphasis Supplied**]*

(b) State of Madhya Pradesh V/s Tikamdas (1975) 2 SCC 100 , the relevant extracts of the judgment are reproduced herein below

"5. *Let us examine the rival contentions and test the soundness of each briefly. First of all, we have to ascertain the scope and area of the Rule-making powers, the limitations thereon and the retroactive operation of such rules.* ***There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf.*** *Our attention has been drawn to Sections 62(g) and (h) and 63 in this connection, by counsel for the State. The State Government may make rules for the purpose of carrying out the provisions of the Act (Section 62). Such rules may regulate the amount of fee, the terms and conditions of licences and the scale of fees and the manner of fixing the fees payable in respect of such licences [62(g) and (h)]. This provision, by itself, does not expressly grant power to make retrospective rules. But Section 63 specifically states that*

> *"**all rules made and notifications issued under this Act shall be published in the Official Gazette, and shall have effect from the date of such publication or from such other date as may be specified in that behalf**".*

Clearly the legislature has empowered its delegate, the State Government, not merely to make the Rules but to give effect to them from such date as may be specified by the delegate. This provision regarding

subordinate legislation does contemplate not merely the power to make rules but to bring them into force from any previous date. Therefore ante- dating the effect of the amendment of Rule 4 is not obnoxious to the scheme nor ultra vires Section 62."

[Emphasis Supplied]

(c) Bejgam Veeranna Venkata Narasimloo and Ors. v. State of Andhra Pradesh and Ors. (1998) 1 SCC 563, The relevant extracts of the Judgment are reproduced herein below

"17. The next question is whether the State Government can fix the procurement price of the rice purchased by it retrospectively. *The High Court's view was that the State Government cannot do it. But the High Court has tried to salvage the case for the State Government by holding that the notification dated 24-2-1977 was not really retrospective even though clause (2) of the notification states that "the amendment hereby made shall be deemed to have come into force on 7-9-1976". The High Court stated the question before it and its answer in the following words:*

> *"Thus, the whole question in this case boils down to one of interpretation of the relevant provisions of the EC Act. In this case, it must be admitted that there is no provision in the EC Act authorising the making of subordinate legislation with retrospective effect. It follows, therefore, that Ex. B-4 would be invalid if it is truly a retrospective subordinate piece of legislation. This raises the question whether Ex. B-4 dated 24-2-1977 fixing prices with effect from 7-9-1976 can be truly called a retrospective law. We are of the clear opinion that it is not."....*

19. We are unable to follow how the High Court could come to the conclusion that the vested right of the appellants had not been disturbed in any way by the subordinate legislation. Rice has been sold under a procurement order and a right to be paid in terms of that Order had accrued to the seller as soon as sale of rice was effected. As a matter of fact, the FCI did pay the appellants the price for the rice purchased. If a portion of the price paid by the FCI is taken away, the appellants will be prejudicially affected. They not only had acquired a vested right to be paid but actually received payment for the rice sold. If the rice was delivered without any valid procurement order, the sellers were entitled to be paid at the market rate in terms of Section 70 of the Contract Act. The retrospective subordinate legislation has tried to take away a portion of the money the appellants had

lawfully obtained.

20. We are of the view that the decision of the High Court is clearly erroneous. The recoveries which are now sought to be made from the appellants are clearly unlawful and unjust. The appeals are allowed. The judgment under appeal is set aside. There will be no order as to costs."

[Emphasis Supplied]

12.9 In fact, the Hon'ble High Court of Bombay vide its Judgment dated 09.06.2020 in a similar case titled as ***Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) vs. Principal, College of Engineering, Pune*** *[SCC Online Bom 699:2020(4) ALLMR 523] has held that MSEDCL shall not be allowed to issue the Supplementary Bills retrospectively for its own fault. The relevant extract of the Judgment is reproduced hereunder: -*

"25. From a careful consideration of the above, it is quite evident that the present is not a case covered by sub-clause (1) of Section 56. It is not a case of nonpayment of electricity charges, not to speak of neglect in paying the charges. Right from the beginning when the respondent became a consumer under the petitioner its tariff category was changed from time to time by the petitioner and was accordingly billed. It is not the case of the petitioner that the respondent had defaulted in the payment of such electricity bills. ***It was only after the CAG pointed out that respondent ought to have been charged under tariff category LT-I from September, 2012, that petitioner carried out inspection in the premises of the respondent on 03.02.2018. Thereafter the tariff category of the respondent was changed to LT-I from February, 2018 but at the same time, a supplementary bill dated 17.03.2018 for the differential amount was issued retrospectively from September, 2012****.*

26. While examining 56(2) the Full Bench held that a consumer cannot be vexed in the event the licensee is negligent in recovering the amount due. If the views of CAG is treated as correct, in that event the electricity charges on the basis of tariff category LT-I became due from September, 2012. ***For the next two years from September, 2012 there is nothing on record to show that the petitioner had raised any bill or attempted to recover electricity charges from the respondent under LT-I tariff category. Even after two years no such bills were raised. First time on the basis of LT-I tariff category bill was raised on 17.03.2018. The language used in subsection (2) is "when such sum became first due" in contradistinction to such sum being first billed. Period of limitation will commence when such sum became first due. Admittedly, as per the petitioner such charge or sum became first due in September 2012 but billed for the first time on 17.03.2018. In such circumstances, it was not open to the petitioner to raise the supplementary bill retrospectively on 17.03.2018***

for the period from September, 2012 and thereafter issue disconnection notice*.*

27. That being the position, Court finds no error or infirmity in the impugned decision."

[Emphasis supplied*]*

12.10 Accordingly, in view of the foregoing, it is submitted that the Petitioner should not be made to suffer due to the failure on the part of MPPKVVCL and raise the invoices. It is an admitted fact that such correction was not carried out by MPPKVVCL at first instance due to its own negligence. Therefore, the bills prior to 27.12.2016 and 02.08.2022 cannot be recovered as the same is barred by limitation.

12.11 In fact, as per Prem Cottex Judgment, the bar actually operates on two distinct rights of the licensee i.e., MPPKVVCL and that section 56(2) bars not merely the normal remedy of recovery but also bars the remedy of disconnection. For ready reference, the relevant extract is reproduced hereunder:

*"15. **Therefore, the bar actually operates on two distinct rights of the licensee, namely, (i) the right to recover; and (ii) the right to disconnect. The bar with reference to the enforcement of the right to disconnect, is actually an exception to the law of limitation**. Under the law of limitation, what is extinguished is the remedy and not the right. To be precise, what is extinguished by the law of limitation, is the remedy through a court of law and not a remedy available, if any, de hors through a court of law. However, **section 56(2) bars not merely the normal remedy of recovery but also bars the remedy of disconnection**. This is why we think that the second part of Section 56(2) is an exception to the law of limitation."*

(Emphasis Supplied)

12.12 Further, the Committee while upholding MPPKVVCL's demand has relied upon Order dated 03.10.2018 passed by this Hon'ble Commission in Petition No. 35 of 2008 Kalani Industries Private Limited & Anr. vs. MPPKVVCL & Ors.

12.13 It is most respectfully submitted that the said Order was passed in the specific factual background and does not apply in rem. Further, even in the said case the impact of ToD billing was made known to the Consumer and generator prior to transmission of power. Whereas in the present facts the demand has been made belatedly on 27.12.2018 for the period from April 2015 to July 2017 and 02.08.2022 for the period from April 2015 to July 2021. Therefore, such retrospective demand by MPPKVVCL is wholly perverse and illegal.

12.14 Without prejudice to the above, the Order dated 03.10.2008 was not an Order in rem governing all RE open access transactions. Further the said Order was passed by this Hon'ble Commission concerning wind farm, while the present demand was raised on a solar power generator, thus Order dated 03.10.2008 is not applicable to the present facts of the Petitioner.

12.15 It is settled position of law that when this Hon'ble Commission seeks the applicability of any order passed by it in rem, it specifies the same within

its order. In this regard reliance is placed on the Judgment of the Hon'ble Supreme Court in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532. The relevant extracts of the Judgment are herein reproduced below: -

"37. It may be noticed that the cases referred to above relate to actions in rem. ***A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals.*** *Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly,* ***a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself.***

(Vide Black's Law Dictionary.)"

12.16 It is submitted that the Petitioner had executed PP & WA with Respondent No. 3 to 8, who are third party generators based on the terms and conditions of their respective PP&WAs only. Any change in the said PP&WA's energy accounting conditions cannot be done with retrospective effect especially by MPPKVVCL in the absence of a regulatory sanction. It is submitted that the Petitioner is not objecting to the use of the TOD method for adjustment of solar units generated by third party generators and consumed by it. However, the said method cannot be applied by MPPKVVCL retrospectively.

12.17 In view of the above, it is submitted that the Impugned Order passed by the Committee ought to be set aside and it is requested before this Hon'ble Commission to quash the Demand Notices raised by MPPKVVCL.

Re. Agreements executed between the parties do not envisage recovery of tariff.

13. The Committee while passing the Impugned Order has held that the Agreements executed between Petitioner and Respondent No. 4 to 8 envisaged ToD method. With great respect, it is submitted that the Committee's reliance on the Agreements executed between Petitioner with Respondent No. 4 to 8 is wholly misplaced.

13.1. Before delving into the merits, it is imperative to peruse Clause 6.1.2 (d) and 7.2 of the PP&WA and the same is reproduced hereunder:

"Clause 6.1.2 For the purpose of accounting the following methodology is agreed :

…d) Net Units for Wheeling to HR Johnson = C Meter had the provisions of the recording the time of the day generation i.e.,

peak load hours (6:00 PM to 10:00 PM) and off peak hours (10:00PM to 6:00 AM). ***Credit for net generation units shall then be given accordingly to the time of day recording, but billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. This meter shall be construed to be the billing Meter for the third part****. "*

Clause 7.2
MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., shall raise a bill for the electricity consumed by the Purchaser on a monthly basis or at such intervals as may be decided by MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., from time to time. Such bills shall show separately the KWH units consumed by the purchaser through the Supplier's Solar Farms. The Purchaser shall within three (3) days of the receipt of the electricity bill from MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., forwarded to the Supplier copy of each such electricity bill. The Supplier will raise an invoice at the mutually agreed rate with 18% discount on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge, within fifteen (15) days from the receipt of electricity bills from the Purchaser, for the electricity consumed by the purchaser for the KWH units recorded in each corresponding MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., bills as having been consumed by the Purchaser from the Supplier's Salor Farms. The present base tariff is Rs. 5.10 per KWh, hence the applicable energy charge will be Rs. 4.182 perKwh. Prevailing as on date and nothing will be charged extra over this expect when there is a revision in tariff charges by MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd. The Purchaser shall make the payment for the Invoice within Seven (7) days of receipt of the invoice (herein referred to as "Due Date"). The Purchaser shall not be entitled to make any deductions, set off from the Invoice amount. The Parties agree that the Rate as provided above shall be revised by the Parties on mutually agreed terms from time to time based on the revision of the tariff by MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd."

13.2. From a bare perusal of the Clause 6.1.2(d) and Clause 7.2 of the agreements executed by the Petitioner with Respondent No. 4 to 8 the following emerges for consideration: -

(a) PP& WA clearly specifies that the credit for net generation of units shall be given according to the TOD recording.

(b) Billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. The supplier shall raise an invoice at the mutually agreed rate with 30% discount (changed from time to time) on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge). The tariff is also fixed in the billing Clause 7.2, and it is specifically mentioned that nothing will be charged extra over the fixed tariff except when there is a revision in tariff charges.

13.3. It is further submitted that the Committee while dismissing the representation made by the Petitioner relied on Clause 12.3 of PP&WA dated 27.05.2014, executed between Respondent Private Generators, MPPKVVCL and MPPMCL which is also erroneous as:

(a) Petitioner is not a signatory to the Agreements signed between MPPMCL, MPPKVVCL and Private Respondents. Therefore, the Petitioner is not contractually bound by such agreements.

(b) Further, MPPKVVCL is a Distribution Licensee operating under the Regulatory Regime of the Hon'ble Commission. Unless and until this Hon'ble Commission specified ToD billing, the same cannot be contractually enforced.

13.4. That being said, there is no privity of Contract between Petitioner and Respondent Private Generators and Petitioner not being a signatory to the Agreement cannot be contractually bound by such agreements. In this regard reliance is placed on the Judgment passed by the Hon'ble Supreme Court in Md. Serajuddin Vs State of Orissa (1975) 2 SCC 47. The relevant excerpts of the Judgment are herein reproduced below: -

> *"25. The contention on behalf of the appellant that the contract between the appellant and the Corporation and the contract between the Corporation and the foreign buyer formed integrated activities in the course of export is unsound… **The features which point with*** unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale**……..**
>
> *……*The Corporation entered on the scene and entered into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was***the exporter of the goods.*** There was no privity of contract between the appellant and the foreign buyer. The privity of contract is between the Corporation and the foreign buyer**.**
>
> *26* ***Such contracts for procurement of goods for export are***
>
> ***described in commercial parlance as back to back contracts.*** *In export trade it is not unnatural to find a string of contracts for export of goods. It is only the contract which occasions the export of goods which will be entitled to exemption.* ***The appellant was under no contractual obligation to the foreign buyer either directly or indirectly****. ……*
>
> *…….. The rights of the appellants were against the Corporation. Similarly the obligations of the appellant were to the Corporation. The foreign buyer could not claim any right against the Appellant nor did the appellant have any obligation to the foreign buyer. All acts done by the Appellant were in performance of the appellant's obligation under the contract with the Corporation and not in performance of the obligations of the Corporation to the foreign buyer.*
>
> ***(Emphasis Supplied)***

13.5. In light of the submissions made above, it is requested before this Hon'ble Commission to set aside the Impugned Order and consequently quash the Demand Notices.

Re. The Petitioner has made all the payment for energy consumed.

14. It is an admitted fact that the Petitioner had already made all payments for the energy consumed by it even before the demands were raised by MPPKVVCL vide Notices dated 27.12.2018 and 02.08.2022. Further, the said payments were made on the basis of bills raised by MPPKVVCL which clearly provided for renewable energy units consumed by the Petitioner.

15.1. With respect to the period April 2015 to July 2017 in question, it is submitted that the Renewable Energy Units consumed by the Petitioner and duly noted in the bills raised by MPPKVVCL is equivalent to the units billed by the Respondent No. 4 to 8 in their monthly bills. The same is evident from the bill raised by MPPKVVCL and Respondent No. 3 to 8 for the month of February 2017. The table in this regard is provided hereunder: -

Energy Bill Month: Jan' 17

A. *Purchase from Solar Vendors*

Vendor	***Unit***	***Bill Amount***	***Bill No.***	***Bill Date***	***Payment Date***	***UTR No.***
SKP Bearing Industries	*89131*	*438685*	*SKP/SPV/2016-17/10*	*05.02.17*	*20.02.17*	*CMS-170220000T6Q*
Seattle Power Solutions Pvt Ltd	*87603*	*431164*	*SPSPL/SPV/2016-17/10*	*05.02.17*	*20.02.17*	*CMS – 170220000T6T*
J.K Minerals	*87039*	*428389*	*JKM/SPV/2016-17/10*	*05.02.17*	*20.02.17*	*CMS-170220000T6S*
Atul Sharma	*175207*	*862334*	*AS/PS/H&R/2016-17/10*	*05.02.17*	*20.02.17*	*CMS-170220000T72*
Ankit Gems Pvt. Ltd.	*165153*	*812850*	*AGL/PS/H&R/2016-17/10*	*05.02.17*	*20.02.17*	*CMS-170220000T6V*
	604133	***2973422***				

B. *Purchase from Solar Vendors*

Vendor	***Unit***	***Bill Amount***	***Bill No.***	***Bill Date***	***Payment Date***	***UTR No.***
MPPKVVCL	*139967*	*1733919*	*784591202 273*	*05.02.17*	*20.02.17*	*CMS-170220000T6W*
	139967	***1733919***				

Total Units 744100

True copies of bill raised by MPPKVVCL and Respondent No. 3 to 8 for the month of February 2017 is annexed hereto and marked as ***ANNEXURE P/26 (COLLY.).***

15.2. It is submitted that the Petitioner has made payment for renewable energy as per the bills raised by MPPKVVCL, during the said duration, there was no intimation by MPPKVVCL that a different methodology was to be adopted and there would be a revision of bill. It was only on 27.12.2018 that MPPKVVCL raised the demand notice for the reasons best known to MPPKVVCL.

15.3. Demand Notices dated 27.12.2018 and 02.08.2022 raised by MPPKVVCL are unjustified and arbitrary as the Petitioner is being subjected to payment of units for which it has already made payments to Respondent No. 4 to 8. MPPKVVCL not be allowed retrospectively. If the same is allowed, it would allow other parties to make changes to the billing at any point of time and there would be no certainty for consumers such as Petitioner.

15.4. Further, the Committee has chosen to place reliance on the Judgment of the Hon'ble Judgment of the Hon'ble High Court of Madhya Pradesh in W.P. No. 827 of 2003 titled as Kapoor Saw Manufacturing Co. vs. MPSEB & Ors. 2006 SCCOnLine MP 612 while holding that the Petitioner is statutorily obligated to pay the differential amount. With great respect, the Committee's reliance on the aforesaid Judgment is wholly misplaced as:

(a) In the case relied upon by the Committee, the dispute between the parties is with regards to the ratio at which the multiple factor was to be applied. The power was supplied continuously for a period of 4 years, and it was discovered that the multiple factor was wrongly applied. There was no dispute that the multiple factor was wrongly applied and the authority to levy multiple factor of 15 was unquestioned. Hence, the only dispute was whether the bill can be raised retrospectively.

(b) Whereas in the case at hand there exists a dispute with regards to the supplementary bill itself which in the first place has been raised without any recourse to the provision of the Act and/or Regulations framed by this Hon'ble Commission and /or Order passed by this Hon'ble Commission.

15.5. In light of the submissions made above, it is requested before this Hon'ble Commission to set aside the Impugned Order and consequently quash the Demand Notices dated 27.12.2018 and 02.08.2022.

Re. Letter dated 30.04.2014 was never intimated to/served on the

Petitioner

15. *It is submitted that MPPKVVCL in its Demand Notice has solely relied upon its own letter dated 30.04.2014 to state the applicability of energy accounting on TOD basis was intimated to all concerned. However, it is stated that the said letter was never provided to the Petitioner and that from the reading of the Demand Notice, it is evident that at best the letter in question is an internal communication cannot saddle the Petitioner with any financial liability especially since MPPKVVCL is licensee under the aegis of this Hon'ble Commission. Therefore, any TOD adjustment if at all has to be carried prospectively with due sanction of this Hon'ble Commission either in the form of a Regulation and/or Order passed by this Hon'ble Commission.*

15.1. *Without prejudice to above, it is submitted that MPPKVVCL is a Distribution Licensee operating under the aegis of this Hon'ble Commission. MPPKVVCL cannot be allowed to charge/ recover Tariff from its consumers at its whims and fancies. Such a recovery would be in violation to Section 62 (6) of the Act. Therefore, without any sanction from this Hon'ble Commission either in the form of a Regulation and/ or Order, MPPKVVCL cannot recover/ adjust units on the basis of TOD consumption by the Petitioner.*

15.2. *It is a settled position of law that a licensee shall not recover excess charge exceeding the tariff that is determined in this regard reliance is placed on the decision of the Hon'ble Supreme Court in NTPC Ltd. v. M.P. SEB, (2011) 15 SCC 580, the relevant excerpts of the Judgment are reproduced below:*

> *"17. On this background* ***sub-section (6) lays down that if a licensee or a generating company recovers a price or charge exceeding the tariff which is determined under this section, the excess amount shall be recoverable by the person who has paid such excess price or charge along with interest at bank rate. We have noted that the earlier five sub-sections lay down the manner in which the tariff is to be determined, and thereafter sub-section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. The words "tariff determined under this section" indicate that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections.****".*
>
> *(****Emphasis Supplied****)*

15.3. *Further, it is reiterated that failure in RTC due to its own fault or change in Energy Accounting method is applicable only prospectively and sufficient time is to be provided by MPPKVVCL so that the Petitioner being the consumer could have accordingly altered the power generation with Respondent No. 3 to 8/third party generators. Thus, minimizing the consumption of units which were being consumed from MPPKVVCL.*

15.4. *It is submitted that MPPKVVCL, being a statutory authority, is bound to act in a fair manner, ensure transparency in their actions and provide reasons and rationale for the decisions taken. MPPKVVCL as to provide*

reasons as to what prevented it from revising the bills earlier.

15.5. Therefore, the Impugned Order passed by the Committee is liable to be set aside and the Demand Notices/Supplementary bills raised by MPPKVVCL shall be quashed.

16. It is respectfully submitted that the instant petition is bona fide in nature, and it is, therefore, most respectfully prayed that the present Petition filed by the Petitioner may kindly be allowed by this Hon'ble Commission.

8. With the aforesaid submissions, the petitioner prayed the following in the subject matter:

(a) Set aside the Impugned Order dated 25.01.2022 passed by the Committee.

(b) Pass an Order or direction for quashing of the Demand Notice/ Supplementary Bill dated 27.12.2018, 18.10.2021 and 08.11.2021 issued by MPPKVVCL.

(c) Direct MPPKVVCL to refund the amount already deposited by the petitioner pursuant to Demand Notices dated 27.12.2018, 18.10.2021 and 08.11.2021 along with interest.

9. At the hearing held on 27th October' 2022, Ld. Counsels for the Respondent requested for one weeks' time to file their responses on amended petition filed by Petitioner. Accordingly, the Commission allowed a week's time to the Respondents to file their responses on amended petition. The Petitioner were directed to file rejoinder in one week, thereafter. Case was fixed for argument on 22nd November' 2022.

10. At the hearing held on 22.11.2022, Ld. Counsel appearing for the Petitioner submitted that he received replies filed by Respondents to the amended petition only a day before. Therefore, he requested the Commission to grant him ten days' time to file rejoinder. The Commission allowed ten days' time to the Petitioner to file the Rejoinder. Case was fixed for arguments on 13th December' 2022.

11. At the hearing held on 13.12.2022, Ld. Counsels for both the parties concluded their arguments. Parties were directed to file their written submissions within one week. Case was reserved for order.

12. Respondent No. 2 (SLDC) vide letter dated 20.09.2022 broadly submitted its reply to the petition as under:

"1. That the Respondent, State Load Despatch Centre, MPPTCL, Jabalpur hereinafter called SLDC, is the apex body for scheduling and system operation in the State of MP incorporated under Section 31 of Electricity Act 2003. In exercise of the Powers conferred under Section 31(1) of Electricity Act-2003 (Central Act 36 of 2003), the Government of MP vide order No 2489/13/04 dated 17-05-2004 has notified the State Load Despatch Centre, Jabalpur as apex body to ensure integrated operation of the power system in the state, to be operated by the State Transmission Utility, hereinafter called as STU.

2. *Section-32 (1) (c) of the Electricity Act 2003 is reproduced below-*

> *The State Load Despatch Centre shall keep accounts of the quantity of electricity transmitted through the State grid.*

Thus the responsibility of State Load Despatch Centre is to prepare the monthly State Energy Account as per provisions contained in M.P. Electricity Grid Code and Clause-7(1) of MP Electricity Balancing & Settlement Code, 2015, which broadly contain the following information:

(a) Details of PAFM (Plant Availability Factor achieved during the Month in %) for each State Area Generating Station/ Independent Power Producer;

(b) Details of mis-declaration of Declared Capability by State Area Generating Station/ Independent Power Producer (if any);

(c) Details of Energy scheduled to Discoms from Inter State Generating Station and State Area Generating Station /Independent Power Producer;

(d) The details of energy injection of Renewable Energy Generators (REG) at common metering point, energy purchased by Madhya Pradesh Power Management Company Limited and energy wheeled to Discoms for own use / third party sale as furnished by respective Discoms/ Madhya Pradesh Power Transmission Company Limited; and

(e) Any other details which State Load Despatch Centre feels necessary to complete the State Energy Account;

Thus, in State Energy Account, SLDC indicates the energy generated by REG Generators and energy wheeled to Discoms for own use / third party sale.

3. *The Hon'ble Commission has assigned responsibility to Discomsfor collecting and furnishing monthly data of RE Generators of previous month to SLDC in the first week of each month for incorporating in monthly State Energy Account.*

4. *It is to submit that as mandated in the Electricity Act 2003, MPEGC and Balancing & Settlement Code 2015, the monthly State Energy Account prepared by SLDC contains details of Energy scheduled to Discoms from Inter State Generating Stations, State Sector Generating Stations and Independent Power Producers, details of energy injection by RE Generators, RE energy purchased by MPPMCL, energy wheeled to Discoms in which captive user or third party consumer of RE Generator is located etc.*

5. *The Petitioner (M/s Prism Johnson Ltd., Hyderabad) has filed the present petition No. 39/2022 seeking to set aside the Order dated 25.01.2022 passed by the Open Access Monitoring Dispute Resolution and Decision Review Committee and consequent directions for quashing of the Demand Notice / Supplementary Bill dated 27.12.2018, 18.10.2021 and 08.11.2021 issued by M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.to the*

Petitioner for units consumed from April 2015 to July 2017.

6. *The responsibility of SLDC is limited to prepare monthly State Energy Account which contains details in terms of energy only. All the commercial settlement based on the energy indicated in the monthly State Energy Account is done by the various entities of the State Grid as per PPAs / Agreements and various regulatory provisions in this regard. Thus, commercial settlement amongst the various State Grid entities is beyond the purview of SLDC.*

7. *The settlement of Renewable Energy between Generator and third party consumer / CPPs is done by the Discoms only. The Hon'ble Commission in its order dated 3rd October 2008 in Petition No. 35/2008, has indicated the procedure for energy accounting methodology for adjustment of units generated by RE Generators in respect of captive and third party sale. The relevant para of order dated 03.10.2008 is reproduced below:*

"10. As regards the metering and energy accounting methodology, the Commission decides that the following procedure be followed for adjustment of units generated in respect of captive and third party sale:-

(i) The developer or concerned Discom shall install meters on either individual unit or a group of WEG owned by a single entity from which third party sale or captive use is intended. The meter shall have the provision for recording time of the day generation i.e. generation during normal hours (6:00 AM to 6:00 PM), peak load hours (6:00 PM to 10:00 PM) and off peak hours (10:00 PM to 6:00 AM next day. The credit for the generated units shall then be given accordingly to the time of the day recording. This meter shall be construed to be the billing meter for captive and/or third party sale.

(ii) In case separate ToD metering is not installed on WEG(s) involved in captive use/ third party sale, the adjustment of total units generated shall first be done from off peak consumption, remaining units from normal hours consumption and balance from peak hours consumption of the consumer."

8. *The amount claimed by the M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd. from the Petitioner is due to settlement of RE energy in TOD manner as per regulatory provision on later date. Compliance of directives of Judiciary body which had retrospective effect cannot be treated as violation of Electricity Act 2003.*

9. *Thus, SLDC is of the view that Section-56 (2) of Electricity Act-2003 shall not be applicable on the claim raised by the M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd. to the Petitioner. As, it is a subsequent correction in change in settlement procedure of energy drawn against contract demand in accordance with regulatory provisions.*

10. *Thus, owing to the roles & responsibilities of SLDC defined in Electricity Act 2003 and M.P. Electricity Grid Code, SLDC cannot offer any*

comments on various paras of this petition which is purely commercial and legal in nature and involves financial dispute between the Consumer and Discom.

11. The issues under which relief is sought by the Petitioner are purely of commercial nature and be decided by the provisions of respective regulation of the Hon'ble Commission in this regard. The respondent no. 2, SLDC is of the view that claim raised by the M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd. to the Petitioner is in accordance with regulatory provisions."

13. Respondent No. 1, (MPPKVVCL) vide letter dated 18.11.2022 submitted its reply to the petition as under:

"The present pleadings are submitted in furtherance to the earlier submissions/ pleadings dated 02.09.2022 with a bonafide purpose to clarify the stand of the answering respondent.

Before submitting paragraph wise reply to the petition, the answering respondent craves leave to place on record, the summary of the answering respondent's contention on the subject case which is as under:-

1. That, the Petitioner, M/s Prism Johnson Ltd is HT consumer of West Discom and is also availing power supply by purchase of Solar Power from various generators (Respondent no. 4 to 8 in petition No. 39 of 2022) through the open access over the distribution system of West Discom.

2. That, the petitioner has filed the instant petition challenging Order dated 25.01.2022 passed by the Open Access Monitoring Dispute Resolution & Decision Review Committee (Committee).

RE: INSTANT PETITION IS NOT MAINTAINABLE AGAINST THE DEMAND NOTICE DATED 02.08.2022

3. That, originally petitioner has filed instant petition seeking following relief:

11. In view of the above the Petitioner most respectfully prays that this Hon'ble Commission may be pleased to:

(a) Set aside the impugned Order dated 25.01.2022 passed by the Committee.

(b) Pass an Order or direction for quashing of the Demand Notice/ Supplementary Bill dated 27.12.2018, 18.10.2021 and 08.11.2021 issued by MPPKVVCL.

(c) Direct MPPKVVCL to refund the amounts already deposited by the Petitioner pursuant to demand Notices dated 27.12.2018, 18.10.2021 and 08.11.2021 along with interest.

(d) Pass such further and other Orders, as this Hon'ble Commission may deem fit and proper.

Subsequently, Petitioner has amended the petition. Now, as per amended petition petitioner is seeking following relief:

17. In view of the above the Petitioner most respectfully prays that this Hon'ble Commission may be pleased to:

(a) Set aside the impugned Order dated 25.01.2022 passed by the

Committee.

(b) Pass an Order or direction for quashing of the Demand Notice/Supplementary Bill dated 27.12.2018, 18.10.2021, 08.11.2021 ***and 02.08.2022*** *issued by MPPKVVCL.*

(c) Direct MPPKVVCL to refund the amounts already deposited by the Petitioner pursuant to demand Notices dated 27.12.2018, 18.10.2021 08.11.2021 ***and 02.08.2022*** *along with interest.*

(d) Pass such further and other Orders, as this Hon'ble Commission may deem fit and proper.

4. *It may be seen that apart from relief sought in the originally filed petition vide amended petition petitioner has also sought to challenge the demand notice dated 02.08.2022. It is submitted that, answering respondent has issued supplementary bill from Apr-2015 to Jul-2021 of Rs. 1,90,02,209/- on dt. 02.08.2022 to petitioner on account of RTC (real time clock) failure. Due to RTC failure, the generation meter of power plant supplying power to the petitioner was wrongly recording renewable energy generation units in TOD 1 (i.e 22:00 to 06:00 Hrs.) and TOD 3 (i.e 18:00 to 22:00 Hrs). It is a undisputable fact that a solar power plant cannot generate electricity in the night hour. Accordingly, upon noticing the mistake answering respondent has revised the settlement of energy done earlier and issued the demand notice.*

5. *It is submitted that the demand notice dated 02.08.2022 is not challenged by the petitioner before the Committee thus instant petition to that extent is not maintainable before this Hon'ble Commission.*

6. *That, while passing the order dated 25.01.2022 the Open Access Monitoring, Dispute Resolution & Decision Review Committee has not considered the demand notice dated 02.08.2022. Therefore, while challenging the dated 25.02.2022 petitioner cannot challenge the demand notice dated 02.08.2022.*

7. *In view of above the amended petition to the extant it is challenging the demand notice dated 02.08.2022 is not maintainable.*

RE: TOD BLOCK WISE SETTLEMENT OF ENERGY DRWAN THROUGH OPEN ACCESS

8. *That, the billing of consumption done by the Petitioner through HT Supply of West Discom was to be made by segregating the total power availed/ consumed by Petitioner in following two separate parts: -*

i) Power availed through HT supply from West Discom.

ii) Solar Power availed from Private Solar Power Generators.

9. *That, as the renewable energy generator doesn't generate energy evenly round the clock, hence what should be the manner of credit of wheeled energy is the question of determination. The said came under consideration of Hon'ble MPERC in the petition No. 35/2008. After considering the issue in detail Hon'ble Commission has approved the procedure to be followed for adjustment of units generated. The relevant part of the said judgment is reproduced as under:-*

"10. As regards the metering and energy accounting methodology, the Commission decides that the

following procedure be followed for adjustment of units generated in respect of captive and third party sale : -

(i) The developer or concerned Discom shall install meters on either individual unit or a group of WEG owned by a single entity from which third party sale or captive use is intended The meter shall have the provision for recording time of the day generation i.e. generation during normal hours (6:00 AM to 6:00 PM), peak load hours (6:00 PM to 10:00 PM) and off peak hours (10:00 PM to 6:00 AM next day. The credit for the generated units shall then be given accordingly to the time of the day recording. This meter shall be construed to be the billing meter for captive and/or third party sale.

(ii) In case separate ToD metering is not installed on WEG(s) involved in captive use / third party sale, the adjustment of total units generated shall first be done from off peak consumption, remaining units from normal hours consumption and balance from peak hours consumption of the consumer."

10. *That, the segregation of Electricity Units generated and supplied by private generators through open excess to the Petitioner from total electricity consumed by Petitioner was to be made on basis of following Time of Day (TOD) blocks as per Clause 12.3 of Power Purchase and Wheeling Agreement (PPWA) executed between the Private Generators ,West Discom and M.P. Power Management Company Limited (MPPMCL) wherein the Petitioner's name has been specifically mentioned (in Para 7 of preamble of agreements) as third party purchaser of Solar Power wheeled :-*

i) Peak Hours 06:00 PM to 10:00 PM
ii) Off Peak Hours 10:00 PM to 06:00 AM
iii) Normal Hours 06:00 AM to 06:00 PM

The said Clause 12.3 in the agreement dated 27/05/2014 with private generators reads as under:-

"Clause 12.3 – As the Solar Power Generation occurs during hours (normally between 06:00 hrs to 18:00 hrs), hence credit of wheeled energy shall be given by Discom (s) on the basis of TOD concept of generation and consumption as per their practice."

The aforesaid procedure of energy accounting in TOD manner exists in all the PPWA. Copies of Agreements were as ***Annexure –R-1 to R-4 of the Reply dated 09.07.2020 filed by West Discom in the petition No. 19 of 2020.***

11. *That, even the agreements executed by the Petitioner company itself with private generators (respondent no. 4 to 8 of petition No. 19 of 2020)*

provides for the segregation of energy in the aforesaid TOD manner. Relevant Clause 6.1.2 (d) , Clause 6.2, Clause 7.2, 7.3 and 7.4 of said agreements (Annexure P-3 at page 26 and P-4 at page 39 of petition No. 19 of 2020) reads as under :-

"Clause 6.1.2 (d) :- For the purpose of accounting the following methodology is agreed :

a) … …

b) … …

c) … …

d) Net Units for Wheeling to HR Johnson = C

Meter has the provisions of the recording the time of the day generation i.e. peak load hours (6:00 PM to 10:00 PM) and off peak hours (10:00 PM to 6:00 AM). Credit for net generation units shall then be given accordingly to the time of day recording, but billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. This meter shall be construed to be the billing Meter for the third party."

"Clause : 6.2 :- The Purchaser agrees and acknowledge that the actual supply of Electricity may vary on account of change in solar radiation and therefore any excess or shortfall resulting there from in supply of electricity shall be supplied to / from MPSEB and the Supplier shall have no liability for such excess / shortfall. "

"Clause 7.2 MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., shall raise a bill for the electricity consumed by the Purchaser on a monthly basis or a t such intervals as may be decided by MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., from time to time. Such bills shall show separately the KWH units consumed by the purchaser through the Supplier's Solar Farms. The Purchaser shall within three (3) days of the receipt of the electricity bill from MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., forwarded to the Supplier copy of each such electricity bill. The Supplier will raise an invoice at the mutually agreed rate with 18% discount on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge, within fifteen (15) days from the receipt of electricity bill from the Purchaser, for the electricity consumed by the Purchaser for the KWH units recorded in each corresponding MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., bills as

having been consumed by the Purchaser from the Supplier's Solar Farms. The present base tariff is Rs.5.10 per KWh, hence the applicable energy charge will be Rs.4.182 per Kwh. Prevailing as on date and nothing will be charged extra over this expect when there is a revision in tariff charges by MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd.

The Purchaser shall make the payment for the Invoice within Seven (7) days of receipt of the invoice (hereinafter referred to as the "Due Date"). The Purchaser shall not be entitled to make any deductions, set off from the Invoice amount. The Parties agree that the Rate as provided above shall be revised by the Parties on mutually agreed terms from time to time based on the revision of the tariff by MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., "

"Clause 7.3 In case the Purchaser does not receive any electricity bill from MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., or its intermediary or receives the bill fifteen (15) days after the normal receipt date, for any reason whatsoever then in such event, the Purchaser shall make ad hoc payment to the Supplier based on the report generated by MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., or its intermediary confirming the credit of units given to the Purchaser by the Supplier. The Parties shall reconcile the account immediately upon receipt of the bill by the Purchaser from MPSEB / M.P. Paschim Kshetra Vidyut Vitran Co. Ltd., or its intermediary and if any amount is to be found to have been paid in excess to the Supplier, then the excess amount shall be adjusted in the charges for the subsequent month. In the event of shortfall in payment of charges, the Purchaser shall make the payment with five (5) days of the reconciliation of the accounts as set out hereinabove."

"Clause 7.4 :- In case of any difference in the bill raised by MPSEB / M.P. Paschim Kshetra Vidhyut Vitran Co. Ltd. and the data available to Supplier about the supply of electricity from Supplier's Solar Farm to the Purchaser, the Supplier shall resolve the matter with MPSEB. The Purchaser will provide all relevant data and assistance required by the Supplier to reconcile any

difference."

12. *That, it may be seen that Hon'ble Commission in the petition No. 35 of 2008 has approved that the credit for the generated units shall be given according to the time of the day recording and appropriate provisions in this regard also incorporated in the Power Purchase and Wheeling agreement entered with generators by Discom/MPPMCL as well as agreement entered by the Petitioner consumer with generators.*

13. *That, it is submitted that PPWA are governed by the Orders of the Hon'ble MPERC issued from time to time as per Para 11 of Preamble Clause of the agreements. The said para 11 reads as under:*

"And whereas, this agreements shall be governed by the provisions of relevant codes, regulations, Orders e.t.c of the CEA/CERC/MPERC including their amendments from time to time and as per the terms and conditions of the Union/State Govt. Polices."

14. *That, it is further submitted that second proviso to regulation 13.2 of MPERC (Terms & Conditions for Intra- State Open Access in Madhya Pradesh) Regulations, 2005 specifically provides that till such time the Balancing and Settlement Code is approved by the Commission, the terms and conditions for energy and demand balancing as set out in the existing agreements shall continue to apply. In case of renewable generators balancing & settlement provisions introduced by MPERC (Forecasting, Scheduling, Deviation Settlement Mechanism and related matters of Wind and Solar generating stations) Regulations 2018. Therefore, earlier settlement shall be done in accordance with the ToD manner as prescribed in the agreement and also approved by the Hon'ble MPERC in the petition No. 35 of 2008.*

15. *That, the West Discom has verified the data of power supply availed by Petitioner from the West Discom and private Solar Energy Generators supplying solar energy to the Petitioner. The West Discom found that in-advertently the segregation of power availed by Petitioner from two sources could not be made in TOD manner which resulted in billing of lesser number of units from HT supply and credit was granted for higher number of solar power units availed through open excess from private generators. Immediately, after notice such mistake answering West Discom has raised the demand of escaped billing in accordance with the order of the Hon'ble Commission and provision of the Agreements, which is under challenge in the present application and earlier petition No. 19 of 2020.*

16. *That, the Petitioner was aware about the procedure for calculating the number of units availed from the power system of West Discom separately from day one of :-*
    - *i) Executing the agreements with private generators.*
    - *ii) Executing PPWA by private generators with West Discom and MPPMCL.*

17. *That, the Petitioner is under statutory obligation to pay the difference amount towards escaped / deficit billing which would have been paid by it otherwise, if the error in segregation of units consumed had not occurred.*

18. *That, so far as Petitioner's reliance upon applicability of section 56 (2) is concerned it is respectfully submitted that the bar of section 56 (2) regarding 2 years would not come in the way of West Discom as the same do not apply to the case of escaped/deficit billing. The amount claimed by West Discom through supplementary demand became due only on 27/12/2018 when it was issued to the Petitioner. Relevant provision of section 56(2) reads as under:-*

> *"Section 56(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became* ***first due*** *unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."*

19. *That, the plea of two years is not applicable since the amount became* ***'first due'*** *on 27/12/2018 when the supplementary demand of escaped billing was issued and not earlier. The restriction of section 56 (2) do not come in the way of recovery of difference amount which escaped from billing.*

20. *That, the* ***Hon'ble High Court of M.P., Gwalior in identical Case W.P. No.827/2003 Kapoor Saw Manufacturing Co. MPSEB and others*** *2006 SCC Online MP 612 have by detailed judgment dated 13/07/2006 have upheld the supplementary bill of past period. The relevant para is reproduced as under:*

> *"****(12.) AS far as bar contained in sub-section (2) of Section 56 for recovery of the entire amount of arrears for more than 4 years is concerned, Section 56 of the Indian Electricity Act contemplates a procedure for disconnection of electricity for default of payment where a consumer neglects to pay any electricity dues or charge to a Electric Company. The said provision and the bar created under sub-section (2) of Section 56 will apply to cases where recovery of amount is being made on the ground of negligence on the part of the consumer to pay the electricity dues. It is in such cases that recovery beyond the period of 2 years is prohibited. Present is not a case where action is taken due to default or negligence on the part of the consumer. Present is a case where error in the matter of calculating tariff by the Board is being corrected when the error came to the notice of the Board on 18-9-00. The provision of Section 56 will not apply in the***

facts and circumstances of the present case."

15. *That, West Discom further rely on* ***the judgment dated 24/01/1997 of the Hon'ble Supreme Court in the case of Supreme Court Swastik Industries V/s. Maharashtra State electricity Board 1997 (9) SCC 465*** *wherein the judgment dated 30/08/1996 passed by National Commission has been upheld.*

16. *That, the answering respondent further craves leave to refer and rely on the report of the committee which is elaborate and speaking and well founded on the facts on law.*

PARAGRAPH WISE REPLY:-

I. CONSPECTUS:-

1-3 *That, as regards the contents of paragraph 1 to 3, it is submitted that the same are matter of record and does not call for any reply.It is further submitted that the petitioner has challenged the subsequent demand dated 02.08.2022 also, it is submitted that the stand taken by the answering respondent is well justified on trite preposition of law and in the factual and legal backdrop.*

4. *That, as regards the contents of paragraph 4, it is submitted that the grounds of challenge to the report of the committee are unfounded and baseless, the report of the committee is based on correct facts on record.*

5-8 *That, as regards the contents of amended paragraph no. 5-8, it is submitted that the answering respondent craves leave to refer and rely upon the record of the case.*

II. ***Description of the parties :-***

9. *That, as regards the contents of paragraph 9 and its sub-paragraphs, it is submitted that the same is description of the litigation parties, therefore, does not call for any reply at this juncture.*

III. ***Jurisdiction of this Hon'ble Commission:-***

10. *That, as regards the contents of paragraph 10, it is submitted that this Hon'ble Commission has the jurisdiction to examine the present case.*

IV. ***Brief Facts :-***

11. *That, as regards the contents of paragraph 11.1 to 11.14, it is submitted that the answering respondent craves leave to refer and rely upon the factual matrix of the present case and the correct legal position governing the field. Any pleading which is inaccurate plea raised by the petitioner is denied and the stand taken by the answering respondent in earlier pleadings and based on record is re-iterated and justified.*

11.5-11.6 *That, as regards the contents of paragraph 11.5 & 11.6, it is submitted that, the Hon'ble commission vide order dt. 03.10.2008 under petition no. 35/2008 has already decided the procedure for adjustment of units generated in respect of captive and third party sale. Also it is mentioned in the clause no. 12.3 "energy accounting"*

of PP&WA dtd. 27.05.2014, that credit of wheeled energy shall be given by discom on the basis of TOD concept of generation and consumption as per their practice. Therefore the Supplementary bill/Demand Notice issued on dt. 27.12.2018 is correct.

11.7-11.26 *That, as regards the contents of paragraph 11.7 to 11.26, it is submitted that the answering respondent craves leave to refer and rely upon the factual matrix of the present case and the correct legal position governing the field. Any pleading which is inaccurate plea raised by the petitioner is denied and the stand taken by the answering respondent in earlier pleadings and based on record is re-iterated and justified.*

11.27 *That, as regards the content of Paragraph 11.27, MPPKVVCL has provided the information sought by the petitioner along-with meter test reports vide letter on dtd. 03.11.2022* ***(Appendix-1).***

11.28 *That, as regards the contents of paragraph 11.28, it is submitted that the answering respondent craves leave to refer and rely upon the factual matrix of the present case and the correct legal position governing the field. Any pleading which is inaccurate plea raised by the petitioner is denied and the stand taken by the answering respondent in earlier pleadings and based on record is re-iterated and justified.*

V. ***REPLY TO GROUNDS:-***

12. *That, as regards the contents of paragraph no. 12, in the text of petition, the petitioner has raised heavy reliance on S. 56(2) of Indian Electricity Act, however, the said statutory provision has been analysed by various judicial pronouncement and the demand raised by various electricity supply company against the electricity consumers even after a stipulated period have been upheld and as in the present case also, on scrutiny of the record, the audit wing / cell has found that the petitioner has been availing electricity supply under a wrong category and therefore, the demand has been raised which is perfectly within the parameters as being laid down by various judicial pronouncement and such judicial pronouncement has been referred and relied upon in the later part of the reply and thus, the present petition is devoid of merit and deserves to be dismissed.*

12.1 *That, as regards the contents of paragraph 12.1, it is submitted that the contention of the petitioner in this paragraph and sub-paragraphs is completely alien to the correct interpretation of law, the committee has examined the correct interpretation of the statutory provisions and the legal position and subsequent demand dated 02.08.2022 is also justified on trite preposition of law and in back drop of the correct factual matrix.*

12.2 *That, as regards the contents of paragraph 12.2, it is submitted that the petitioner is giving an incorrect interpretation to the ratio of the judgment. The answering respondent craves leave to refer and rely upon the cardinal principles for interpretation of have judgment have been examined.*

12.3-12.5 *That, as regards the contents of paragraph 12.3-12.5, it is*

submitted that the petition is not maintainable in view of availability of alternate remedy to the petitioner to present the case in front of Open Access Monitoring Dispute Resolution & Decision Review Committee.

12.6 *That, as regards the contents of paragraph 12.6 and its sub-paragraphs, it is submitted that the committee has made the correct interpretation of the legal position and the statutory provisions governing the field and the answering respondent craves leave to refer and rely on the same.*

12.7 *That, as regards the contents of paragraph 12.7, it is submitted that the findings and the conclusions drawn by the committee are correct, well founded and based on appropriate appreciation of legal and factual matrix.*

12.8 *That, as regards the contents of paragraph 12.8 and its sub-paragraphs, it is submitted that the petitioner is incorrectly interpreting the correct interpretation of law governing the field and thus, the interpretation made by the petitioner is denied.*

12.9-12.10 *That, as regards the contents of paragraph 12.9-12.10, it is submitted that the factual matrix of the judgment so being referred are different and the demand so being raised against the petitioner is well founded and justified on the scheme of the electricity and the law governing the field.*

12.11 *That, as regards the contents of paragraph 12.11, it is submitted that the judgment in case of PremCotex has further been explained and analyzed by the Hon'ble Supreme Court of India and the answering respondent craves leave to refer and rely on the further judgment wherein the Hon'ble Supreme Court has clarified the situation.*

12.12-12.14 *That, as regards the contents of paragraph 12.12, 12.13 and 12.14, it is submitted that the reference and reliance by the committee on the earlier judgment of this Hon'ble Commission is well founded and on trite preposition of law.*

12.15 *That, as regards the contents of paragraph 12.15, it is submitted that the factual matrix of the judgment so being quoted and relied upon by the petitioner and facts of the present case are entirely different and therefore, the said judgment does not provide any shelter to the petitioner.*

12.16 *That, as regards the contents of paragraph 12.16, it is submitted that the answering respondent has already clarified their stand and the answering respondent refers on the pleadings submitted earlier.*

12.17 *That, as regards the contents of paragraph 12.17, it is submitted that the contention of the petitioner are hereby categorically denied being contrary to the trite preposition of law.*

13.1-13.2 *That, as regards the contents of paragraph 13.1-13.2, it is submitted that the Committee has rightly examined the factual matrix and the provisions / documents governing the field and the documents.*

13.3 *That, as regards the contents of paragraph 13.3, it is submitted that the answering respondent craves leave to refer and rely upon*

the pleadings submitted hereinabove.

13.4 That, as regards the contents of paragraph 13.4, it is submitted that the judgment is entirely different to the factual matrix and does not provide any shelter to the petitioner.

13.5 That, as regards the contents of paragraph 13.5, it is submitted that the orders which are the subject matter of challenge are perfectly well founded and justifiable on trite preposition of law and therefore, does not call for any interference by this Hon'ble Commission.

14. That, as regards the contents of paragraph 14, it is submitted that the answering respondent craves leave to refer the record of the case and the pleadings and the documents submitted in the earlier round of litigation and before the Committee and this Hon'ble Commission.

14.1-14.3 That as regards the contents of paragraph 14.1-14.3, it is submitted that the respondent 1 issued energy bill to petitioner after adjustment of renewable energy units and petitioner has made the payment of the same. Also, petitioner purchased the renewable energy units from respondent 4 to 8. Further, energy bills from April-15 to July-2017 were revised due to revision of adjustment of renewable energy units as per TOD manner and energy bills from April-15 to July-21 were revised due to RTC failure. Since, the petitioner makes payment of renewable energy units to the respondent 4 to 8, therefore the petitioner may reimburse the supplementary bill amount from respondent 4 to 8.

14.4 That, as regards the contents of paragraph 14.4, it is submitted that the stand taken by the committee is justified and the pleadings raised by the petitioner are devoid of substance and therefore, denied to the extent of being contrary to the law and record of the case.

14.5 That, as regards the contents of paragraph 14.5, it is submitted that the impugned demand notice is well founded, justifiable and therefore, the notices dated 27.12.2018 and 02.08.2022 should be allowed to be executed.

15-15.1 That, as regards the contents of paragraph 15-15.1, it is submitted that the answering respondent craves leave to refer the record of the case and the pleadings and the documents submitted in the earlier round of litigation and before the Committee and this Hon'ble Commission.

15.2-15.3 That, as regards the contents of paragraph 15.2-15.3, it is submitted that the stand taken by the answering respondent is perfectly justified and the Judgement of the Hon'ble Supreme Court referred and relied upon by the petitioner is on different footings and does not provide any support to the petitioner.

15.4-15.5 That, as regards the contents of paragraph 15.4-15.5, it is submitted that the answering respondent craves leave to refer the record of the case and the pleadings and the documents submitted in the earlier round of litigation and before the Committee and this Hon'ble Commission.

16. That, as regards the contents of paragraph 16, it is submitted that

the petition is devoid of substance and does not saying merit.

17. That, the contents of prayer clause are denied. The petitioner is not entitled to any relief as claimed in this paragraph from this Hon'ble Commission and the petition is liable to be dismissed with cost as the same is devoid of any merit."

14. Respondent No. 2 (SLDC) vide letter dated 17.11.2022 submitted its compliance of directives as under:

"In compliance to directives issued by Hon'ble commission vide daily order dtd 31.10.2022, the Respondent No.2 (SLDC)most respectfully submits that petitioner through this amended petition has placed on record the additional Demand Notice / Supplementary Bill dated 02.08.2022 then to the Notices dated 27.12.2018 and 18.10.2021 issued by MPPKVVCL to the petitioner for seeking recovery of arrear for the period April 2015 to July 2021 in original petition. Thus, Respondent No. 2 (SLDC) has no additional submission in the matter.

It is therefore submitted that reply filed by Respondent No. 2 (SLDC) vide letter No. 07-05/Pet.39/2022/1792 dated 27.09.2022 in the matter of Petition No. 39 of 2022 may kindly be considered by the Hon'ble Commission as final reply in the matter."

15. Petitioner vide affidavit dated 24.12.2022 submitted its rejoinder to the reply filed by Respondent No. 2 dated 17.11.2022 as under:

*"1. That the instant Amended Petition has been filed by Prism Johnson Limited (**"Petitioner"**) under Section 86(1)(f) of the Electricity Act, 2003 ("**the Act**") read with Regulation 8.8 (x) of the MPERC (Terms and Conditions for Intra State Open Access in State of Madhya Pradesh) Regulations, (Revision- 1) 2021 ("**Open Access Regulations, 2021**") as well as in terms of the liberty granted by this Hon'ble Commission vide Order dated 18.12.2020 passed in Petition No. 19 of 2020 .*

*2. The Petitioner through the present Petition has challenged the legality, validity and propriety of the following Demand Notices/Supplementary Bills ("**Demand Notice**"): -*

*(a) Demand Notice dated 27.12.2018 issued by Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited. ("**MPPKVVCL**") seeking illegal recovery of Rs. 2,56,26,841/- from the Petitioner for the reason that the bills from the month of April, 2015 to July, 2017 issued to the Petitioner have been retrospectively revised on account of non-adjustment of solar units in Time of Day ("**TOD**") manner.*

(b) Demand Notices dated 18.10.2021 and 08.11.2021 issued by MPPKVVCL seeking Delayed Payment Surcharge amounting to Rs. 59,68,507/- charged on the demand raised by MPPKVVCL vide Demand Notice dated 27.12.2018 for the period from 2019 to 2021 approximately.

(c) Demand Notice dated 02.08.2022 issued by MPPKVVCL to the Petitioner seeking recovery of Rs. 1,90,02,209/- for the period

*from April 2015 to July 2021 on account of Round-the-clock ("**RTC**") failure of solar generator meter due to which the bills were incorrectly raised by MPPKVVCL.*

3. *On 29.09.2022, this Hon'ble Commission vide Order directed the Petitioner to file the Amended Petition following with the reply by the Respondents.*
4. *On 31.10.2022, this Hon'ble Commission vide its Order directed the Respondents to file their reply within a week following with the Rejoinder by the Petitioner.*
5. *On 17.11.2022, the Respondent No. 2 filed its reply to the present Amended Petition. In compliance of the directions passed by this Hon'ble Commission, the Petitioner has filed the present Rejoinder.*
6. *It is hereby submitted that Respondent No. 2 has raised the following objections before this Hon'ble Commission:*
   (a) *At the instance, the commercial settlement amongst the various State Grid entities is beyond the purview of Respondent No. 2.*
   (b) *The amount claimed by the Respondent No. 1 from the Petitioner is due to settlement of RE energy in TOD manner as per regulatory provision on later date. Compliance of directives of Judiciary body which had retrospective effect cannot be treated as violation of the Act.*
   (c) *Section 56(2) of the Act shall not be applicable on the claims raised by Respondent No. 1 to the Petitioner.*

7. *At the outset, the Petitioner denies and disputes all the averments, allegations and contentions of the Respondent No. 2 save and except the facts that are a matter of record or have been specifically admitted herein. Any omission on the part of the Petitioner to specifically deal with any of the allegations /averments/contentions contained in the Reply filed by Respondent No. 2 should not be treated as an admission thereof by the Petitioner.*

II. ISSUE-WISE REJOINDER

Re. Retrospective effect cannot be treated as violation of the Act. Re. Section 56(2) of the Act shall not be applicable.

8. *It is most respectfully submitted that Demand Notices dated 27.12.2018 and 02.08.2022 should be quashed as the same falls under the purview of Section 56(2) of the Act. In support to the submissions made by the Petitioner the following is relevant: -*

(a) *Section 56(2) of the Act is a non obstante clause which specifies that that no sum due from any consumer, under the section shall be recoverable after the period of two year from the date when such sum became first due. The only exception under which such recovery is permissible is that the said sum must have been shown continuously as recoverable as arrears. For ready reference, Section 56(2) of the Act has been extracted hereunder:*

"Section 56. (Disconnection of supply in default of payment): -

- (2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.

(b) In the present instance, it is submitted that the Demand Notice dated 27.12.2018 pertains to the period beginning from April 2015 to July 2017 and Demand Notice dated 02.08.2022 pertains to the period beginning from April 2015 to July 2021. In terms of the aforementioned provision, Respondent No. 1 can only recover the amount in terms of Section 56(2) of the Act. Accordingly, the claim of Respondent No. 1 has not been made out in terms of Section 56(2) of the Act.

9. The effect of a non obstante clause was explained by the Hon'ble Supreme Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447 wherein it was held as follows: -

> *"67.* ***A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause****. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."*
>
> ***[Emphasis Supplied]***

10. Moreover, it is submitted that Respondent No. 1 vide Demand Notice dated 02.08.2022 has intimated the Petitioner that on account of RTC failure of the solar generator meter, the bills for the period from April 2015 to July 2021 were incorrectly raised by Respondent No. 1.

*11. In this regard, it is submitted that it is surprising that the RTC failure went un-noticed for a period of 6 years and 4 months. In fact, as per Clause 8.14 of the Madhya Pradesh Electricity Supply Code, 2013 ("**Supply Code, 2013**") it is the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose. Moreover, Clause 8.15 of the Supply Code, 2013 provides that the licensee shall also conduct periodical inspection/testing of the HT meters at least once in a year. The relevant extracts of the Supply Code, 2013 are reproduced hereunder: -*

> "**Testing of Meters**

8.14 It shall be the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose.

8.15 The licensee shall also conduct periodical inspection/testing of the meters as per the following schedule:

(a) Single phase /three phase meters : at least once in every five years.

(b) HT meters : at least once in a year.

The CT and PT wherever installed, shall also be tested along with meters.

If required, the licensee may remove the existing meter for the purpose of testing. The representatives of the licensee must, however, produce an authenticated notice to this effect and sign the document, mentioning his full name and designation, as a receipt, before removing the meter. The consumer shall not object to such removal."

12. *From the above, the following emerges for kind consideration of this Hon'ble Commission: -*

(a) The licensee has failed to conduct the periodical inspection/testing of the HT meters once in a year.

(b) The licensee has failed to discharge its obligations as enshrined under the Supply Code, 2013.

(c) Therefore, without accepting the liability imposed by the Notice dated 02.08.2022 it is submitted that the Petitioner is being penalized for gross inaction committed by the Licensee and the Licensee as per its own admission has failed to adhere to the Regulations specified by the Hon'ble Commission. In light of the submission made, the Demand Notice dated 02.08.2022 is ex-facie illegal and liable to be set aside.

13. *Without prejudice to the above, it is submitted that even if the submission raised by the Respondents that Section 56(2) is not applicable is accepted, the following emerges for consideration of this Hon'ble Commission: -*

(a) From a perusal of the Demand Notices, it is evident that the same has been issued without any recourse to the provision of the Act and/or Regulations framed by this Hon'ble Commission and/or Order passed by this Hon'ble Commission.

(b) In this regard, it is submitted that Respondent No. 1 is a Distribution Licensee operating under the aegis of this Hon'ble Commission. Respondent No. 1 cannot be allowed to charge/recover tariff from its consumers at its whims and fancies. Such a recovery would be in violation of Section 62(6) of

the Act. Therefore, without any sanction from this Hon'ble Commission either in the form of a Regulation and/or Order, Respondent No. 1 cannot recover/adjust units on the basis of TOD consumption by the Petitioner.

(c) In addition to the above, it is an admitted fact that the Petitioner has made all the payments as raised by the Respondent No. 1 vide Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022. Further, it is submitted that the said payments were made on the basis of bills raised by Respondent No. 1 which clearly provided for Renewable Energy units consumed by the Petitioner.

(d) On a perusal of the aforementioned bills, it is evident that the Renewable Energy units consumed by the Petitioner and duly noted in the bills raised by Respondent No. 1 is equivalent to the units billed by the Respondent No. 4 to 8 in their monthly bills. Therefore, the Petitioner has already made the payment against the units consumed by it.

(e) Therefore, the Petitioner, at this stage, cannot be made to pay for the revision of tariff which is being retrospectively applied as thesame is against the settled principles of tariff recovery. It is submitted that Respondent No. 1 cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on Respondent No. 1 to issue a Demand Notice either expressly or by necessary implication.

(f) It is a settled position under law that Respondent No. 1 cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on Respondent No. 1 to issue a Demand Notice either expressively or by necessary implication.

*14. Further, it is apposite to mention that on 17.11.2017, this Hon'ble Commission notified the Seventh Amendment to the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 ("**RE Amendment Regulations**"). By way of the said amendment, generation of electricity from renewable sources such as solar was subjected to 'Scheduling' in terms of the provisions of Indian Electricity Grid Code, 2010 ("**IEGC**").*

15. Therefore, from 17.11.2017 for the first time scheduling was directed to be carried by the RE Generators. Hence, if at all any ToD billing can be compelled with the sanction of this Hon'ble Commission post the basic requirement of scheduling which only introduced on 17.11.2017.

16. In view of the above, it is submitted that a Regulation can only be applicable from the date of its notification in the Official Gazette until and unless it has been expressly indicated to operate otherwise.

17. It is submitted that the critical fact that for almost four years no such billing was asserted by Respondent No. 1 in interacting with the Petitioner. Moreover, it is an admitted fact that based on the invoices

raised by Respondent No. 1, the Petitioner has made legitimate payment to Respondent No. 1 as well as other RE generators i.e., Respondent No. 3 to 8. Hence, Respondent No. 1 cannot now renege from its own invoices and its conduct to saddle additional liability on the Petitioner without any sanction from this Hon'ble Commission. Since the charges due is a result of fault on the part of the Respondent No.1, assuming it to be valid, it is not reasonable to force realization of the amount in the impugned bill on the Petitioner.

18. *The Petitioner has made further payments to the RE Generators relying upon the previous bills of Respondent No. 1. Hence, without prejudice to the above if the Petitioner is made to pay the supplementary bills to Respondent No. 1, there should be a proper adjustment made so that the back to back payments made by the Petitioner are adjusted.*
19. *In view thereof, the Petitioner should not be made to suffer nearly 4 years after, due to the failure on the part of Respondent No. 1 to convey to the Petitioner and Respondents No. 3 to 8 to carry out solar unit adjustment in TOD manner so as to avoid any surplus flow of power. Since the same was not carried out by Respondent No. 1 at first instance due to its own negligence, there is no fault of the Petitioner and hence the Impugned Demand Notice on this ground alone deserves to be set aside.*
20. *In light of the submissions made above, it is requested before this Hon'ble Commission to reject the contentions raised by Respondent No. 2 vide its reply and be pleased to allow the prayer made by the Petitioner in the instant Amended Petition."*

16. Petitioner vide affidavit dated 24.12.2022 submitted its rejoinder to the reply filed by Respondent No. 1 dated 18.11.2022 1 as under:

*"1. The instant Amended Petition has been filed by Prism Johnson Limited (**"Petitioner"**) under Section 86(1)(f) of the Electricity Act, 2003 ("**the Act**") read with Regulation 8.8 (x) of the MPERC (Terms and Conditions for Intra State Open Access in State of Madhya Pradesh) Regulations, (Revision-1) 2021 ("**Open Access Regulations, 2021**") as well as in terms of the liberty granted by this Hon'ble Commission vide Order dated 18.12.2020 passed in Petition No. 19 of 2020.*

*2. The Petitioner through the present Petition has challenged the legality, validity, and propriety of the following Demand Notices/Supplementary Bills ("**Demand Notice**"): -*

*(a) Demand Notice dated 27.12.2018 issued by Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Limited ("**MPPKVVCL/ Respondent No. 1**") seeking illegal recovery of Rs. 2,56,26,841/- from the Petitioner for the reason that the bills from the month of April, 2015 to July, 2017 issued to the Petitioner have been retrospectively revised on account of non-adjustment of solar units in Time of Day ("**TOD**") manner.*

(b) Demand Notices dated 18.10.2021 and 08.11.2021 issued by Respondent No. 1 seeking Delayed Payment Surcharge amounting to Rs. 59,68,507/- charged on the demand raised by Respondent No. 1 vide Demand Notice dated 27.12.2018 for the period from 2019 to 2021 approximately.

(c) *Demand Notice dated 02.08.2022 issued by Respondent No. 1 to the Petitioner seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021 on account of Round-the-clock ("**RTC**") failure of solar generator meter due to which the bills were incorrectly raised by Respondent No. 1.*

3. *On 29.09.2022, this Hon'ble Commission vide Order directed the Petitioner to file the Amended Petition following with the reply by the Respondents.*
4. *On 31.10.2022, this Hon'ble Commission vide its Order directed the Respondents to file their reply within a week following with the Rejoinder by the Petitioner.*
5. *On 18.11.2022, the Respondent No. 1 filed its reply to the present Amended Petition. In compliance of the directions passed by this Hon'ble Commission, the Petitioner has filed the present Rejoinder.*
6. *It is hereby submitted that Respondent No. 1 has raised the following objections before this Hon'ble Commission:*
   (a) *The instant Amended Petition is not maintainable against the Demand Notice dated 02.08.2022 as the same was not challenged before the Open Access Monitoring, Dispute Resolution & Decision Review Committee. ("**the Committee**")*
   (b) *Since, renewable energy generator does not generate energy evenly round the clock, therefore, the credit of wheeled energy shall be done in accordance with the procedure approved by this Hon'ble Commission in Petition No. 35 of 2008.*
   (c) *Segregation of electricity units generated and supplied by private generators through open excess to the Petitioner from total electricity consumed by the Petitioner was to be made on basis of TOD blocks as per Clause 12.3 of the Power Purchase and Wheeling Agreement ("**PP&WA**") executed between Private Generators, West Discom and M.P. Power Management Company Limited ("**MPPMCL**").*
   (d) *Agreements executed by the Petitioner with the private generators provides for segregation of energy in the TOD manner.*
   (e) *Bar of Section 56(2) regarding 2 years would not come in the way of West Discom as the same do not apply to the case of escaped/deficit billing. The amount claimed by West Discom through supplementary demand became due only on 27.12.2018 when it was issued to the Petitioner.*
7. *At the outset, the Petitioner denies and disputes all the averments, allegations and contentions of the Respondent No. 1 save and except the facts that are a matter of record or have been specifically admitted herein. Any omission on the part of the Petitioner to specifically deal with any of the allegations/ averments/ contentions contained in the Reply filed by Respondent No. 1 should not be treated as an admission thereof by the Petitioner.*

II. *ISSUE-WISE REJOINDER*

Re. Instant Petition is not maintainable against the Demand Notice dated 02.08.2022

8. *Respondent No. 1 has raised a contention that the Demand Notice dated 02.08.2022 has not been challenged by the Petitioner before the*

Committee thus instant Petition to that extent is not maintainable before this Hon'ble Commission.

8.1. In response to the contention raised by Respondent No. 1, it is most respectfully submitted that the submissions/ argument raised by Respondent No. 1 does not hold any footing on the maintainability of the amended petition as the Demand Notice/ Supplementary Bill dated 27.12.2018 as well as Demand Notice dated 02.08.2022 seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021 on account of RTC failure of solar generator meter are interlinked with each other and can be adjudicated by this Hon'ble Commission.

8.2. It is trite law that in the interests of the parties and of achieving a substantial reduction in costs and the multiplicity of proceedings, common issues between the parties should be litigated in a single action.

8.3. In light of the above, it is submitted that since the Demand Notice dated 02.08.2022 are interlinked with the Demand Notices dated 27.12.2018, therefore, this Hon'ble Commission has the jurisdiction to adjudicate the present dispute. Therefore, the submissions made by Respondent No. 1 shall be rejected.

Re. TOD Block wise settlement of energy drawn through open access

9. Respondent No. 1 vide its reply has raised the contention that since, renewable energy generator doesn't generate energy evenly round the clock, therefore, the credit of wheeled energy shall be done in accordance with the procedure approved by this Hon'ble Commission in Petition No. 35 of 2008.

9.1 It is submitted that the above contention raised by Respondent No. 1 is incorrect and liable to be rejected. In this regard, it is submitted that the said Order was passed in the specific factual background and does not apply in rem. Further, even in the said case the impact of ToD billing was made known to the Consumer and generator prior to transmission of power. Whereas in the present facts the demand has been made belatedly on 27.12.2018 for the period from April 2015 to July 2017 and 02.08.2022 for the period from April 2015 to July 2021. Therefore, such retrospective demand by Respondent No. 1 is wholly perverse and illegal.

9.2 It is settled position of law that when this Hon'ble Commission seeks the applicability of any order passed by it in rem, it specifies the same within its order. In this regard reliance is placed on the Judgment of the Hon'ble Supreme Court in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532. The relevant extracts of the Judgment are herein reproduced below:

> *"37. It may be noticed that the cases referred to above relate to actions in rem.* ***A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals.*** *Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the*

parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, ***a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself.***

(Vide Black's Law Dictionary.)"

9.3 From the facts of the present case, the following is relevant for the kind consideration of this Hon'ble Commission: -

(a) The Order dated 03.10.2008 was not an Order in rem governing all RE Open access transactions. As nothing of this nature was suggested in the said Order.

(b) It is also pertinent to mention that the Order dated 03.10.2008 is concerned with wind farm and the present petition is with respect to solar power generators and the same is not applicable to the present petition.

(c) Further, even as per Respondent No. 1, it is only seeking ToD metering w.e.f. from April, 2015 in the case of the Petitioner, however, Respondent No. 1 has not placed anything on record to suggest that it was implementing ToD metering with other consumers even prior to that. Therefore, even by conduct, it is evident that the Respondent No. 1 has not accepted the said Order passed by this Hon'ble Commission as an Order in rem.

(d) Lastly, in its Demand Notice dated 27.12.2018, Respondent No. 1 has not relied upon the Order passed by this Hon'ble Commission. The demand notice refers to internal letter dated 30.04.2014 which also does not whisper the Order dated 03.10.2008. Therefore, clearly Respondent No. 1 is seeking to justify its illegal demand by placing incorrect reliance on the earlier Order passed by this Hon'ble Commission.

9.4 In view of the above, it is submitted that Respondent No. 1 cannot rely upon an Order without appreciating the specific factual background.

9.5 Without prejudice to the aforesaid, even assuming that the said order was applicable in the present case, even then, the claim of Respondent No. 1 is hopelessly barred by limitation. The order was passed on 03.10.2008 and there was not a whisper of such procedure being adopted by Respondent No. 1. Therefore, Respondent No. 1 cannot, at this stage, be allowed to adopt and change the accounting methodology in a retrospective manner.

9.6 Further, it is submitted that Respondent No. 1, in its reply, has contended that the segregation of Electricity Units generated and supplied by private generators (Respondent No. 4 to 8) through open access to the Petitioner from total electricity consumed by Petitioner was to be made on basis of TOD blocks as per Clause 12.3 of the PP&WA executed between the Respondent Private Generators, Respondent No. 1 and

MPPMCL. In fact, in the said PP&WA, the Petitioner's name is specifically mentioned as third- party purchaser of Solar Power. Further, even the agreements executed by the Petitioner with Respondent No. 4 to 8 provides for the segregation of energy in the TOD manner. In this regard, the following is relevant: -

(e) *Petitioner is not a signatory to the Agreements signed between MPPMCL, Respondent No. 1 and Private Respondents. Therefore, the Petitioner is not contractually bound by such agreements.*

(f) *Further, Respondent No. 1 is a Distribution Licensee operating under the Regulatory Regime of the Hon'ble Commission. Unless and until this Hon'ble Commission specified ToD billing, the same cannot be contractually enforced.*

9.7 Notwithstanding and without prejudice to the above, it is submitted that Respondent No. 1 has erred in the interpretation of the clauses. From a bare perusal of the Clause 6.1.2(d) and Clause 7.2 of the agreements executed by the Petitioner with Respondent No. 4 to 8 clearly specifies that the credit for net generation of units shall be given according to the TOD recording. However, billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. The supplier shall raise an invoice at the mutually agreed rate with 18% discount on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge). The tariff is also fixed in the billing clause 7.2 and it is specifically mentioned that nothing will be charged extra over the fixed tariff except when there is a revision in tariff charges. The relevant provisions are being reproduced as follows: -

> *"**Clause 6.1.2(d)**:- For the purpose of accounting the following methodology is agreed :*
>
> *…d) Net Units for Wheeling to HR Johnson = C*
>
> *Meter had the provisions of the recording the time of the day generation i.e., peak load hours (6:00 PM to 10:00 PM) and off peak hours (10:00PM to 6:00 AM). Credit for net generation units shall then be given accordingly to the time of day recording, but billing and payment would **be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. This meter shall be construed to be the billing Meter for the third part. "***
>
> ***…Clause 7.2***
>
> *MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., shall raise a bill for the electricity consumed by the Purchaser on a monthly basis or at such intervals as may be decided by MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., from time to time. Such bills shall show separately the KWH units consumed by the purchaser through the Supplier's Solar Farms. The Purchaser shall within three (3) days of the receipt of the electricity bill from MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., forwarded to the Supplier copy of each such electricity bill. The Supplier will raise an invoice at the mutually agreed rate with 18% discount on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge, within fifteen (15) days from the receipt of electricity bills from the Purchaser, for the electricity consumed by the purchaser for the KWH units*

recorded in each corresponding MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd., bills as having been consumed by the Purchaser from the Supplier's Salor Farms. The present base tariff is Rs. 5.10 per KWh, hence the applicable energy charge will be Rs. 4.182 per Kwh. Prevailing as on date and nothing will be charged extra over this expect when there is a revision in tariff charges by MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd.
The Purchaser shall make the payment for the Invoice within Seven
(7) days of receipt of the invoice (herein referred to as "Due Date"). The Purchaser shall not be entitled to make any deductions, set off from the Invoice amount. The Parties agree that the Rate as provided above shall be revised by the Parties on mutually agreed terms from time to time based on the revision of the tariff by MPSEB/M.P. Pashchim Kshetra Vidyut Vitran Co. Ltd."

9.8 From a bare perusal of the Clause 6.1.2(d) and Clause 7.2 of the agreements executed by the Petitioner with Respondent No. 4 to 8, the following emerges for consideration: -

(a) PP& WA clearly specifies that the credit for net generation of units shall be given according to the TOD recording.

(b) Billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. The supplier shall raise an invoice at the mutually agreed rate with 30% discount (changed from time to time) on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge). The tariff is also fixed in the billing Clause 7.2, and it is specifically mentioned that nothing will be charged extra over the fixed tariff except when there is a revision in tariff charges.

9.9 It is evident that the billing was supposed to be done at a mutually agreed rate i.e., at a discounted rate of 18% at of the prevailing tariff. Therefore, the reliance placed by Respondent No. 1 on the contractual provisions is incorrect and liable to be rejected.

9.10 Vide the said reply, Respondent No. 1 has raised the issue that a mistake was committed while issuing earlier bills and the same was rectified as soon as it was noticed. Further, the mistake was on account of inadvertent segregation of power availed by Petitioner from two sources which were supposed to be computed in TOD manner as provided in the agreements. The same resulted in billing of lesser number of units from HT supply and credit was granted for higher number of solar power units availed through open excess from private generators.

9.11 In response to the contention raised by Respondent No. 1, it is submitted that the above contention is an afterthought and liable to be rejected at the very outset. In this regard, the following submissions are noteworthy:-

*(a) On 17.11.2017, this Hon'ble Commission notified the Seventh Amendment to the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 ("**RE Amendment Regulations**"). By way of the said*

*amendment, generation of electricity from renewable sources such as solar was subjected to 'Scheduling' in terms of the provisions of Indian Electricity Grid Code, 2010 ("**IEGC**").*

(b) Therefore, from 17.11.2017 for the first time scheduling was directed to be carried by the RE Generators. Hence, if at all any ToD billing can be compelled with the sanction of this Hon'ble Commission post the basic requirement of scheduling which only introduced on 17.11.2017.

9.12 In view of the above, it is submitted that a Regulation can only be applicable from the date of its notification in the Official Gazette until and unless it has been expressly indicated to operate otherwise. In this regard, reliance is placed on Judgments passed by the Hon'ble Supreme Court in Kusumam Hotels Private Limited v. Kerala State Electricity Board and Ors., reported as (2008) 13 SCC 213 and Binani Zinc Limited v. Kerala State Electricity Board & Ors., reported as (2009) 11 SCC 244.

9.13 It is submitted that the critical fact that for almost four years (Demand Notice dated 27.12.2018) and 6 years and 4 months (Demand Notice dated 02.08.2022) no such billing was asserted by Respondent No. 1 in interacting with the Petitioner. Moreover, it is an admitted fact that based on the invoices raised by Respondent No. 1, the Petitioner has made legitimate payment to Respondent No. 1 as well as other RE generators i.e., Respondent No. 3 to 8. Hence, Respondent No. 1 cannot now renege from its own invoices and its conduct to saddle additional liability on the Petitioner without any sanction from this Hon'ble Commission. Since the charges due is a result of fault on the part of the Respondent No.1, assuming it to be valid, it is not reasonable to force realization of the amount in the impugned bill on the Petitioner.

9.14 In view thereof, the Petitioner should not be made to suffer, due to the failure on the part of Respondent No. 1 to convey to the Petitioner and Respondents No. 3 to 8 to carry out solar unit adjustment in TOD manner so as to avoid any surplus flow of power. Since the same was not carried out by Respondent No. 1 at first instance due to its own negligence, there is no fault of the Petitioner and hence the Impugned Demand Notices on this ground alone deserves to be set aside.

9.15 Further, Respondent No. 1, at this stage, is raising extraneous grounds to justify the Impugned Demand Notices which in untenable and impermissible in law.

9.16 Respondent No. 1 vide its reply has raised the contention that bar of Section 56(2) regarding 2 years would not come in the way of West Discom as the same do not apply to the case of escaped/deficit billing. The amount claimed by West Discom through supplementary demand became due only on 27.12.2018 when it was issued to the Petitioner.

9.17 In response to the contention raised by Respondent No. 1, it is submitted that the said contentions are misconceived and fallacious and hence liable to be rejected. It is most respectfully submitted that Demand Notices dated 27.12.2018 and 02.08.2022 should be quashed as the same falls under the purview of Section 56(2) of the Act. In support to the submissions made by the Petitioner the following is relevant: -

(a) Section 56(2) of the Act is a non obstante clause which specifies that that no sum due from any consumer, under the section shall

be recoverable after the period of two year from the date when such sum became first due. The only exception under which such recovery is permissible is that the said sum must have been shown continuously as recoverable as arrears. For ready reference, Section 56(2) of the Act has been extracted hereunder:

> *"Section 56. (Disconnection of supply in default of payment): -*
>
> *- (2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."*

(b) The effect of a non obstante clause was explained by the Hon'ble Supreme Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447 wherein it was held as follows: -

> *"67.* ***A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause****. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."*
>
> ***[Emphasis Supplied]***

(c) In the present instance, it is submitted that the Demand Notice dated 27.12.2018 pertains to the period beginning from April 2015 to July 2017 and Demand Notice dated 02.08.2022 pertains to the period beginning from April 2015 to July 2021. In terms of the aforementioned provision, Respondent No. 1 can only recover the amount in terms of Section 56(2) of the Act. Accordingly, the claim of Respondent No. 1 has not been made out in terms of Section 56(2) of the Act.

*(d) However, it is an admitted fact that in the present case no amount was being shown to be due and recoverable in the bills raised by Respondent No. 1. It is submitted that the delay and laches are squarely applicable to proceedings initiated under the Act. The Hon'ble Supreme Court has held the same in '**Andhra Pradesh vs***

***Lanco Kondapalli Power Limited and others' [(2016) 3 SCC 468]**. For ready reference the relevant excerpt of the said Judgment has been extracted hereunder:*

> *"We have taken the aforesaid view to avoid injustice as well as possibility of discrimination. We have already extracted a part of paragraph 11 of the judgment in the case of State of Kerala*
>
> *v. V.R. Kalliyanikutty (supra) wherein Court considered the matter also in the light of Article 14 of the Constitution. In that case the possibility of Article 14 being attracted against the statute was highlighted to justify a particular interpretation as already noted. It was also observed that it would be ironic if in the name of speedy recovery contemplated by the statute, a creditor is enabled to recover claims beyond the period of limitation. In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) also appears to be for speedy resolution so that a vital developmental factor – electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the Civil Court. Evidently, in absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission.* ***Hence, we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation*** *prescribed for an ordinary suit before the civil court. But in appropriate case, a specified period may be excluded on account of principle underlying salutary provisions like Section 5 or 14 of the Limitation Act.* ***We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory."***
>
> ***[Emphasis Supplied]***

9.18 *Moreover, it is submitted that Respondent No. 1 vide Demand Notice dated 02.08.2022 has intimated the Petitioner that on account of RTC failure of the solar generator meter, the bills for the period from April 2015 to July 2021 were incorrectly raised by Respondent No. 1.*

9.19 *In this regard, it is submitted that it is surprising that the RTC failure went un-noticed for a period of 6 years and 4 months. In fact, as per Clause 8.14 of the Madhya Pradesh Electricity Supply Code, 2013 ("**Supply Code, 2013**") it is the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose. Moreover, Clause 8.15 of the Supply Code, 2013 provides that the licensee shall also conduct periodical inspection/testing of the HT meters at least once in a year. The relevant extracts of the Supply Code, 2013 are reproduced hereunder: -*

*"**Testing of Meters***

8.14 It shall be the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose.
8.15 The licensee shall also conduct periodical inspection/testing of the meters as per the following schedule:

(a) Single phase /three phase meters : at least once in every five years.

(b) HT meters : at least once in a year.

The CT and PT wherever installed, shall also be tested along with meters.
If required, the licensee may remove the existing meter for the purpose of testing. The representatives of the licensee must, however, produce an authenticated notice to this effect and sign the document, mentioning his full name and designation, as a receipt, before removing the meter. The consumer shall not object to such removal."

9.20 From the above, the following emerges for kind consideration of this Hon'ble Commission: -

(a) The licensee has failed to conduct the periodical inspection/testing of the HT meters once in a year.

(b) The licensee has failed to discharge its obligations as enshrined under the Supply Code, 2013.

(c) Therefore, without accepting the liability imposed by the Notice dated 02.08.2022 it is submitted that the Petitioner is being penalized for gross inaction committed by the Licensee and the Licensee as per its own admission has failed to adhere to the Regulations specified by the Hon'ble Commission. In light of the submission made, the Demand Notice dated 02.08.2022 is ex-facie illegal and liable to be set aside.

9.21 It is pertinent to mention that the Judgments relied upon by the Respondent No. 1 is not applicable to the facts of the present case for the reasons mentioned hereinunder: -

Judgments	***Facts***	***Reasoning***
Maharashtra State Electricity Board vs. Swastik Industries 1996 Indlaw NCDRC 63 & Swastik Industries vs. Maharashtra State Electricity Board (1997) 9 SCC 465	*The reading of the meter was not properly recorded by the staff of the Electricity Board.*	*The case cited was filed under Section 24 of the Electricity Act, 1910 and the case in hand under the Electricity Act, 2003. Section 24 of the previous act has no such limitation as mentioned in the act of 2003 and hence, the case cited is not applicable to the present dispute.*
Kapoor Saw Manufacturing Co. vs MPSEB and Ors.. (2007) 53 AIC 316(MP)	*The regular meter of the Petitioner was replaced with an electric meter in the year 2000 and at that point of time the multiplying factor of the existing meter was declared as 15 by the Electricity Board on the ground that upto the date of replacement of the meterwrong multiple factor of 1.5 was applied instead of 15.*	*In the cited case, it is seen that the only dispute between the parties is with regard to the ration at which the multiple factor was to be applied. The Power was supplied continuously for a period of 4 years, and it was discovered that the multiple factor was wrongly applied. There was no dispute that the multiple factor was wrongly applied and the authority to levy multiple factor of 15 was unquestioned. Hence, the only dispute was whether the bill can be raised retrospectively. Whereas in the case at hand, there exists a dispute with regard to the supplementary bill itself. The Petitioner submits that Respondent No. 1 is raising the supplementary bill without any recourse to the provisions of the Act and/ or Regulations*

		framed by this Hon'ble Commission and/or Order passed by this Hon'ble Commission. Hence, the facts of the cited Judgments do not apply to the present case.

9.22 It is trite law that a judgment cannot be read as statute. Thus, same shall not be applicable in a separate set of facts with different nature of proceedings. The Hon'ble Supreme Court has upheld the same in following judgments:

*(a) **Zee Telefilms Ltd. vs. Union of India**, (2005) 4 SCC 638:*

> *"254. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it."*

*(b) **Islamic Academy of Education vs. State of Karnataka,** (2003) 6 SCC 697:*

> *"139. A judgment, it is trite, is not to be read as a statute. The ratio **decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal.** (See Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721] .) Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721].)"*

[Emphasis supplied]

9.23 Accordingly, in view of the foregoing, it is submitted that the Petitioner should not be made to suffer, due to the failure on the part of Respondent No. 1 to carry out solar unit adjustment in TOD manner and RTC failure of the solar generator meter and raise the invoices. It is an admitted fact that such correction was not carried out by Respondent No. 1 at first instance due to its own negligence.

9.24 Without prejudice to the above, it is submitted that even if the submission raised by the Respondents that Section 56(2) is not applicable is accepted, the following emerges for consideration of this Hon'ble Commission: -

(a) From a perusal of the Demand Notices, it is evident that the same has been issued without any recourse to the provision of the Act

and/or Regulations framed by this Hon'ble Commission and/or Order passed by this Hon'ble Commission.

(b) In this regard, it is submitted that Respondent No. 1 is a Distribution Licensee operating under the aegis of this Hon'ble Commission. Respondent No. 1 cannot be allowed to charge/recover tariff from its consumers at its whims and fancies. Such a recovery would be in violation of Section 62(6) of the Act. Therefore, without any sanction from this Hon'ble Commission either in the form of a Regulation and/or Order, Respondent No. 1 cannot recover/adjust units on the basis of TOD consumption by the Petitioner.

(c) In addition to the above, it is an admitted fact that the Petitioner has made all the payments as raised by the Respondent No. 1 vide Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022. Further, it is submitted that the said payments were made on the basis of bills raised by Respondent No. 1 which clearly provided for Renewable Energy units consumed by the Petitioner.

(d) On a perusal of the aforementioned bills, it is evident that the Renewable Energy units consumed by the Petitioner and duly noted in the bills raised by Respondent No. 1 is equivalent to the units billed by the Respondent No. 4 to 8 in their monthly bills. Therefore, the Petitioner has already made the payment against the units consumed by it.

(e) Therefore, the Petitioner, at this stage, cannot be made to pay for the revision of tariff which is being retrospectively applied as the same is against the settled principles of tariff recovery. It is submitted that Respondent No. 1 cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on Respondent No. 1 to issue a Demand Notice either expressly or by necessary implication.

(f) It is a settled position under law that Respondent No. 1 cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on Respondent No. 1 to issue a Demand Notice either expressively or by necessary implication.

9.25 In light of the submissions made above, it is requested before this Hon'ble Commission to reject the contentions raised by Respondent No. 1 vide its reply and be pleased to allow the prayer made by the Petitioner in the instant Amended Petition.

III. *Para-wise Rejoinder*

10. The contents of para 1 to 2 of the reply, does not require any specific reply as the same is a matter of fact and record.

11. The contents of para 3 to 7 of the reply, are denied and disputed to the extent that the same are contrary to the stand taken by the Petitioner in the present Rejoinder. It is further submitted that the submissions made by Respondent No. 1 have already been dealt by the Appellant in the present Rejoinder and craves liberty to rely upon the submissions at the

time of the hearing.

12. *The content of para 8 of the Reply are false and hereby denied. It is submitted that the billing of the electricity consumption made by the Petitioner was to be done at the fixed tariff as mentioned in para 9.7 of the present rejoinder.*
13. *The contents of paras 9 and 12 are denied to the extent that the order passed by this Hon'ble Commission in Petition No. 35 of 2008 are applicable in the present dispute. It is submitted that the Order dated 03.10.2008 is limited only to the Petition No. 35 of 2008 and not applicable to the present Petition. Respondent No. 1 is trying to mislead this Hon'ble Commission by relying upon the Order not applicable to the present case.*
14. *The contents of paras 10, 11 and 15 are denied to the extent that after setting off the TOD wise Solar Power Generation from total consumption, billing of net energy has to be considered as supplied by Respondent No. 1 through HT Connection granted to Petitioner. It is submitted that the Petitioner has dealt with the said submissions at paragraph 9.6 and 9.7 of the present Rejoinder and the same is not repeated herein for the sake of brevity.*
15. *In reply to para 13 it is submitted that it is true that the power purchase agreement between Respondent No.4-8 and MPPKVCL are governed by the provisions of relevant codes, regulations, orders, etc. of the CEA/CERC/MPERC. However, it is pertinent to mention that the present demand is not based on the relevant codes, regulations, orders, etc. of this Hon'ble Commission.*
16. *The contents of para 14 of the reply, are denied and disputed to the extent that the same are contrary to the stand taken by the Petitioner in thepresent Rejoinder. It is further submitted that the submissions made by Respondent No. 1 have already been dealt by the Appellant in the present Rejoinder and craves liberty to rely upon the submissions at the time of the hearing.*
17. *The contents of para 16 of the Reply are admitted. It is true that the Petitioner was aware about the procedure for calculating the number of units availed from the power system of Respondent No. 1. However, Respondent No. 1 has wrongly interpreted the clause of the agreements.*
18. *The contents of para 17 to 22 of the reply are misconceived and denied in toto. It is further submitted that the submissions made by Respondent No.1 have already been dealt by the Appellant in the present Rejoinder and craves liberty to rely upon the submissions at the time of the hearing.*
19. *In light of the submissions made above, it is requested before this Hon'ble Commission to reject the contentions raised by Respondent No. 1 vide its reply and be pleased to allow the prayer made by the Petitioner in the instant Amended Petition."*

17. Respondent No. 2 (SLDC) vide letter dated 22.12.2022 replied to the rejoinder dated 02.12.2022 filed by the petitioner as under:

"1. In compliance to Hon'ble Commission daily order dated 24.11.2022, the petitioner had submitted rejoinder on the reply dated 20.09.2022 of

respondent no. 2 (SLDC). In response to above rejoinder, it is to submit that the submissions made by the petitioner in its rejoinder dated 02.12.2022 are misplaced on part of respondent no.2, they have not raised any issue specifically pertaining to respondent No.2 (SLDC). Hence, para wise reply is not required to be submitted in the matter.

2. *It is to submit that respondent No. 2 (SLDC) has already submitted its reply vide letter No. 07-05/Pet.39/2022/1736 dated 20.09.2022 on all the points raised in the Petition No. 39 of 2022 and rejoinder dated 02.12.2022. The same may kindly be considered by the Hon'ble Commission.*

3. *In addition to the reply submitted by the respondent no.2 (SLDC") vide letter dated 20.09.2022, it is to submit that issue raised by the petitioner in its rejoinder dated 02.12.2022 at para 14, 15 and 16 regarding commencement of scheduling of RE Generators w.e.f. 17th Nov 2017 is not correct. The relevant regulatory provisions are given below:-*

4. *As per Third Amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 published on 28th Nov 2014 "The scheduling of Wind Electric Generators with collective capacity of 10MW and above and Solar Generating Plants with collective capacity of 5MW and above shall be made as per the decision of Central Electricity Regulatory Commission".*

5. *The Central Electricity Regulatory Commission in CERC (Indian Electricity Grid Code) Regulations, 2010 notified on 28thApril 2010 which came into force from 03.5.2010 has already mandated the provision of Scheduling of Wind and Solar Generation w.e.f. 01.01.2011. Subsequently, the Central Electricity Regulatory Commission through third amendment in CERC (Indian Electricity Grid Code) Regulations, 2010 notified on 7thAugust, 2015 amended the provisions in scheduling of wind and solar generating stations. Thus, scheduling of wind and solar generating stations was in force since3rd amendment of MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 i.e. w.e.f. 28th Nov 2014.*

6. *It is to submit that all the pooling stations of all the above generators from whom the petitioner is procuring power are qualified solar pooling stations with collective capacity of more than 5MW and subjected to scheduling. As the 0.63MWof solar generator of M/s SKP Bearing, 0.63MW of solar generator of M/s Seatle Power and 0.63MW of solar generator of M/s JK Minerals are connected at 33KV Ckt-2 of M/s Ujas Energy Ltd. at 132KV Agar Grid Substation with collective capacity of 14.99MW. The 1.25MW solar generator of M/s Ankit Gems Pvt. Ltd. is connected at 33KV Ckt-1 of Ujas Energy Ltd. at 132KV Susner Grid Substation with collective capacity of 14.99MW. The 1.25MW solar generator of M/s Atul Sharma is connected at 33KV Ckt-1 of M/s Ujas Energy Ltd. at 132KV Bercha Grid Substation with collective capacity of 15MW.*

7. It is to further submit that as per MPERC order dated 22.08.2006 in the matter of petition No. 160 of 2005, the credit to the HT consumers procuring power from RE generators is to be provided on the basis of actual generation of RE generator. Thus, solar generating stations which are State entities and undertaking intra State transactions are paid as per actual generation and not as per scheduled generation. The purpose of forecasting and scheduling of wind and solar generators selling power within the State is to maintain grid discipline and grid security.

8. Thus, the petitioner statement that requirement of scheduling introduced on 17.11.2017 can be made applicable from the date of notification of Regulations is totally irrelevant and misleading."

18. Petitioner on 26.12.2022 submitted its written submission as under:

*"1. The instant Amended Petition has been filed by Prism Johnson Limited (**"Petitioner"**) under Section 86(1)(f) of the Electricity Act, 2003 ("**the Act**") read with Regulation 8.8 (x) of the MPERC (Terms and Conditions for Intra State Open Access in State of Madhya Pradesh) Regulations, (Revision- 1) 2021 ("**Open Access Regulations, 2021**") as well as in terms of the liberty granted by this Hon'ble Commission vide Order dated 18.12.2020 passed in Petition No. 19 of 2020 seeking setting aside of the Order dated 25.01.2022 ("**Impugned Order**") passed by the Open Access Monitoring, Dispute Resolution and Decision Review Committee ("**Committee**") along with quashing of the illegal and arbitrary demands raised by Madhya Pradesh Paschim Kshetra Vidyut Co. Ltd. ("**MPPKVVCL/ Respondent No. 1**") vide Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022.*

*2. The Petitioner through the present Petition has challenged the legality, validity, and propriety of the following Demand Notices/Supplementary Bills ("**Demand Notice**"): -*

*(a) Demand Notice dated 27.12.2018 issued by Respondent No. 1 retrospectively seeking illegal recovery of Rs. 2,56,26,841/- from the Petitioner for the period from April, 2015 to July, 2017 on account of non-adjustment of solar units in Time of Day ("**TOD**") manner.*

(b) Demand Notices dated 18.10.2021 and 08.11.2021 issued by Respondent No. 1 seeking Delayed Payment Surcharge amounting to Rs. 59,68,507/- charged on the demand raised by Respondent No. 1 vide Demand Notice dated 27.12.2018 for the period from 2019 to 2021 approximately.

(c) Demand Notice dated 02.08.2022 issued by Respondent No. 1 to the Petitioner seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021

*on account of Round-the-clock ("**RTC**") failure of solar generator meter due to which the bills were incorrectly raised by Respondent No. 1.*

3. *On 29.09.2022, this Hon'ble Commission vide Order directed the Petitioner to file the Amended Petition following with the reply by the Respondents.*
4. *On 19.10.2022, the Petitioner filed the present Amended Petition.*
5. *On 31.10.2022, this Hon'ble Commission vide its Order directed the Respondents to file their reply following with the Rejoinders by the Petitioner.*
6. *In compliance of the directions passed by this Hon'ble Commission, the Respondents filed its replies following with the Rejoinders by the Petitioner.*
7. *On 13.12.2022, the present Petition was listed before this Hon'ble Commission. During the hearing, this Hon'ble Commission directed the parties to file the Written Submission.*
8. *In compliance of the directions passed by this Hon'ble Commission, the Petitioner has filed the present Written Submissions. It is submitted that the List of Dates is annexed herewith and marked as **EXHIBIT-A**.*

A. ISSUES FOR CONSIDERATION

9. *At the outset, it is submitted that the Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022 are untenable in law and the reasons for the same are submitted hereunder: -*

Re. No requirement of ToD in terms of Open Access Regulations, 2005 and PP&WA.

10. *At the outset, it is submitted that the Petitioner fulfils its power requirement by purchasing solar power from Respondent No. 4 to 8 through open access of the power system of Respondent No. 1.*
11. *Respondent No. 1 is a wholly owned Company of the government of Madhya Pradesh and undertakes activities of distribution and retail supply for and on behalf of Madhya Pradesh State Electricity Board. It is submitted that all this while when the power was being supplied by Respondent No. 4 to 8 to the Petitioner, the bills were raised by Respondent No. 1 itself on monthly basis. It is apposite to mention that in the present case, the Petitioner has made all the payments qua the bills raised by the Respondent No. 1.*
12. *Surprisingly, after almost 4 years, Respondent No. 1 issued the Demand Notice dated 27.12.2018 seeking retrospective illegal recovery of Rs. 2,56,26,841/- from the Petitioner for the period from April, 2015 to July, 2017 on account of non-adjustment of solar units in Time of Day ("**TOD**") manner.*
13. *From a perusal of the Demand Notice, it is evident that the same has been issued without any recourse to the provision of the Act and/or Regulations framed by this Hon'ble Commission and/or Order passed by this Hon'ble Commission. Pertinently, Respondent No. 1 in its Demand Notice has solely relied upon its*

own letter dated 30.04.2014 to state the applicability of energy accounting on TOD basis was intimated to all concerned. However, it is stated that the said letter was never provided to the Petitioner and that from the reading of the Demand Notice, it is evident that at best the letter in question is an internal communication which cannot saddle the Petitioner with any financial liability especially since Respondent No.1 is a licensee under the aegis of this Hon'ble Commission. Therefore, any TOD adjustment if at all has to be carried prospectively with due sanction of this Hon'ble Commission either in the form of a Regulation and/or Order passed by this Hon'ble Commission

14. *However, the Committee while passing the Impugned Order [**Para (XIX) @Pg. 37**] has pertinently relied upon Regulation 13.2 of the Open Access Regulations, 2005. Regulation 13.2 of the Open Access Regulations, 2005 provides that till such time the Balancing and Settlement Code is approved by the Hon'ble Commission**, the terms and conditions for energy and demand balancing as set out in the existing agreements shall continue to apply**. The relevant extract of Regulation 13.2 is extracted hereunder for the kind consideration of this Hon'ble Commission: -*

> *"13.2 All open access users must make reasonable endeavours to ensure that their actual demand or actual sent-out capacity, as the case may be, at an inter-connection does not exceed the contract maximum demand or actual sent-out capacity for that inter- connection.*
>
> *…*
>
> ***Provided further, that till such time the Balancing and Settlement Code is approved by the Commission, the terms and conditions for energy and demand balancing as set out in the existing agreements shall continue to apply**."*
>
> ***[Emphasis Supplied]***

15. *It is submitted that since there were no Regulations recognizing billing has to be done in the ToD manner, the agreement in existence shall continue to apply. It is submitted that at that point of time PP&WAs dated 15.05.2014 executed between the Petitioner and Respondent No. 4 to 8 was in existence.*

16. *From a bare perusal of the Clause 6.1.2(d) and Clause 7.2 of the agreements executed by the Petitioner with Respondent No. 4 to 8 clearly specifies that the credit for net generation of units shall be given according to the TOD recording. However, billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. The supplier shall raise an invoice at the mutually agreed rate with 18% discount on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge). The tariff is also fixed in the billing clause 7.2 and it is specifically mentioned that nothing will be charged*

*extra over the fixed tariff except when there is a revision in tariff charges. [**Refer Pg. 25 of the Petition**]*

17. *From a bare perusal of the Clause 6.1.2(d) and Clause 7.2 of the agreements executed by the Petitioner with Respondent No. 4 to 8, the following emerges for consideration: -*
    (a) *PP& WA clearly specifies that the credit for net generation of units shall be given according to the TOD recording.*
    (b) *Billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate of surcharge. The supplier shall raise an invoice at the mutually agreed rate with 30% discount (changed from time to time) on prevailing tariff (Energy Charges of MPSEB irrespective of TOD rebate of Surcharge). The tariff is also fixed in the billing Clause 7.2, and it is specifically mentioned that nothing will be charged extra over the fixed tariff except when there is a revision in tariff charges.*
18. *In light of the above, it is submitted that since the PP&WAs does not recognize that billing and payment has to be done in ToD manner, therefore, it is requested before this Hon'ble Commission to quash the Demand Notice dated 27.12.2018, 18.10.2021 and 08.11.2021.*
19. *Further, it is submitted that the Committee while passing the Impugned Order [**Para (XV & XVI) @Pg. 34**] and Respondent vide its reply has contended that the segregation of Electricity Units generated and supplied by private generators (Respondent No. 4 to 8) through open access to the Petitioner from total electricity consumed by Petitioner was to be made on basis of TOD blocks as per Clause 12.3 of the PP&WA executed between the Respondent Private Generators, Respondent No. 1 and MPPMCL. In fact, in the said PP&WA, the Petitioner's name is specifically mentioned as third-party purchaser of Solar Power. Further, even the agreements executed by the Petitioner with Respondent No. 4 to 8 provides for the segregation of energy in the TOD manner. In this regard, the following is relevant: -*
    (a) *Petitioner is not a signatory to the Agreements signed between MPPMCL, Respondent No. 1 and Private Respondents. Therefore, the Petitioner is not contractually bound by such agreements.*
    (b) *Further, Respondent No. 1 is a Distribution Licensee operating under the Regulatory Regime of the Hon'ble Commission. Unless and until this Hon'ble Commission specified ToD billing, the same cannot be contractually enforced.*
20. *That being said, there is no privity of Contract between Petitioner and Respondent Private Generators and Petitioner not being a signatory to the Agreement cannot be contractually bound by such agreements. In this regard reliance is placed on*

*the Judgment passed by the Hon'ble Supreme Court in Md. Serajuddin Vs State of Orissa (1975) 2 SCC 47. [**Refer Para 13.4 @Pg. 27 of the Petition**]*

21. *In light of the submissions made above, it is requested before this Hon'ble Commission to set aside the Impugned Order and consequently quash the Demand Notices.*

Re. Regulations cannot be applied retrospectively

22. *It is submitted that admittedly the Committee while passing the Impugned Order recognizes that the Regulation namely MPERC (Forecasting, Scheduling, Deviation Settlement Mechanism and related matters of Wind and Solar Generating Stations) Regulations, 2018 ("**Forecasting Regulations, 2018**") recognizes that settlement is to be done in accordance with the said Regulation. The relevant extract of the Impugned Order is reproduced hereunder for the kind consideration of this Hon'ble Commission: -*

> *"(XIX) It is further noted by the Committee that second proviso to Regulation 13.2 of MPERC (Terms & Conditions for Intra- State Open Access in Madhya Pradesh) Regulations, 2005 specifically provides that till such time the Balancing and Settlement Code is approved by the Commission, the terms and conditions for energy and demand balancing as set out in the existing agreements shall continue to apply. **Subsequently, a separate Regulation namely, MPERC (Forecasting, Scheduling, Deviation Settlement Mechanism and related matters of Wind and Solar Generating Stations) Regulations 2018 and its amendment was notified subsequently by MPERC in 2018. However, earlier settlements were to be done in accordance with the ToD manner as prescribed in the agreement and also approved by the Commission petition No. 35 of 2008.**"*
>
> ***[Emphasis Supplied]***

23. *The questions that arise before this Hon'ble Commission that whether the said Regulation can be applied retrospectively. It is submitted that the Hon'ble Supreme Court and various Hon'ble High Courts have held that no statute/regulations shall be construed to have a retrospective operation unless such a construction appears very clearly. In this regard, reliance is placed upon the following Judgment: -*

(a) *Mahabir Vegetable Oils (P) Ltd. & Anr. vs. State of Haryana & Ors., (2006) 3 SCC 620.*

> *"**41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A***

delegatee therefore can make rules only within the four corners thereof.

42. *It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (See West v. Gwynne [(1911) 2 Ch 1 : 104 LT 759 (CA)] .)*

43. A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of sub-section (2-A) of Section 64 of the Act and not prior thereto*."*

[Emphasis Supplied]

(b) State of Rajasthan & Ors. vs. Basant Agrotech (India) Ltd., (2013) 15 SCC 1.

*"**39.** From the aforesaid, it is luculent that the language used therein is quite different. In the case at hand, Section 16 uses the words "from time to time". Even if we accept the submission of the learned counsel for the State that the words "time to time" are redundant, the provision does not remotely suggest to have conferred power on the State Government to make rules with retrospective effect. In fact, the aforestated decision was cited with immense aplomb during the course of hearing that words "time to time" empower the State Government or the delegate to make the rules retrospectively. It may be noted, that despite so much gloss put on the said proposition in the written note of submission, there is a real departure but we think, and we should, that the original submission made in the course of hearing deserves to be dealt with.*

53. *Thus, the conspectus of authorities and the meaning bestowed in the common parlance admit no room of doubt that the words "from time to time" have a futuristic tenor and they do not have the etymological potentiality to operate from a previous date. The use of the said words in Section 16 of the Act cannot be said to have conferred the jurisdiction on the State Government or delegate to issue a notification in respect of the rate with retrospective effect. Such an interpretation does not flow from the statute which is the source of power. Therefore, the notification as far as it covers the period prior to the date of publication of the notification in the Official Gazette is really a transgression of the*

statutory postulate. Thus analysed, we find that the view expressed by the High Court on this score is absolutely flawless and we concur with the same. We may reiterate for the sake of clarity that we have not adverted to the defensibility of the analysis from other spectrums which are founded on the principles set forth in Kesoram case [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201] as the matter has been referred to a larger Bench and the lis in these appeals fundamentally pertains to the retrospective applicability of the notification issued by the State Government as regards the rate of cess on the major mineral i.e. rock phosphate."

24. *From the above judgments, it is submitted that the Forecasting Regulations, 2018 cannot be applied retrospectively in the present case.*
25. *Furthermore, the Committee while passing the Impugned Order has held that "However, earlier settlements were to be done in accordance with the ToD manner as prescribed in the agreement and also approved by the Commission petition No. 35 of 2008"*
26. *As highlighted above, the PP&WAs dated 15.05.2014 executed between the Petitioner and private generator does not recognize that billing and payment has to be done in ToD manner.*
27. *Further, the Committee while upholding Respondent No. 1's demand has relied upon Order dated 03.10.2018 passed by this Hon'ble Commission in Petition No. 35 of 2008 Kalani Industries Private Limited & Anr. vs. MPPKVVCL & Ors. In this regard, the following is relevant: -*
    - *(a) The Order dated 03.10.2008 was not an Order in rem governing all RE Open access transactions.*
    - *(b) Order dated 03.10.2008 is concerned with wind farm and the present petition is with respect to solar power generators and the same is not applicable to the present petition.*
    - *(c) Further, even as per Respondent No. 1, it is only seeking ToD metering w.e.f. from April, 2015 in the case of the Petitioner, however, Respondent No. 1 has not placed anything on record to suggest that it was implementing ToD metering with other consumers even prior to that. Therefore, even by conduct, it is evident that the Respondent No. 1 has not accepted the said Order passed by this Hon'ble Commission as an Order in rem.In the said case the impact of ToD billing was made known to the Consumer and generator prior to transmission of power. Whereas in the present facts the demand has*

been made belatedly on 27.12.2018 for the period from April 2015 to July 2017. Therefore, such retrospective demand by Respondent No. 1 is wholly perverse and illegal.

28. *It is settled position of law that when this Hon'ble Commission seeks the applicability of any order passed by it in rem, it specifies the same within its order. In this regard reliance is placed on the Judgment of the Hon'ble Supreme Court in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532. [**Refer Para 9.2 @Pg. 25 of the Petition**]*
29. *In view of the above, it is submitted that Respondent No. 1 cannot rely upon an Order without appreciating the specific factual background.*
30. *In light of the above, it is requested before this Hon'ble Commission to set aside the Impugned Order and quash the Demand Notices dated 27.12.2018, 18.10.2021 and 08.11.2021 issued by Respondent No. 1.*

Re. Respondent No. 1 has failed to follow the due process of law.

31. *Respondent No. 1 vide Demand Notice dated 02.08.2022 has intimated the Petitioner that on account of RTC failure of the solar generator meter, the bills for the period from April 2015 to July 2021 were incorrectly raised by Respondent No. 1.*
32. *Respondent No. 1 has raised a contention that the Demand Notice dated 02.08.2022 has not been challenged by the Petitioner before the Committee thus instant Petition to that extent is not maintainable before this Hon'ble Commission.*
33. *In response to the contention raised by Respondent No. 1, it is most respectfully submitted that the submissions/ argument raised by Respondent No. 1 does not hold any footing on the maintainability of the amended petition as the Demand Notice/ Supplementary Bill dated 27.12.2018 as well as Demand Notice dated 02.08.2022 seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021 on account of RTC failure of solar generator meter are interlinked with each other and can be adjudicated by this Hon'ble Commission.*
34. *It is trite law that in the interests of the parties and of achieving a substantial reduction in costs and the multiplicity of proceedings, common issues between the parties should be litigated in a single action.*
35. *In light of the above, it is submitted that since the Demand Notice dated 02.08.2022 are interlinked with the Demand Notices dated 27.12.2018, therefore, this Hon'ble Commission has the jurisdiction to adjudicate the present dispute. Therefore, the submissions made by Respondent No. 1 shall be rejected.*
36. *In this regard, it is submitted that it is surprising that the RTC failure went un-noticed for a period of 6 years and 4 months. In fact, as per Clause 8.14 of the Madhya Pradesh Electricity Supply Code, 2013 ("**Supply Code, 2013**") it is the responsibility*

*of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose. Moreover, Clause 8.15 of the Supply Code, 2013 provides that the licensee shall also conduct periodical inspection/testing of the HT meters at least once in a year. [**Relevant extracts @Pg.18 of the Petition**]*

37. *From the above, the following emerges for kind consideration of this Hon'ble Commission: -*
    (a) *The licensee has failed to conduct the periodical inspection/testing of the HT meters once in a year.*
    (b) *The licensee has failed to discharge its obligations as enshrined under the Supply Code, 2013.*
    (c) *Therefore, without accepting the liability imposed by the Notice dated 02.08.2022 it is submitted that the Petitioner is being penalized for gross inaction committed by the Licensee and the Licensee as per its own admission has failed to adhere to the Regulations specified by the Hon'ble Commission. In light of the submission made, the Demand Notice dated 02.08.2022 is ex-facie illegal and liable to be set aside.*

38. *Furthermore, it is submitted that Clause 8.18 of the Supply Code, 2013 provides the procedure to be adopted by the licensee to test any meter. Relevant clause of the Supply Code, 2013 is reproduced hereunder for the kind consideration of this Hon'ble Commission: -*

> *"**Defective Meters***
>
> *8.16 The Licensee shall have the right to test any meter and related apparatus if there is a reasonable doubt about the accuracy of the meter, and the consumer shall provide the licensee necessary assistance in conduct of the test. The consumer shall be allowed to be present during the testing.*
>
> *8.17 A consumer may request the licensee to test the meter, if he doubts its accuracy, by applying to the licensee along with the requisite testing fee. The licensee shall test the meter within 15 days of the receipt of the application and fee. Preliminary testing of electronic meters can be carried out in the premises of the consumers through electronic testing equipment.*
>
> ***8.18 In all cases of testing of a meter in the laboratory, the consumer shall be informed of the proposed date of testing at least 7 days in advance, so that he may be present at the time of testing, personally or through an authorized representative. The signature of the consumer or his authorized representative, if present, shall be obtained on the Test Result Sheet**."*

[Emphasis Supplied]

39. From the above, the following emerges for kind consideration of this Hon'ble Commission: -

(a) Licensee has failed to inform the Petitioner 7 days prior to conduct testing of a meter.

(b) Since, Petitioner was not informed about the testing, the representatives of the Petitioner were not present at the time of testing as meter as envisaged under the Regulation.

40. It is submitted that Respondent No. 1 has failed to follow the procedure as envisaged under the Supply Code, 2013. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. In this regard, reliance is placed upon the Hon'ble Supreme Court's Judgment in ***Dipak Babaria & Ors. v. State of Gujarat & Ors****., (2014) 3 SCC 502 wherein it was held as under: -*

> *"61. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. This proposition of law laid down in Taylor*
>
> *v. Taylor (1875) 1 Ch D 426, 431 was first adopted by the Judicial Committee in Nazir Ahmed v. King Emperor reported in MANU/PR/0020/1936 : AIR 1936 PC 253 and then followed by a bench of three Judges of this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh reported in MANU/SC/0053/1954 : AIR 1954 SC*
>
> *322. This proposition was further explained in paragraph 8 of State of U.P. v. Singhara Singh by a bench of three Judges reported in MANU/SC/0082/1963 : AIR 1964 SC 358 in the following words:*
>
> ***8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed.***
>
> ***The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted "***

[Emphasis Supplied]

41. In light of the above, it is submitted the Demand Notice dated 02.08.2022 issued by Respondent No. 1 is liable to be quashed as the Respondent No. 1 has failed to satisfy Regulations envisaged under Supply Code, 2013.

Re. Bills cannot be raised retrospectively.

42. *It is submitted that the Committee while passing the Impugned Order has failed to appreciate that the Petitioner at this stage cannot be made to pay for the revision of tariff which is being retrospectively applied as the same is against the settled principles of tariff recovery. It is submitted that Respondent No. 1 cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on Respondent No. 1 to issue a Demand Notice either expressly or by necessary implication*

43. *It is a settled position under law that Respondent No. 1 cannot retrospectively change the methodology for computing the energy charges as there is no power conferred on Respondent No. 1 to issue a Demand Notice either expressively or by necessary implication. [**Refer Pg. 20 to 23 of the Petition**]*

44. *In fact, the Hon'ble High Court of Bombay vide its Judgment dated 09.06.2020 in a similar case titled as **Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) vs. Principal, College of Engineering, Pune** [SCC Online Bom 699:2020(4) ALLMR 523] has held that MSEDCL shall not be allowed to issue the Supplementary Bills retrospectively for its own fault. [**Refer Para 12.9 @Pg. 23 of the Petition**]*

45. *In view thereof, the Petitioner should not be made to suffer, due to the failure on the part of Respondent No. 1 to convey to the Petitioner and Respondents No. 3 to 8 to carry out solar unit adjustment in TOD manner so as to avoid any surplus flow of power. Since the same was not carried out by Respondent No. 1 at first instance due to its own negligence, there is no fault of the Petitioner and hence the Impugned Demand Notices on this ground alone deserves to be set aside.*

46. *It is apposite to mention that only on 17.11.2017, this Hon'ble Commission notified RE Amendment Regulations. By way of the said amendment, generation of electricity from renewable sources such as solar was subjected to 'Scheduling' in terms of the provisions of IEGC. Therefore, from 17.11.2017 for the first time scheduling was directed to be carried by the RE Generators.*

47. *Further, Respondent No. 1, at this stage, is raising extraneous grounds to justify the Impugned Demand Notices which in untenable and impermissible in law.*

Re. The Petitioner has made all the payment for energy consumed.

48. *It is submitted that the Petitioner has made payment for renewable energy as per the bills raised by Respondent No. 1, during the said duration, there was no intimation by Respondent No. 1 that a different methodology was to be adopted and there would be a revision of bill. It was only on 27.12.2018 and 02.08.2022 that Respondent No. 1 raised the demand notice for the reasons best known to Respondent No. 1.*

49. *Demand Notices dated 27.12.2018 and 02.08.2022 raised by Respondent No. 1 are unjustified and arbitrary as the Petitioner*

is being subjected to payment of units for which it has already made payments to Respondent No. 4 to 8. Respondent No. 1 not be allowed retrospectively. If the same is allowed, it would allow other parties to make changes to the billing at any point of time and there would be no certainty for consumers such as Petitioner.

50. *Further, the Committee has chosen to place reliance on the Judgment of the Hon'ble Judgment of the Hon'ble High Court of Madhya Pradesh in W.P. No. 827 of 2003 titled as Kapoor Saw Manufacturing Co. vs. MPSEB & Ors. 2006 SCCOnLine MP 612 while holding that the Petitioner is statutorily obligated to pay the differential amount. With great respect, the Committee's reliance on the aforesaid Judgment is wholly misplaced as:*
    - *(a) In the case relied upon by the Committee, the dispute between the parties is with regards to the ratio at which the multiple factor was to be applied. The power was supplied continuously for a period of 4 years, and it was discovered that the multiple factor was wrongly applied. There was no dispute that the multiple factor was wrongly applied and the authority to levy multiple factor of 15 was unquestioned. Hence, the only dispute was whether the bill can be raised retrospectively.*
    - *(b) Whereas in the case at hand there exists a dispute with regards to the supplementary bill itself which in the first place has been raised without any recourse to the provision of the Act and/or Regulations framed by this Hon'ble Commission and /or Order passed by this Hon'ble Commission.*

51. *In light of the submissions made above, it is requested before this Hon'ble Commission to set aside the Impugned Order and consequently quash the Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022.*

52. *Without prejudice to above, it is submitted that Respondent No. 1 is a Distribution Licensee operating under the aegis of this Hon'ble Commission. Respondent No. 1 cannot be allowed to charge/ recover Tariff from its consumers at its whims and fancies. Such a recovery would be in violation to Section 62 (6) of the Act. Therefore, without any sanction from this Hon'ble Commission either in the form of a Regulation and/ or Order, Respondent No. 1 cannot recover/ adjust units on the basis of TOD consumption by the Petitioner.*

53. *It is a settled position of law that a licensee shall not recover excess charge exceeding the tariff that is determined in this regard reliance is placed on the decision of the Hon'ble Supreme Court in NTPC Ltd. v. M.P. SEB, (2011) 15 SCC 580 [**Refer Para 15.2 @Pg. 31 of the Petition**]*

54. *Further, it is reiterated that failure in RTC due to its own fault or change in Energy Accounting method is applicable only prospectively and sufficient time is to be provided by Respondent No. 1 so that the Petitioner being the consumer could have*

accordingly altered the power generation with Respondent No. 3 to 8/third party generators. Thus, minimizing the consumption of units which were being consumed from Respondent No. 1.

55. *It is submitted that Respondent No. 1, being a statutory authority, is bound to act in a fair manner, ensure transparency in their actions and provide reasons and rationale for the decisions taken. Respondent No. 1 has to provide reasons as to what prevented it from revising the bills earlier.*
56. *Therefore, the Impugned Order passed by the Committee is liable to be set aside and the Demand Notices/Supplementary bills raised by Respondent No. 1 shall be quashed.*
57. *It is respectfully submitted that the instant petition is bona fide in nature, and it is, therefore, it is requested before this Hon'ble Commission to quash the Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022."*

19. Respondent No. 1 submitted its written submission as under :

"The humble answering respondent craves leave to refer and rely upon the pleadings and the documents submitted on record, however, for ready reference, short summary / synopsis and the relevant page numbers are submitted herein as under. The present synopsis is being filed mainly on the following counts:-

A) Details of pleadings and page numbers in reply regarding RTC failure.
B) For Billing as per TOD Manner.
C) Regarding applicability of S. 56(2) of Indian Electricity Act.
D) Effect of findings by Open Access Monitoring, Dispute Resolution & Decision Review Committee.
E) Calculation of Revised adjustment of solar units under TOD Manner.
F) Calculation of Revised Adjustment of solar units on account of RTC Failure.

A. Details of pleadings and page numbers in reply regarding RTC failure :-

1. *That, due to RTC failure, the generation meter of petitioner was recording renewable energy units in TOD-1(22:00 to 06:00 Hrs.) and TOD-3 (18:00 to 22:00 Hrs) which was abnormal in case of solar generator. Therefore the demand notice/supplementary bill from Apr-2015 to Jul-2021 of Rs.1,90,02,209/-dated 02.08.2022 was issued.* ***(Please refer point no. 4 in the reply submitted by respondent 1 on dated 18.11.2022)***

2. *That, it is submitted that the demand notice/supplementary bill dated 02.08.2022 is not challenged by the petitioner before the Open Access Monitoring, Dispute Resolution & Decision Review Committee thus instant petition to that extent is not maintainable before this Hon'ble Commission. (Please refer point no. 5 to 7 in the reply submitted by respondent 1on dated 18.11.2022).*

B) <u>For Billing as per TOD Manner :-</u>

1. *That, further, The Hon'ble commission passed order under petition no. 35/2008 for TOD wise adjustment of units generated in respect of captive and third party sale. (Please refer point no. 9 in the reply submitted by respondent 1 on dated 18.11.2022).*

2. *That, the appropriate provision was incorporated in the Power Purchase and Wheeling agreement entered with generators by Discom/MPPMCL as well as agreement entered by the Petitioner consumer with generators.*

3. *That, further, the segregation of Electricity Units generated and supplied by private generators through open excess to the Petitioner from total electricity consumed by Petitioner was to be made on basis of following Time of Day (TOD) blocks as per Clause 12.3 of Power Purchase and Wheeling Agreement (PPWA) executed between the Private Generators, West Discom and M.P. Power Management Company Limited (MPPMCL).(Please refer point no. 10 in the reply submitted by respondent 1 on dated 18.11.2022).*

4. *That, it is also submitted that, even the agreements executed by the Petitioner company itself with private generators (respondent no. 4 to 8 of petition No. 39 of 2022) provides for the segregation of energy in the aforesaid TOD manner.(Please refer point no. 11 in the reply submitted by respondent 1 on dated 18.11.2022).*

5. *That, further, it is submitted that second proviso to regulation 13.2 of MPERC (Terms & Conditions for Intra- State Open Access in Madhya Pradesh) Regulations, 2005 specifically provides that till such time the Balancing and Settlement Code is approved by the Commission, the terms and conditions for energy and demand balancing as set out in the existing agreements shall continue to apply.(Please refer point no. 14 in the reply submitted by respondent 1 on dated 18.11.2022).*

6. *That, the West Discom has verified the data of power supply availed by Petitioner from the West Discom and private Solar Energy Generators supplying solar energy to the Petitioner. The West Discom found that in-advertently the segregation of power availed by Petitioner from two sources could not be made in TOD manner which resulted in billing of lesser number of units from HT supply and credit was granted for higher number of solar power units availed through open excess from private generators. Immediately, after notice such mistake answering West Discom has raised the demand of escaped billing in accordance with the order of the Hon'ble Commission and provision of the Agreements.*

C) <u>Regarding applicability of S. 56(2) of Indian Electricity Act :-</u>

That, further, the Petitioner's reliance upon applicability of section 56 (2) is concerned, it is respectfully submitted that the bar of section 56 (2) regarding 2 years would not come in the way of West Discom as

*the same do not apply to the case of escaped/deficit billing because the amount became **'first due'** on 27/12/2018 & 02.08.2022 when the supplementary demand of escaped billing was issued and not earlier.(Please refer point no. 18 to 20 in the reply submitted by respondent 1 on dated 18.11.2022).*

D) Effect of findings by Open Access Monitoring, Dispute Resolution & Decision Review Committee :-

1. *That, it is submitted that, the Open Access Monitoring, Dispute Resolution & Decision Review Committee has examine the interpretation of statutory provisions and the legal positions also the findings & conclusions drawn by the committee are correct, well found and based on appropriate appreciation of legal and factual matrix. Therefore, the answering respondent further craves leave to refer and rely on the report of the committee for the demand notice issued on dated 27.12.2018.*
2. *That, it is also submitted that, the demand notices issued on dated 18.10.2021 and 08.11.2021 by the answering respondent is in accordance with the clause no. 1.16 of "General terms and conditions of High Tension Tariff" of Tariff Order for the FY 2021-22 of delay payment surcharge.*
3. *That, further, provisions of Supply Code 2013 clause 8.15 regarding periodical inspection/testing of HT meters once in a year are given w.r.t. testing of HT consumer's import energy meters. Further, the accuracy of meter (KWH/KVAH/PF/CT/PT etc.) has been tested vide routine inspection/testing but the testing of meter's RTC is not in the purview of periodical testing of meter of HT consumers/generators by Discom.*

E) Calculation of Revised adjustment of solar units under TOD Manner:-

That, initially total adjustment of solar units was given in energy bills of the petitioner irrespective of TOD (Time of Day) breakup in following manner.

Example: 1

Sr. No.	***Particulars***	***Total (KWH Units)***
1	*Discom Consumption*	*800000*
2	*Solar units (Gross)*	*550100*
3	*Solar Units after wheeling loss (94%)*	*517094*
4	*Units for Solar adjustment (Net)*	*517094*
5	*Billed Units after solar adjustment (1-4)*	***282906***
6	*Inadvertent Flow*	***0***

Further, the energy bills of petitioner were revised and adjustment of solar units given in TOD wise in following manner:-

Example: 2

Sr. No.	***Particulars***	***TOD-1 (i.e. 22:00 Hrs to 06:00 Hrs)***	***TOD-2 (i.e. 06:00 Hrs to 18:00 Hrs)***	***TOD-3 (i.e. 18:00 Hrs to 22:00 Hrs)***	***Total (KWH Units)***
1	*Discom Consumption (In Units)*	*300000*	*400000*	*100000*	*800000*
2	*Solar units (Gross)*	*100*	*500000*	*50000*	*550100*
3	*Solar Units after wheeling loss (94%)*	*94*	*470000*	*47000*	*517094*
4	*Units for Solar adjustment (Net)*	*94*	*400000*	*47000*	*447094*
5	*Billed Units after solar adjustment (1-4)*	*299906*	*0*	*53000*	***352906***
6	*Inadvertent flow*	*0*	*70000*	*0*	

It is submitted that, in above mentioned example no. 2 the adjustment of solar units has been given to the petitioner in energy bill as per the TOD manner against Discom consumption. The Discom consumption in TOD-2 is less compared to Solar Units of TOD-2 (after wheeling loss), therefore credit of solar units for TOD-2 block was restricted up to Discom consumption. Due to this 70000 units were billed in revised bill as compared to the initial bill.

F) ***<u>Calculation of Revised Adjustment of solar units onaccount of RTC Failure:-</u>***

That, initially total adjustment of solar units was given in energy bills of the petitioner during RTC (Real Time Clock) failure period in following manner.

Example: 3

Sr. No.	***Particulars***	***TOD-1 (i.e. 22:00 Hrs to 06:00 Hrs)***	***TOD-2 (i.e. 06:00 Hrs to 18:00 Hrs)***	***TOD-3 (i.e. 18:00 Hrs to 22:00 Hrs)***	***Total (KWH Units)***
1	*Discom Consumption (In Units)*	*300000*	*500000*	*100000*	*900000*
2	*Solar units (Gross)*	*20000*	*500000*	*100000*	*620000*
3	*Solar Units after wheeling loss*	*18800*	*470000*	*94000*	*582800*

	(94%)				
4	*Units for Solar adjustment (Net)*	*18800*	*470000*	*94000*	*582800*
5	*Billed Units after solar adjustment (1-4)*	*281200*	*30000*	*6000*	*317200*
6	*Inadvertent Flow*	*0*	*0*	*0*	*0*

Further, the energy bills of petitioner were revised by considering correction in RTC of generation meter in the following manner:-

Example: 4

Sr. No.	***Particulars***	***TOD-1 (i.e. 22:00 Hrs to 06:00 Hrs)***	***TOD-2 (i.e. 06:00 Hrs to 18:00 Hrs)***	***TOD-3 (i.e. 18:00 Hrs to 22:00 Hrs)***	***Total (KWH Units)***
1	*Discom/Consumption (In Units)*	*300000*	*500000*	*100000*	*900000*
2	*Solar units with RTC Failure (Gross)*	*20000*	*500000*	*100000*	*620000*
3	*Solar units with RTC correction (Gross)*	*0*	*620000*	*0*	*620000*
4	*Solar Units after wheeling loss (94%)*	*0*	*582800*	*0*	*582800*
5	*Units for Solar adjustment (Net)*	*0*	*500000*	*0*	*500000*
6	*Billed Units after solar adjustment (1-5)*	*300000*	*0*	*100000*	*400000*
7	*Inadvertent Flow*	*0*	*82800*	*0*	*82800*

It is submitted that, in above mentioned example 4, the adjustment of solar units have been given to the petitioner in energy bills considering correction in RTC (Real Time Clock) Failure. Due to RTC failure, the generation meter of petitioner was recording abnormal Solar Generation in TOD-1(22:00 to 06:00 Hrs.) and TOD-3 (18:00 to 22:00 Hrs). It is an undisputable fact that a solar power plant cannot generate electricity in the night hours. Accordingly, Total Solar Generation has been considered as generation during day hours TOD-2 (06:00 Hrs to 18:00 Hrs). Due to this 82800 units were billed in revised bill as compared to the initial bill.

PRAYER:-

It is therefore, prayed that in the light of the above submissions, the petition filed by the petitioner may kindly be dismissed.

Observations of the Commission:

20. The instant Petition has been filed by M/s Prism Johnson Ltd. under Section 86(1)(f) of the Electricity Act, 2003 (the Act) read with Regulation 8.8 (x) of MPERC (Terms and

Conditions for Intra State Open Access in State of Madhya Pradesh) Regulations, (Revision - I) 2021 seeking setting aside of the Order dated 25.01.2022 passed by the Open Access Monitoring, Dispute Resolution and Decision Review Committee along with quashing of the demands raised by Madhya Pradesh Paschim Kshetra Vidyut Co. Ltd. (MPPKVVCL) vide Demand Notices dated 27.12.2018, 18.10.2021, 08.11.2021 and 02.08.2022.

21. The Petitioner is a Company duly incorporated under the Companies Act 1956. In order to fulfill its power requirements, the Petitioner purchases solar power from Respondent No. 4 to 8 through open access to the distribution network of the MPPKVVCL, Indore.

22. This matter first came to notice of the Commission in 2020 when a petition was filed to resolve open access dispute. Vide an order dated 18.12.2020, the Commission had directed the Petitioner's to first approach the Open Access Monitoring, Dispute Resolution and Decision Review Committee (the Committee) as per the remedy available under MPERC (Terms & Conditions for Intra State Open Access in MP) Regulations'2005 for resolution of the dispute and had further granted liberty to Petitioner to approach this Commission in case the Petitioner is aggrieved with the Committee's decision.

23. The Committee in its order dated 25.01.2022 rejected the Petitioner's prayer and directed the Petitioner to make payment of Rs. 2,56,26,841/- as demanded by MPPKVVCL vide its Demand Notice dated 27.12.2018. The Committee further stated the following:

(a) That the aforementioned amount shall not come within the purview of Section 56(2) of the Act, nor the demand raised by MPPKVVCL is barred by limitation as per Section 56(2). In its reasoning, the Committee cited the judgment passed by the Hon'ble Supreme Court in Civil Appeal No. 7235 of 2009 named *Prism Cottex v. Uttar Haryana Bijli Nigam Limited and Ors*.

(b) The Charges claimed under the Demand Notice are in line with the Power Purchase and Wheeling Agreements (PP&WA) entered between Respondent No. 4 to 8 with MPPKVVCL and Agreement executed by the Petitioner with Respondent No. 4 to 8.

(c) The settlements of open access energy shall be done following the Time of Day (ToD) manner as prescribed in the Agreement and as approved by this Commission in Petition No. 35 of 2008 named *Kalani Industries Private Limited & Anr. vs. MPPKVVCL & Ors*.

(d) There is a statutory obligation on the Petitioner to pay the differential amount towards escaped/deficit billing in accordance with the Judgment of the Hon'ble High Court of Madhya Pradesh in W.P. No. 827 of 2003 named *Kapoor Saw Manufacturing Co. vs. MPSEB & Ors*. 2006 SCC On Line MP 612.

24. It is pertinent to mention that on 27.09.2022, the subject Petition was listed before the Commission for hearing. The Petitioner submitted that subsequent to the filing of the present petition, certain facts have transpired that need to be placed on record before the

Commission. The Commission, vide its daily order dated 29.09.2022, granted liberty to the Petitioner to file the amended petition to place on record the additional facts.

25. Accordingly, on 19.10.2022, the Petitioner filed an amended petition explaining the change of circumstances. In light of the facts and circumstances, the Petitioner has challenged the following demands:

(a) Demand Notice dated 27.12.2018 issued by Respondent No. 1 retrospectively seeking recovery of Rs. 2,56,26,841/- from the Petitioner for the period from April, 2015 to July, 2017 on account of non-adjustment of solar units in Time of Day ("TOD") manner.

(b) Demand Notices dated 18.10.2021 and 08.11.2021 issued by Respondent No. 1 seeking Delayed Payment Surcharge amounting to Rs. 59,68,507/- charged on the demand raised by Respondent No. 1 vide Demand Notice dated 27.12.2018 for the period from 2019 to 2021 approximately.

(c) Demand Notice dated 02.08.2022 issued by Respondent No. 1 to the Petitioner seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021 on account of Real time clock ("RTC") failure of solar generator meter due to which the bills were incorrectly raised by Respondent No. 1.

26. We have gone through the submissions (along with Annexures) made by parties. Based on that, the Commission is of the understanding that broadly the subject petition has to be decided on three major issues. These are as follows:

ISSUE NO. 1-

27. The first issue is with respect to the ToD billing clause and whether agreements executed between the parties (PP&WA) envisage recovery of tariff in ToD manner.

28. The Petitioner has submitted that in the instant case, ToD method of accounting is not envisaged in the agreements entered into between the Petitioner and Respondent no. 4 to 8. That clause 6.1.2(d) and Clause 7.2 of the agreements executed by the Petitioner with Respondent No. 4 to 8 clearly specifies that the credit for net generation of units shall be given according to the TOD recording. However, billing and payment would be done on normal rate of Energy Charges irrespective of TOD rebate or surcharge.

29. To this, the Respondent has submitted that appropriate provision has been incorporated in clause 12.3 of the Power Purchase and Wheeling agreement entered with generators by Discom/MPPMCL which provides for energy adjustment and billing on ToD principles. The Respondent has also taken support of consideration of this Commission in petition 35 of 2008 wherein it was held as follows:

"10. As regards the metering and energy accounting methodology, the Commission decides that the following procedure be followed for adjustment of units generated in respect of captive and third party sale : -

(i) The developer or concerned Discom shall install meters on either individual unit or a group of WEG owned by a single entity from which third party sale or captive use is intended The meter shall have the provision for recording time of the day generation i.e. generation during normal hours (6:00 AM to 6:00 PM), peak load hours (6:00 PM to 10:00 PM) and off peak hours (10:00 PM to 6:00 AM next day. The credit for the generated units shall then be given accordingly to the time of the day recording. This meter shall be construed to be the billing meter for captive and/or third party sale.

(ii) In case separate ToD metering is not installed on WEG(s) involved in captive use / third party sale, the adjustment of total units generated shall first be done from off peak consumption, remaining units from normal hours consumption and balance from peak hours consumption of the consumer."

30. Hence, Respondent submitted that MPERC in petition No. 35 of 2008 approved that the credit for the generated units shall be given according to the time of the day recording and appropriate provisions in this regard also incorporated in the PP&WA entered with generators by Discom/MPPMCL as well as agreement entered by the Petitioner with generators.

31. It is noted that the petitioner in his written submission has quoted the provisions of agreements entered into between the petitioner and respondent 4 to 8 i.e. between the Solar Generators and the beneficiary whereas the demands under challenge have been raised by Respondent no. 1 on the basis of power purchase and wheeling agreements all dated 27.05.2014 executed between the Respondent No. 1, MPPMCL, Developer and the Generating Companies (Respondent no. 4 to 8 in this petition). The Clause 12.3 of the of power purchase and wheeling agreement, dated 27.05.2014 stipulates as under:

"*Clause 12.3 - As the Solar Power Generation occurs during hours (normally between 06:00 hrs to 18:00 hrs),* ***hence credit of wheeled energy shall be given by Discom (s) on the basis of TOD concept of generation and consumption as per their practice."***

32. We have noted that the aforesaid procedure of energy accounting in TOD manner exists in all the PP&WA executed by the respondent no. 4 to 8 with distribution company. There is no doubt that the provisions of private agreements executed between the petitioner and respondent no. 4 to 8 do not have any bearing on the energy accounting methodology and billing done by Respondent no. 1 as per Power Purchase and Wheeling Agreement executed with Generating Companies. The energy accounting and billing of the beneficiary of the respondent no. 4 to 8 has to be done based on power purchase and wheeling agreements executed between the generating companies, developer, distribution company and the MPPMCL.

33. In light of the above-mentioned factual status and contentions of the parties with respect to the issue of ToD, we find no merit in the arguments put forth by the Petitioner. Hence, energy accounting and billing as per the ToD method is valid in the subject matter and shall be taken into consideration.

ISSUE NO. 2-

34. The second issue that has arisen in the present petition is whether the bar under Section 56(2) is applicable on the Demand Notice.

35. In this regard, the Petitioner has submitted that the bills prior to 27.12.2016 and 02.08.2022 cannot be recovered as the same are barred by limitation. The Petitioner further submitted that in the Demand Notice dated 27.12.2018, the recovery pertained to the period beginning from April- 2015 until July -2017. Therefore, in terms of the aforementioned provision, MPPKVVCL can only recover the amount which is within two years from the date of bill i.e., only until 27.12.2016. As regards the bills prior to 27.12.2016, MPPKVVCL can only recover that amount if the same was shown to be due continuously since the time the said amount became due.

36. Placing reliance on the Prem Cottex Judgment passed by Hon'ble Supreme Court, the Petitioner quoted the following:

> "*15. Therefore, the bar actually operates on two distinct rights of the licensee, namely, (i) the right to recover; and (ii) the right to disconnect. The bar with reference to the enforcement of the right to disconnect, is actually an exception to the law of limitation. Under the law of limitation, what is extinguished is the remedy and not the right. To be precise, what is extinguished by the law of limitation, is the remedy through a court of law and not a remedy available, if any, de hors through a court of law. However, section 56(2) bars not merely the normal remedy of recovery but also bars the remedy of disconnection. This is why we think that the second part of Section 56(2) is an exception to the law of limitation*."

37. The Petitioner has submitted that the Demand Notice sent by Respondent MPPKVVCL is illegal and contrary to Section 56(2) of the Act. Section 56(2) provides that no sum due from any consumer, under the section shall be recoverable after the period of two years from the date when such sum became first due. For a clear understanding, the same has been reproduced as under:

> "***Section 56. (Disconnection of supply in default of payment)****: --*
> *(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became* ***first due*** *unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity*."

38. In response to the Petitioner's contentions, the Respondent has submitted that the bar of section 56 (2) regarding 2 years would not come in the way of MPPKVVCL as the same do not apply to the case of escaped/deficit billing. The amount claimed by MPPKVVCL through supplementary demand became due only on 27.12.2018 when it was issued to the Petitioner. The amount became **'first due'** on 27.12.2018 when the supplementary demand of escaped billing was issued and not earlier. The restriction of section 56(2) does not come in the way of recovery of difference amount which escaped from billing.

39. Respondent also submitted that, Hon'ble High Court of Madhya Pradesh, Gwalior in identical Case W.P. No.827/2003 *Kapoor Saw Manufacturing Co. MPSEB and Others* 2006 SCC Online MP 612 dated 13.07.2006 wherein Hon'ble HC has upheld the supplementary bill of the past period. The relevant para is reproduced as under:

> "*(12.) As far as bar contained in sub-section (2) of Section 56 for recovery of the entire amount of arrears for more than 4 years is concerned, Section 56 of the Indian Electricity Act contemplates a procedure for disconnection of electricity for default of payment where a consumer neglects to pay any electricity dues or charge to a Electric Company. The said provision and the bar created under sub-section (2) of Section 56 will apply to cases where recovery of amount is being made on the ground of negligence on the part of the consumer to pay the electricity dues. It is in such cases that recovery beyond the period of 2 years is prohibited. Present is not a case where action is taken due to default or negligence on the part of the consumer. Present is a case where an error in the matter of calculating tariff by the Board is being corrected when the error came to the notice of the Board on 18-9-00. The provision of Section 56 will not apply in the facts and circumstances of the present case*."

40. In addition to the above cited judgment, Hon'ble Supreme Court in Civil Appeal No. 7235 of 2009, *M/s Prism Cottex V/s Uttar Haryana Bijli Nigam Ltd and Others* held that:

> "*If the demand is not raised, there is no occasion for a consumer to neglect to pay any charge for electricity. Sub section (2) of Section-56 has a non-obstante Clause with respect to what is contained in any other Law, regarding the right to recover including the right to disconnect. Therefore, if the licensee has not raised any bill, there can be no negligence on the part of the consumer to pay the bill and consequently the period of limitation prescribed under Sub-section (2) will not start running. So long as the limitation has not started running, the bar for recovery and disconnection will not come into effect. Hence, the decision in Rahamatullah Khan and Section-56(2) will not go to the rescue of the Appellant.*"

41. We are of the view that from the above judgements, it is quite clear that the limitation period starts running only when an issue is first brought to the notice of parties. In the subject matter, it happened on 27.12.2018 when the amount became first due. Therefore, demand raised on 27.12.2018 and demand of consequential delayed payment surcharge raised on 18.10.2021 and 08.11.2021 holds good and cannot be held barred as per the mandate of Section 56(2).

ISSUE NO. 3-

42. Whether billing of connection of petitioner needs to be revised on account of failure of Real Time Clock (RTC) element of the Solar Generation Meter? And also, which party was responsible for generation meter maintenance and testing?

43. MPPKVVCL on 02.08.2022 issued a Demand Notice/Supplementary Bill to the Petitioner seeking recovery of Rs. 1,90,02,209/- for the period from April 2015 to July 2021 on account of Real Time Clock (RTC) element failure of solar generator meter due to which the generation was being shown during night hours.

44. Vide a letter dated 10.08.2022, the Petitioner sought the following information in support of the demand raised by MPPKVVCL vide notice dated 02.08.2022:

1) "*The basis of calculation with evidence, including energy meter readings (MRI details) for bills revision summary as per referred demand note.*
2) *Frequency of meter testing and cross check by competent authority at solar generator side and whether solar generator has accepted the same.*
3) *As MPPKVVCL is taking RTC readings on a monthly basis, therefore, since when RTC got changed*."

45. With respect to the above, the Petitioner submitted that as per Clause 8.14 of the Madhya Pradesh Electricity Supply Code, 2013 ("Supply Code, 2013"), it is the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose. Moreover, Clause 8.15 of the Supply Code, 2013 provides that the licensee shall also conduct periodical inspection/testing of the HT meters at least once in a year.

46. Let us have a look at the relevant extracts of the Supply Code, 2013 that are reproduced hereunder:-

"***Testing of Meters***

8.14 It shall be the responsibility of the licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose.

8.15 The licensee shall also conduct periodical inspection/testing of the meters as per the following schedule:

(a) Single phase /three phase meters: at least once in every five years.

(b) HT meters: at least once in a year.

The CT and PT wherever installed, shall also be tested along with meters.

If required, the licensee may remove the existing meter for the purpose of testing. The representatives of the licensee must, however, produce an authenticated notice to this effect and sign the document, mentioning his full

name and designation, as a receipt, before removing the meter. The consumer shall not object to such removal."

47. We have noted that the clause 8.14 and 8.15 of the MPERC Supply Code, 2013 is applicable in respect of the consumer meter whereas in the instant dispute, the issue in hand is regarding responsibility of maintenance and testing of the generator meter which is governed under the relevant metering regulations of Central Electricity Authority namely Central Electricity Authority (Installation & Operation of Meters) 2006 as amended from time to time , As per the provisions of (Installation & Operation of Meters) 2006 as amended from time to time , location of generation meter should be on outgoing feeder of the generating station and the ownership of generation meter and responsibility of operation and testing also lies with the generating company.

48. In light of the above, Commission is of the view that the provisions of the clause 8.14 and 8.15 of the MPERC Supply Code, 2013 applies to consumer meters only. Since the RTC element of generation meters were defective, consequent energy accounting and billing has to be revised by the distribution licensee considering the energy adjustment in correct time slots. It is also apparent that the ownership and responsibility of maintenance of generation meter installed on the outgoing feeder of generating station lies with the generating company.

49. In view of all foregoing observations, the Commission is of the considered view that the prayers of petitioner on the grounds placed in subject petition have no merit subject to aforesaid observations. Accordingly, the subject petition is dismissed and disposed of.

(Gopal Srivastava)	**(Mukul Dhariwal)**	**(S.P.S. Parihar)**
Member (Law)	**Member**	**Chairman**