MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

BHOPAL

Sub: In the matter of petition seeking directions against MP Paschim KVVCL qua its ex-facie illegal and arbitrary levy of Additional Surcharge on the power consumed by Grasim Industries Ltd. (Staple Fiber Division – Nagda) from its 52 MW onsite Captive Power Plant.

ORDER

(Hearing through video conferencing)
(Date of Order: 20th April' 2022)

M/s. Grasim Industries Ltd.,
Unit : Staple Fiber Division
Birla Gram, Nagda, Distt. Ujjain – 456 331 (M.P.) - **Petitioner**

Vs.

The Managing Director
M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Compound, Pologround, Indore-452003 - **Respondent**

Shri Ayush Dev Bajpai, Advocate, Shri Vikramaditya Singh, Advocate and Ms. Ayushi Ajmera, Advocate appeared on behalf of the petitioner.

Shri Shailendra Jain appeared on behalf of the Respondent.

The petitioner M/s. Grasim Industries Ltd. filed the subject petition under Section 86 (1)(f) of the Electricity Act, 2003 against levy of Additional Surcharge by MP Paschim KVVCL Indore on the power consumed by Grasim Industries Ltd. (Staple Fiber Division – Nagda) from its 52 MW onsite Captive Power Plant.

2. The petitioner also filed an application seeking ad-interim and ex-parte stay on the operation of aforesaid deemed notice issued by the Respondent and not to take any coercive action against the petitioner's unit on account of non-payment of aforesaid demand of additional surcharge.

3. The petitioner broadly submitted the following in this petition:

"1. The present Petition is being filed by Grasim Industries Ltd., Staple Fibre Division under Section 9, 42 and 86 of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005.

2. Petitioner is one of the largest viscose staple fibre manufacturing company in India. It has a manufacturing unit/plant at Nagda and for the purpose of meeting its power requirements the Petitioner had established a captive power plant of a total of 52 MW.

3. Petitioner owns 100% of the CPP and consumes the entire power generated for its own use of manufacturing. It is submitted that, the Petitioner has been a CPP in terms of Rule 3 of the Electricity Rules, 2005 and section 9 of the Electricity Act, 2003 and has not lost its status as a CPP. Petitioner's CPP has

complied with the captive qualification criteria set out in Rule 3 of the Electricity Rules. In the present case Petitioner is entitled to receive all benefits of captive use including no levy of additional surcharge. It is submitted at the outset that the Petitioner has its own dedicated transmission lines for transmitting power from the CPP to its manufacturing center (load center) and the entire CPP and the manufacturing are located within the same premises.

4. *Petitioner's onsite CPP was commissioned in two phases, firstly during the period 1976-77 when the Petitioner established first unit of Captive Power Plant - and thereafter in the year 2009 when the second unit of the Captive Power Plant was established. Here it is relevant to mention that the 52 MW captive power plant is based on co-generation and is therefore in any which ways liable to the promoted and protected as per the provisions of section 86(1)(e) of the Electricity Act, 2003. On 23.7.2021, PETITIONER was issued a Demand Notice from MPPKVVCL levying Additional Surcharge to the tune of Rs. 66,60,54,492/- on the captive power consumed by its load centre (manufacturing center) during FY 2017-18 to FY 2020-2021. It is herein relevant to note that the Petitioner was not a consumer of the Respondent DISCOM till 16.4.2018 and it became an Emergency Stand-By Consumer of the Respondent on -17.4.2018 when it executed the HT Supply Agreement for Stand By Power. A relevant feature of the Stand By Power is that it cannot be drawn regularly on a continuous basis for the entire year and is only drawable for start-up of plant in emergency conditions. It is reiterated that the Petitioner has its own dedicated lines for transmission of captive power and does not use the lines or system of the DISCOM for transmitting power to its load centre. The said Additional Surcharge is levied by MPPKVVCL on the basis of an erroneous interpretation of Section 42(2) and (4) of the Electricity Act. Levy of Additional Surcharge, in the facts of the present case, is contrary to the provisions of the Electricity Act and the legislative intent of promoting captive use of electricity.*

5. *It is submitted that Additional Surcharge can only be levied in terms of Section 42(4) of the Electricity Act which provides that:*

> *"Section 42. (Duties of distribution licensee and open access): ---*
>
> *.....*
>
> *(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, **such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply**....."*

Section 42(4) of the Electricity Act envisages that:

*(a) Additional Surcharge is levied on a consumer when the State Commission permits a class of consumer(s)to avail Open Access for receiving electricity **from a person** other than his area distribution licensee.*

(b) Additional Surcharge is:

*(i) Payable **on charges for wheeling***

*(ii) To meet the **fixed cost of the distribution licensee** arising out his obligation to supply electricity.*

6. Additional Surcharge is not leviable:

a. On a captive user who is receiving power from its own CPP since:

(i) There is no element of supply/ 'sale' involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e. in terms of Rule 3 of the Electricity Rules) does not amount to "supply of electricity" as contemplated under Section 42(4). Supply is defined in the Electricity Act as "sale of electricity to a licensee or consumer''.

(ii) Captive user is different from a consumer receiving supply of electricity on Open Access.

(iii) Even assuming though not admitting, that if availing Open Access, a captive user's Open Access is a right under Section 9(2) and is not subject to the State Commission's discretion under Section 42(4). In other words, Section 42(4) is not applicable to captive users. However, in the instant case, the lines for transmitting power are that of the Petitioner and are dedicated and the lines or system of the Licensee or DISCOM are not used for transmitting power from the CPP to the Load Centre.

b. Electricity is not wheeled through a licensed network and/ or no wheeling charges have been determined for a class of consumers.

c. Where there is no stranding of the licensee's fixed cost in relation to his supply obligation.

7. In the facts of the present case, Additional Surcharge is sought to be levied by MPPKVVCL on captive consumption by petitioner for the period FY 2017-18 to FY 2020-2021 is completely illegal, unjust and arbitrary. As stated above, Additional Surcharge is not leviable on the power consumed by the Unit from its own CPP. Even otherwise, in the facts of the present case, none of the requirements of Section 42(4) of the Electricity Act are met, since:

a. Petitioner has not taken any Open Access in terms of section 42 of the Electricity Act. Section 42(4) is not applicable in the case of captive use such as the present case as the lines of the Licensee are not used for transmitting power.

b. For Petitioner's captive use, no wheeling of electricity has taken place on MPPKVVCL's network and hence Petitioner is not liable to pay any wheeling charges. In fact, Petitioner is not utilising any part of MPPKVVCL's network. Being an onsite CPP, there is no wheeling of electricity. If there is no wheeling of electricity on MPPKVVCL's network there cannot be any additional surcharge levied as additional surcharge is a charge on wheeling.

c. From 17.4.2018 onwards till date the Petitioner's Unit of Staple Fibre

Division is a direct consumer of the Respondent Licensee connected at to the Respondent System at 33 KV. - Wheeling Charges are not determined, much less levied on EHT consumers. EHT consumers connected to the Transmission Network are only liable to pay Transmission Charges as held by this Hon'ble Commission in its Retail Supply Tariff Orders dated 01.04.2017 (for FY 2017-18), 03.05.2018 (for FY 2018-19) and 08.08.2019 (for FY 2019-20) [collectively, "Retail Supply Tariff Orders"]. It is submitted at the outset that the Petitioner has been paying all bills raised by the Respondent regularly from time to time as per the tariff orders of this Hon'ble Commission, including Supply Affording Charges levied whenever the Petitioner has raised its contracted demand.

d. *Petitioner has not availed any Open Access for the purpose of generation and consumption of power from its onsite CPP.*

e. *For the period FY 2017-18 till date, there was no stranding of MPPKVVCL's fixed cost arising out of its obligation to supply electricity, since PETITIONER was paying fixed demand charges to MPPKVVCL for the Emergency Stand By Power as per the Tariff Orders and the Respondent cannot aver or allege that there is a stranding of costs. It is to be noted that the Petitioner is only having a Stand by Power Consumer Agreement and is not a regular consumer of the Respondent.*

8. *Evidently the levy and demand for Additional Surcharge from Petitioner's Unit is untenable and contrary to law. Hence, Petitioner is constrained to approach this Hon'ble Commission by way of the present Petition seeking urgent interim and final reliefs.*

9. *It is submitted that the Petition raises important questions of law regarding levy of Additional Surcharge on captive consumption. It is submitted that given the nature of the dispute and issues raised in the present Petition, this Hon'ble Commission alone has the jurisdiction to adjudicate upon the present Petition. Further, given that Petitioner is the captive generator and user in the present case, and MPPKVVCL is a distribution licensee, the jurisdictional requirements of Section 86(1)(f) are also met.*

10. *The following facts are pertinent for the adjudication of the issues raised in the present Petition:*

a. *In the year- 1976-77 the Petitioner's Staple Fibre Division established its first unit of Captive Power Plant - and in the year 2009 the capacity of the CPP was increased and a second CPP unit was established taking the installed capacity to 52 MW. On 17.4.2018 , PETITIONER and MPPKVVCL (then MPSEB) entered into a HT Supply Agreement for supply of electricity on Emergency Stand By Power basis for Petitioner's own use.It is herein relevant to note that the Petitioner was not a consumer of the Respondent DISCOM till 16.4.2018 and it became an Emergency Stand-By Consumer of the Respondent on from 17.4.2018 when it executed the HT Supply*

Agreement for Stand By Power. A relevant feature of the Stand By Power is that it cannot be drawn regularly on a continuous basis for the entire year and is only drawable for start-up of plant in emergency conditions. It is submitted that the CPP operations of the Petitioner are on islanding mode and hence they do not run parallel with the grid.

A copy of the said HT Supply Agreement dated 17.4.2018 is annexed hereto and marked as ***Annexure P-2.***

b. *On 10.06.2003, the Electricity Act came into force. It was enacted, inter alia, to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for taking measures conducive to development of the electricity industry.*

c. *As per the Statement of Objects and Reasons to the Electricity Act, generation is delicensed, and captive generation is freely permitted. The relevant provisions of the Electricity Act are extracted hereunder for ease of reference:*

*"**Statement of Objects and Reasons–** …. ….*

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions of the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self contained comprehensive legislation arose. Accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also a need to provide for newer concepts like power trading and open access……

4. The main features of the Bill are as follows:–

(i) Generation is being delicensed and captive generation is being freely permitted.

…. ….

***2. Definitions–** …. ….*

…. ….

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

…. ….

(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

…. ….

(47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;

…. ….

…. ….

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

9. Captive Generation– *(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:

Provided further that no license shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.

(2) ***Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:***

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated by the Appropriate Commission.

…. ….

42. Duties of distribution licensee and open access– *(1) It shall be the duty of a distribution licensee to develop and maintain*

an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

…. ….

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

…. ….

(4) ***Where the State Commission <u>permits</u> a consumer or class of consumers to <u>receive supply</u> of electricity from a person other than the distribution licensee*** *of his area of supply,* ***such consumer shall be liable to pay <u>an additional surcharge on the charges of wheeling</u>****, as may be specified by the State Commission,* ***to meet the fixed cost of such distribution licensee arising out of his obligation to supply****.*

…. ….”

d. On 08.06.2005, the Central Government notified the Electricity Rules. Rule 3 of the Electricity Rules provides the qualifications/ requirements that a power plant is obligated to meet, for it to qualify as a Captive Power Plant/ Captive Generating Plant. Rule 3 of the Electricity Rules is set out hereunder for ease of reference:

*“****3. Requirements of captive generating plant–***

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

(a) in case of a power plant –

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

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

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of

association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including –

Explanation :-

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

<u>Illustration</u>: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

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

Explanation– (1) For the purpose of this rule–

(a) "annual basis" shall be determined based on a financial year;

(b) "captive user" shall mean the end user of the electricity generated in a Captive Generating Plant and the term

"Captive Use" shall be construed accordingly;

(c) "ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

(d) "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."

e. On 28.01.2016, the Central Government in exercise of powers under Section 3 issued the Revised Tariff Policy. The Revised Tariff Policy provides as under:

*"8.5.1 National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers **who are permitted open access** should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.*

…. ….

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

…. …."

*A copy of the Revised Tariff Policy dated 28.01.2016 is annexed hereto and marked as **Annexure P–3.***

*f. On 31.03.2017, this Hon'ble Commission passed the Annual Revenue Requirement and Retail Supply Tariff Order for FY 2017-18 in Petition No. 71 of 2016 ("**Retail Supply Tariff Order 2017**"). By way of the said Order, this Hon'ble Commission, inter alia, determined Additional Surcharge to be levied by MPPKVVCL **on Open Access consumers**. The Retail Supply Tariff Order became applicable from 10.04.2017. The relevant part of this Hon'ble Commission's Retail Supply Tariff Order is extracted hereunder for ease of reference:*

"3.24 The Petitioners have prayed in the petition for the determination of additional surcharge to be levied from consumers who are permitted open access in accordance with the provisions of Tariff policy, 2016.

*3.25 **The Petitioners have further submitted that in view of***

above, they have filed a separate petition (P. No. 52/16) before the Commission for levy of additional surcharge under the provisions of Section 42(4) of the Electricity Act 2003 and clause 13.1(g) of MPERC (Terms and Condition for open access in MP Regulations 2005) for approval of additional surcharge as may be deemed appropriate to be recovered from the all Open Access consumers.

…

3.27 In respect of aforesaid petition (52/2016), the Commission had held a public hearing on 24 January 2017 and heard the comments of stakeholders for further consideration.

…

3.28 The Commission, taking cognizance of the Petitioners prayer in instant ARR & Retail supply tariff petition for determination of additional surcharge for FY 2017-18, has merged the Petition No. 52/2016 with instant petition. Accordingly, the Commission has considered the submissions made by the Petitioners and stakeholders in light of the provisions specified in the clause 5.8.3 of the National Electricity Policy, Section 42(4)of the Electricity Act 2003 besides relevant clause 13.1 of MPERC (Term &conditions for Open Access in MP) Regulations, 2005 and ***determined additional surcharge on a yearly basis for Open Access consumers of the State in addition to levy of Cross subsidy surcharge specified in Tariff policy 2016****.*

3.29 The Commission has examined the methodology proposed by the Petitioners in regard to computation of additional surcharge and has inclined to approve the same in principles ***for determination of additional surcharge to be recovered from Open Access consumers for FY 2017-18 on the basis of latest data made available by Petitioners for previous 12 months commencing from September 2015 to August 2016****. The Commission has scrutinized the submission made by the Petitioners vide letter dated 20.02.2017 wherein the Petitioners have worked out the additional surcharge of Rs 1.08 per unit. The Commission has computed the additional surcharge by considering the average monthly fixed rate of surrendered power, which is based on daily least fixed rate of the generating station in the surrendered power. The Commission worked-out additional surcharge is shown in the table below:*

….

The Commission has thus determined the additional surcharge of Rs 0.646 per unit on the power drawn by the Open Access consumers from the date of applicability of this Retail Supply Tariff Order*."*

Relevant extracts of this Hon'ble Commission's Retail Supply Tariff Order 2017 are annexed hereto and marked as ***Annexure P –4****.*

*g. On 03.05.2018, this Hon'ble Commission passed the Annual Revenue Requirement and Retail Supply Tariff Order for FY 2018-19 in Petition No. 3 of 2018 ("**Retail Supply Tariff Order 2018**"). By way of the said Order, this Hon'ble Commission, inter alia, determined Additional Surcharge to be levied by MPPKVVCL **on Open Access consumers**. The Retail Supply Tariff Order became applicable from 11.05.2018. The relevant part of this Hon'ble Commission's Retail Supply Tariff Order 2018 is extracted hereunder for ease of reference:*

*"4.30 The Commission has considered the submissions made by the Petitioners and stakeholders in light of the provisions specified in the clause 5.8.3 of the National Electricity Policy, Section 42(4) of the Electricity Act 2003 besides relevant clause 13.1 of MPERC (Term & conditions for Open Access in MP) Regulations, 2005 and determined additional surcharge on a yearly basis **for Open Access consumers of the State in addition to levy of Cross subsidy surcharge specified in the Tariff Policy 2016**.*

*4.31 The Commission has examined the methodology proposed by the Petitioners in regard to computation of additional surcharge and **has approved the same for determination of additional surcharge to be recovered from Open Access consumers for FY 2017-18** on the basis of latest data made available by Petitioners for previous 12 months commencing from September 2016 to August 2017. The Commission has computed the additional surcharge by considering the average monthly fixed rate arrived based on daily least fixed rate of generating stations whose energy was surrendered due to open access consumers…*

…

*4.32 **The Commission has thus determined the additional surcharge of Rs 0.723 per unit on the power drawn by the Open Access consumers from the date of applicability of this Retail Supply Tariff Order**."*

*Relevant extracts of this Hon'ble Commission's Retail Supply Tariff Order 2018 are annexed hereto and marked as **Annexure P –5**.*

*h. On 08.08.2019, this Hon'ble Commission passed the Annual Revenue Requirement and Retail Supply Tariff Order for FY 2019-20 in Petition No. 08/2019 ("**Retail Supply Tariff Order 2019**"). By way of the said Order, this Hon'ble Commission, inter alia, determined Additional Surcharge to be levied by MPPKVVCL **on Open Access consumers**. The Retail Supply Tariff Order 2019 became applicable from 17.08.2019. The relevant part of this Hon'ble Commission's Retail Supply Tariff Order is extracted hereunder for ease of reference:*

"…. ….

Commission's Analysis

4.30 The Commission has considered the submission made by the Petitioners and stakeholders in light of the provisions specified in the clause 5.8.3 of the National Electricity Policy, Section 42(4) of the Electricity Act, 2003 besides relevant clause 13.1 of MPERC (Term & conditions for Open Access in MP) Regulations, 2005 and determined ***Additional Surcharge on a yearly basis for open access consumers of the State in addition to levy of Cross subsidy surcharge specified in the National Tariff Policy, 2016****.*

4.31 The Commission has examined the methodology proposed by the Petitioners in regard to computation of additional surcharge and has approved the same for determination of additional surcharge to be recovered from Open Access consumers for FY 2019-20 on the basis of latest data made available by Petitioners for previous 12 months commencing from September 2017 to August 2018. ***The Commission has computed the additional surcharge by considering the average monthly fixed rate arrived based on daily least fixed rate of generating stations whose energy was surrendered due to open access consumers****….*

….. …..

4.32 The Commission has thus ***determined the additional surcharge of Rs 0.746 per unit on the power drawn by the Open Access consumers*** *from the date of applicability of this Retail Supply Tariff Order.*

…. ….”

Relevant extracts of this Hon'ble Commission's Retail Supply Tariff Order 2019 are annexed hereto and marked as ***Annexure P –6****.*

i. On 17.7.2021 and 16.08.2021, certificates were issued by PETITIONER's Chartered Accountants (Nerkar and Co) to the effect that the Petitioner CPP meets the requirements of Rule 3 of the Electricity Rules, 2005 and qualifies as a Captive Power Plant. A copy of the above Certificates dated 17.7.2021 and 16.08.2021 are marked and annexed hereto as ***Annexure P-7.***

j. It is further submitted that the Petitioner has been paying all bills raised by the Respondent Licensee towards the emergency stand by power connection at 33 KV taken by the Petitioner including demand charges as per the applicable tariff orders and hence it is submitted that there is no stranding of costs.

k. On 23.07.2021, PETITIONER received MPPKVVCL's Demand Notice dated 23.07.2021. The Demand Notice states that captive generation is not exempt from levy of Additional Surcharge as the only exemption granted to Captive Users is from payment of Cross Subsidy Surcharge under 4th Proviso to Section 42(2) of the Electricity Act. Accordingly, MPPKVVCL has levied Additional Surcharge on

PETITIONER's captive consumption. It is submitted that as stated hereinabove that the Petitioner is a consumer of the Respondent Licensee from 17.4.2018 only for the purpose of Emergency Stand By Power and the consumption of power from its CPP does not qualify as supply of power from a source other than the Distribution Licensee of the area. It is further submitted that the lines of the Respondent Licensee are not used to transmit or wheel the power to the Petitioner load center and the entire captive power is sent to the load center through the dedicated transmission lines installed and maintained by the Petitioner itself. It is reiterated that as stated hereinabove the demand raised under section 42(4) of the Electricity Act, 2003 is illegal and arbitrary as the requirements of section 42(4) are not made out for levying the additional surcharge on the Petitioner. PETITIONER has not taken any Open Access in terms of section 42 of the Electricity Act. Section 42(4) is not applicable in the case of captive use such as the present case as the lines of the Licensee are not used for transmitting power. Hence the present Petition.

l. On 17.8.2021, PETITIONER submitted its Reply to MPPKVVCL's Demand Notice dated 23.07.2021, inter alia, requesting withdrawal of Demand Notice dated 23.07.2021, and then further on 19.08.2021 the Petitioner issued another letter submitting the captive status documents for the year 2020-21. It is also pertinent to mention herein that the in response to the earlier letters/emails of the Respondent Discom the Petitioner had already submitted the captive status documents vide its email dated 22.7.2021 and also by speed post bearing Receipt no. EI 226388543IN. It is pertinent to mention herein that till date the Petitioner has not received any reply form the Respondent.. A copy of PETITIONER's letter dated 17.8.2021, email dated 22.7.2021 and letter dated 19.08.2021 are annexed hereto and marked as Annexure P-8-Colly.

m. Without prejudice to the above and in the alternative, it is submitted that the demand for the period of 10.4.2017 to 22.7.2018 issued by the demand notice dated 23.7.2021, is barred by limitation and is therefore not payable in any which case. It is submitted that it is settled law that the Limitation Act is applicable to the Electricity Act, 2003 and as per the provisions of the Limitation Act, 1963 the demand for the period of 10.4.2017 to 22.7.2018 raised vide demand notice dated 23.7.2021 is barred by time.

n. It is further submitted that similar notices for the recovery of Additional Surcharge on Wheeling were issued to a group company namely Ultra Tech Ltd and also by another Division of the Petitioner namely Chemical Division, and the Hon'ble Commission was pleased to dismiss the Petition filed by Ultra Tech Ltd and the Chemical Division of the Petitioner company. However, the Hon'ble APTEL vide

its orders dated 26.7.2021 passed in appeal no. 198/2021 has been pleased to stay the operation of the order dated 14.5.2021 passed in Petition no. 62 of 2020 and vide order dated 9.8.2021 passed in Appeal no. 212/2021 and vide order dated granted interim protection to the Chemical Division of the Petitioner. A copy of the orders dated 26.7.2021 and 9.8.2021 are attached as Annexure-P-9-.

III. Grounds

A. Additional Surcharge is not leviable on Captive users

Re. Section 42(4) is not applicable to captive user/ consumption

11. It is submitted that, the power to determine and levy Additional Surcharge on consumers flows from Section 42(4) of the Electricity Act. In terms of Section 42(4), Additional Surcharge is leviable on consumers or a class of consumers who are receiving supply of electricity from a person other than their area distribution licensee, on the charges of wheeling. In the instant case the Petitioner is the consumer of the Respondent Licensee and is not receiving supply from any other outside source. It is submitted that the CPP is established under section 9 of the Act, 2003 and does not qualify as an outside source. Additional Surcharge is levied to meet the fixed cost of the distribution licensee arising out of such licensees' obligation to supply electricity.

12. In other words, Section 42(4) envisages that:

*(a) Additional Surcharge is levied on a consumer when the State Commission permits a class of consumer(s) to avail Open Access for receiving electricity **from a person** other than his area distribution licensee.*

(b) Additional Surcharge is:

*(i) Payable **on charges for wheeling***

*(ii) To meet the **fixed cost of the distribution licensee** arising out his obligation to supply electricity.*

13. For Additional Surcharge to be levied on a consumer or a class of consumer, it first needs to be established that:

*(a) The State Commission has **permitted** such consumer or class of consumer **to receive supply** of electricity on Open Access under Section 42 of the Electricity Act.*

*(b) **Supply** of electricity to the consumer/ class of consumer on Open Access is by someone other than the local distribution licensee. The term supply is used in the context of sale of electricity. In other words, 'supply' denotes supply/ sale of electricity from an Independent Power Plant ("**IPP**") or a trading licensee as the case may be, **and not captive use**.The term ''supply'' is defined as sale of electricity to a licensee or a consumer. In the instant case the Petitioner is not selling its own captive power to itself.*

*(c) Such consumer/ class of consumer **must be wheeling electricity** on the network of the area distribution licensee. Meaning thereby that such consumer should be paying Wheeling Charges/ wheeling*

charges ought to have been determined for such consumer or class of consumer. In the instant case the system or lines of the Respondent Licensee is not used as the entire transmission of electricity is through the own dedicated lines of the Petitioner and the same is are within the premises.

(d) Wheeling Charges levied on such consumer/ class of consumer is unable to take care of the fixed cost liability of the area distribution licensee. In other words, the local distribution licensee has to demonstrate that there is stranded fixed cost (arising out of the supply obligation of the licensee) which the local distribution licensee is unable to recover from the Wheeling Charges levied by it, and hence Additional Surcharge would have to be levied for recovery of such fixed cost.

14. A captive user, as defined under Section 9 of the Electricity Act read with Rule 3 of the Electricity Rules, is a person who has set-up a power plant for generating and carrying electricity to a destination of his own use.It is submitted that a captive power plant is established in terms of Section 9 of the Electricity Act. Section 9(1) and 9(2) of the Electricity Act grants a captive user the right to Open Access for the purpose of carrying electricity from his captive power plant to the destination of his own use and also the ***right to establish and maintain its own dedicated transmission lines****.*

15. Section 42(4) empowers the State Commission to determine Additional Surcharge for levy on a consumer or class of consumers who have been permitted to receive power on Open Access by the State Commission in terms of Section 42(2).In the instant case there has never been any open access granted or applied for by the Petitioner for the CPP as the Petitioner uses its own dedicated transmission lines.

Re. There is no element of sale/ supply of electricity in captive use/ consumption

16. Additional Surcharge is levied on consumers or a class or consumers who are availing ***supply*** *of electricity on Open Access. The term supply, inherently and in the context of Section 42* ***involves an element of sale****. Section 2(70) of the Electricity Act defines supply of electricity to mean sale of electricity to a licensee or a consumer. Captive use does not envisage* ***supply*** *of electricity by the captive user to himself (as it would lead to an absurdity). Consumption of power by a person from a generating station owned/ setup by such person, fulfilling the requirements of Section 2(8) read with Rule 3, is recognized by the law as captive (self) consumption by such person and not supply of electricity. Admittedly, PETITIONER's Unit is a captive consumer having set up its CPP for the purpose of self-consumption.*

17. The Electricity Act envisages two sets of consumers –

(a) A captive user, who is permitted to carry electricity to the destination of its own use, and

(b) Other consumers who avail supply of electricity (either from the local

distribution licensee or from any other person e.g., independent power plant or trading licensee) i.e., where an element of sale (except in the case of captive) is involved.

18. *Captive users are also broadly classified into two categories viz.:*
    (a) *Where the captive generating plant and the captive user is situated in the same premises or where captive users receive supply of electricity through a Dedicated Transmission Line i.e., where no wheeling of energy (on a licenced network) takes place for such captive use; and*
    (b) *Where the captive generating plant and the users are situated at two different locations i.e., where transfer of energy takes place for captive consumption through use of grid infrastructure.*

    In both the above cases of captive users, there is no element of supply or sale of electricity. It is submitted that the Petitioner's case falls in the first category wherein the CPP and load centre are located in the same premises and the power is transmitted through dedicated lines without any wheeling on the Respondent licensee system.

19. *The transport of power from captive generating plant to its captive user does not amount to/ is not equal to "supply" of power as defined under Section 2(70) of the Electricity Act. This is evident from the following:*
    (a) *4th Proviso to Section 42(2) of the Electricity Act exempts captive users from levy of Cross Subsidy Surcharge.*
    (b) *In terms of Section 9(2) a captive user has the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use.*
    (c) *Nowhere does 4th Proviso to Section 42 (exemption from Cross Subsidy Surcharge) or Section 9(2) refer to 'supply' of electricity by or to a captive user.*
    (d) *There is no reference to the term 'supply' in Rule 3(1) of the Electricity Rules. Rule 3(2) does mention the term 'supply'* ***only in the context of a captive power plant failing to meet the qualifications under Rule 3(1) of the Electricity Rules.*** *So long as a captive user/ power plant is meeting the qualifications under Rule 3(1) of the Electricity Rules, such captive generation and consumption of electricity by the captive user would not be treated as "supply" of electricity. This in turn entitles such a captive user to exemptions under the Electricity Act. However, in case a captive user/ power plant fails to meet the qualifications under Rule 3(1), in a given financial year, then the entire electricity generated and consumed by the captive user is to be treated as 'supply' of electricity by a generating company to a "consumer". Meaning that the captive user would automatically be treated as an Open Access consumer who is receiving 'supply' of electricity from a person other than its area distribution licensees. Consequently, all Open Access and/or 'supply' related charges will become leviable on such captive user/ power plant. It is submitted that it is an admitted fact that the Petitioner is having a CPP and therefore the levy of additional*

surcharge is completely illegal and arbitrary.

(e) The words "consume" and "receive supply" when interpreted in the context of captive user in terms of Sections 9 and 42(2) of the Electricity Act, refer to a captive generator carrying electricity to the destination of his own use.

(f) In this regard, it is pertinent to note that in terms of Section 2(15) of the Electricity Act, a "consumer" is any person who is "supplied" with electricity. In other words, the term consumer denotes someone to whom electricity is "sold". However, a captive user is one who is carrying electricity to a destination of its own use and is defined in the explanation to Rule 3 as the end user of the electricity generated in a Captive Generating Plant.

20. This makes it clear that the legislative intent was to distinguish between a consumer and a captive user – the former purchases electricity from a third party and the latter utilises electricity generated by it. Hence, the legislature consciously did not use the term 'supply' while referring to a captive user setting up a power plant for his own consumption. Evidently, the legislature has made a distinction between the liabilities of consumers and captive users when it comes to statutory charges that are applicable for 'supply' of electricity. Additional Surcharge cannot be made applicable to captive users since as per Section 42(4) of the Electricity Act, Additional Surcharge can only be levied on consumers who are receiving "supply" of electricity on Open Access.

21. Without prejudice it is submitted that, irrespective of whether a captive power plant is on site or is wheeling electricity to its captive user, there cannot be any levy of Additional Surcharge so long as the captive user/ plant meets the test of Rule 3 of the Electricity Rules since there is no element of sale/ supply in either scenario. Therefore, it is submitted that, so long as a captive user meets the Ownership (26% equity shareholding with voting rights) and Consumption Requirement (51% of the aggregate electricity generated in a financial year) prescribed under Rule 3(1) of the Electricity Rules, then such a captive user is exempt from all charges/ surcharges that are ordinarily applicable to Open Access consumers i.e., charges that are levied pursuant to "supply" of electricity to the Open Access consumer. This includes Additional Surcharge as well, since, as stated hereinabove, a precondition for the levy of Additional Surcharge is "supply" of electricity to the consumer.

22. Given that PETITIONER's Unit is a captive user of its CPP for the period FY 2017-18 to FY 2019-20, there can be no levy of Additional Surcharge on the power consumed by PETITIONER's Unit from its CPP. Levying Additional Surcharge on PETITIONER Unit's captive consumption is ex facie illegal and contrary to law.

23. Without prejudice to the above, it may be noted that in the various Retail Supply Tariff Orders (i.e., for FY 2017 to FY 2020), this Hon'ble Commission

while providing for the levy of Additional Surcharge has specifically made Additional Surcharge applicable ***only on Open Access consumers (and not captive users)****. In the facts of the present case,* ***PETITIONER's Unit is not an Open Access consumer in so far as power consumption from its CPP is concerned****.*

B. Requirements of Section 42(4) not met in the facts of the case

Re. There is no Wheeling of electricity in the present case and Wheeling Charges are not applicable for PETITIONER's Staple Fibre Division-Nagda Unit

24. Without prejudice to the above, it is submitted that as per Section 42(4) of the Electricity Act, Additional Surcharge is to be specified on the charges of wheeling. The Hon'ble Appellate Tribunal by its Judgment dated 29.05.2006 in Kalyani Steels Limited v. Karnataka Power Transmission Corporation Limited & Ors. has held that under Section 42(4) of the Electricity Act, a consumer is liable to pay Additional Surcharge ***only if he is liable to pay charges of wheeling and not otherwise (Para 37).*** *Therefore, prior to levying Additional Surcharge on a captive user, it needs to be established that a captive user is wheeling electricity on the distribution facilities of the distribution licensee and is liable to/ paying wheeling charges.*

25. In the facts of the present case:

(a) There is no wheeling agreement between PETITIONER's Unit and MPPKVVCL for the consumption/ use of energy from PETITIONER's CPP. No Open Access has been availed by PETITIONER for its captive use.

(b) As stated above, the CPP is located on-site. PETITIONER's Unit consumes power from the said CPP via internal dedicated transmission lines which are connected at 22kV feeder(constructed and owned by PETITIONER) which do not form part of MPPKVVCL's distribution network (i.e. islanding system).

(c) PETITIONER's Unit does not utilise any part of MPPKVVCL's distribution network for receiving the electricity generated by the CPP. In other words, there is no wheeling of electricity(on MPPKVVCL's distribution network) for the Manufacturing Unit to receive power from its CPP.

(d) From 17.4.2018 till date the Petitioner Unit is a direct consumer of the Respondent Licensee only for the purpose of Emergency Stand By Power and is connected at 33kV level..

26. In this regard, it is noteworthy that by its various Retail Supply Tariff Orders (i.e. for FY 2017 to FY 2020), this Hon'ble Commission has, amongst others, determined Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge for various class of consumers. Given that PETITIONER's Unit is not liable to pay Wheeling Charges as per the Retail Supply Tariff Orders of this Hon'ble Commission then in light of the Hon'ble Appellate Tribunal's Judgment in Kalyani Steel (supra), Additional Surcharge cannot be levied on the power consumed by PETITIONER's Unit from its Captive Unit.

27. Without prejudice to the above, it is submitted that even if wheeling was undertaken for the consumption of power from a captive power plant, such use does not qualify to be 'supply' or 'sale' and hence no Additional Surcharge can be levied on such use as well. In other words, no wheeling has taken place and no lines or system of the Respondent Licensee has been used for carrying power for captive use and therefore the same cannot be subjected to payment of Additional Surcharge.

Re. There is no stranding of MPPKVVCCL's fixed cost in light of demand charges and Stand by charges already being paid by PETITIONER to MPPKVVCL.

28. Without prejudice to the fact that no Additional Surcharge can be levied for Captive Use, it is submitted that as a precursor to levying Additional Surcharge, MPPKVVCL is required to demonstrate that there is stranded fixed cost on account of PETITIONER's Unit not receiving supply of electricity from MPPKVVCL. In the Retail Supply Tariff Orders, this Hon'ble Commission has held that as a result of consumers shifting to Open Access, power procured by MPPKVVCL remains stranded and the distribution licensee has to bear the additional burden of capacity charges of stranded assets to comply with its Universal Supply Obligation. Accordingly, this Hon'ble Commission has approved levy of Additional Surcharge on Open Access consumers. In fact, while calculating such Additional Surcharge, only the Open Access units wheeled through the distribution licensees' network was considered, not the data of captive generation.

29. It is noteworthy that for the period in question, PETITIONER's Unit has paid fixed monthly demand charges to MPPKVVCL for the emergency stand by power connection. In such circumstances, it cannot be said that on account of PETITIONER's Unit consuming power from its CPP (which is encouraged under the Electricity Act and the National Electricity and Tariff Policies), MPPKVVCL is suffering from stranded fixed cost. MPPKVVCL's fixed cost liability towards its generators for the power procurement is already being met given the various fixed charges that have been paid (and are being paid) by PETITIONER's Unit to MPPKVVCL. Levy of Additional Surcharge on PETITIONER will amount of unjust enrichment of MPPKVVCL. It is submitted that MPPKVVCL has failed to demonstrate any stranding of capacity on account of PETITIONER consuming power generated by its onsite CPP.

30. MPPKVVCL's interpretation of Section 42(4) of the Electricity Act is myopic and causes violence to the said provision. MPPKVVCL's justification for levying Additional Surcharge [no exemption akin to 4th Proviso to Section 42(2) available under Section 42(4)]is misconceived. MPPKVVCCL has failed to appreciate the various elements of Section 42(4) of the Electricity Act and only sought to rely on the 4th Proviso to Section 42(2) to justify its levy of Additional Surcharge under Section 42(4) of the Act.

31. It is submitted that, the Electricity Act read with the Electricity Rules is a

beneficial legislation vis-à-vis captive generation. The Statement of Objects and Reasons of the Electricity Act clearly contemplates promotion of captive generation so as to give a thrust/ impetus to industry. In furtherance of the same, the legislature in its wisdom has exempted captive generators/ users from levy of Cross Subsidy Surcharge, Additional Surcharge, other Open Access charges. It is submitted that any interpretation of the Electricity Act which leads to the conclusion that Additional Surcharge is leviable on captive users would be in teeth of the scope and object of the Electricity Act since the legislature would not have exempted levy of Cross Subsidy Surcharge on captive users on one hand and levied Additional Surcharge on the other, thereby defeating the whole purpose of exempting Cross Subsidy Surcharge. Hence, it is PETITIONER's case that captive users such as the Petitioner are completely exempted from levy of Additional Surcharge. Additional Surcharge can only be levied on (non-captive) Open Access consumers who are liable to pay Cross Subsidy Surcharge under the Electricity Act.

32. *Hence, in view of the above, it is respectfully submitted that Additional Surcharge is not leviable on captive users. Even otherwise, in the facts of the present case, Additional Surcharge cannot be levied on the power consumed by PETITIONER's Unit from its onsite CPP as the requirements of Section 42(4) are not met.*

33. *Considering that the Demand Notice requires PETITIONER to pay Additional Surcharge within 30 days of its issuance, it is imperative that this Hon'ble Commission grant an ex-parte ad interim stay on the Demand Notice during the pendency of the present proceedings. Further, this Hon'ble Commission may also direct MPPKVVCL, pending the adjudication of the present Petition, to refrain from raising any claims towards additional surcharge on the captive consumption by PETITIONER. A prima facie case is made out in favour of PETITIONER given that MPPKVVCL has failed to consider the various elements of Section 42(4) of the Electricity Act (no wheeling, no open access, no 'supply'/ sale of electricity, etc.) while levying Additional Surcharge in present facts of the case. Balance of convenience is also in favour of PETITIONER. Further, irreparable harm and/ or loss will be caused to PETITIONER in the event interim relief is not granted. It is well known that the outbreak of COVID – 19 and the consequential pan-India lockdown has disrupted industrial activity causing deep financial stress. PETITIONER's Units have also suffered financially due to COVID leading to stress. Such illegal levy of Additional Surcharge will additionally burden PETITIONER causing further financial stress. No harm, loss or prejudice will be caused to MPPKVVCL if the interim relief is granted since till date (for a retrospective period of three years) i.e., before the Demand Notice MPPKVVCL had not even raised its demand of Additional Surcharge, which is nothing but an afterthought and an attempt to discourage (contrary to the provisions of the Electricity Act) captive use of electricity.*

34. *Petitioner reserves its right to make such other and further submissions, if*

necessary, at a later stage of the proceedings."

4. With the aforesaid submissions, the petitioner prayed the following:

a. Hold and declare that Additional Surcharge is not leviable by MPPKVVCL on the quantum of power consumed by PETITIONER's Manufacturing Unit from its 52 MW onsite Captive Power Plant.

b. Set aside/ quash MPPKVVCL's Demand Notice/ letter dated 23.07.2021 bearing reference No. MD/WZ/05/COMM/9951, retrospectively levying Additional Surcharge of Rs. 66,60,54,492/- on PETITIONER's Unit for the power consumed by PETITIONER from its 52 MW onsite Captive Power Plant for the period FY 2017-18 to FY 2020-21.

c. In the alternative and without prejudice to prayer at clause (a) and (b), hold and declare that the demand for the period of 10.04.2017 to 22.07.2018 issued by the demand notice dated 23.07.2021, is barred by limitation and is therefore not payable.

5. At the motion hearing held on 09.11.2021, the petition was admitted and the petitioner was directed to serve copy of petition on the Respondent within seven days and report compliance of service to the Commission. The Respondent was directed to file its reply to the subject petition within two weeks, thereafter. The petitioner was further directed to file rejoinder on the aforesaid reply within two weeks, thereafter. The case was fixed for hearing on the 21.12.2021. However, the case could not be listed and heard due to vacancy of Member Law in the Commission from 09.12.2021 to 04.02.2022.

6. Meanwhile, the petitioner had filed two applications on 15.12.2021 and 03.02.2022 respectively. The first application was to allow petitioner to submit amended petition to the extent of change in amount in demand notices issued by Respondent. The second application was filed with the following prayers:

(i) Staying the operations of the amended demand notice dated 17.11.2021, levying an amount of Rs. 55,60,23,780/-.

(ii) Staying the operation of the recovery of the monthly bill dated 27.01.2022 for January 2022.

(iii) Directing MPPKVVCL to refrain from taking any coercive action against the petitioner unit on account of non-payment of such demand of additional surcharge.

(iv) To allow the petitioner to submit amended petition, in the imminent interest of Justice.

7. The petitioner submitted that although the Commission has already decided similar matters in earlier petitions, however, in the meanwhile Hon'ble Supreme Court has pronounced judgment dated 10.12.2021 in the matter of MSEDCL Vs. M/s. JSW Steel Limited & Ors. in Civil Appeal Nos. 5074-5075 of 2019 wherein it was held that *"such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003."* Therefore, in light of the aforesaid judgment pronounced by Hon'ble Supreme Court, interim relief directing the Respondent not to take any coercive action

against the petitioner may be granted till the disposal of this petition. In addition, application for amending the petition be allowed so that updated status regarding outstanding dues may also be placed before the Commission.

8. The Respondent pleaded that this matter was not similar to the matter in which Hon'ble Supreme Court pronounced its judgment dated 10.12.2021. Therefore, relief sought by the petitioner was not justified.

9. Having heard both the parties, the Commission was of the view that no prejudice would be caused to the Respondent if the interim relief against coercive action sought by the petitioner is allowed. The request for amending the petition was also allowed. However, since the matter deserved to be heard and decided expeditiously therefore, it was listed for final arguments on 28th February' 2022.

10. At the hearing on 28th February' 2022 Ld. Counsel who appeared for the petitioner submitted that he cannot appear for the petitioner in this matter since he has been appointed as a Government Advocate in the Hon'ble High Court. He further stated that he has no instructions from the petitioner. In view of aforesaid submission by the Ld. Counsel for the petitioner, it was directed that the petitioner be informed about this development and be asked to represent through another Counsel at the next date of hearing. The representative who appeared for the Respondent requested to file additional submission in this matter. Request of the Respondent was allowed and the Respondent was directed to serve copy of its additional submission on other side also simultaneously. The case was fixed for arguments on 24th March' 2022.

11. At the hearing held on 24th March' 2022, Ld. Counsel who appeared for the petitioner and the representative for Respondent were heard. As requested, both the parties were allowed to file their written arguments within seven days. Case was reserved for orders.

12. Respondent by affidavit dated 2nd December' 2021 submitted its reply to the petition as under:

> *"5. At the outset, the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or inconsistent with what is stated herein, as if the same has been traversed in seriatim, save and except what has been specifically and expressly admitted hereinafter in writing. Any omission on the part of the answering respondent to deal with any specific contention or averment of the petitioner should not be construed as an admission of the same by the answering respondent. Further, all the submission made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.*
>
> *6. Before controverting to the submissions of the petitioner, it would be appropriate to place on record the rationale behind Additional Surcharge as contemplated in Section 42(4) with the scheme of Act 2003.*

Universal Supply Obligation and Rational behind levy of additional surcharge:

7. *The Levy of additional surcharge is provided in Section 42 (4) of the Act which reads as under:*

> ***42(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.***

8. *From bare perusal of Section 42(4), it may be seen that the State Commission is empowered to levy additional surcharge to meet the fixed cost arising out of obligation to supply. It is submitted that although the levy of additional surcharge is provided in the Section 42 (4) of the Act, Section 43(1) of the Act is foundation for levy of additional surcharge. Section 43 of the Act provides that distribution licensee (DISCOM) has a universal supply obligation (USO) and required to supply power as and when demanded by any owner /occupier of premises in its area of supply. The relevant provision of Act is reproduced as under:*

> *43. Duty to supply on request.–(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application* ***by the owner or occupier of any premises,*** *give supply of electricity to such premises, within one month after receipt of the application requiring such supply:*

9. *The distribution licencee has a duty to supply to each and every premises in its licensed area of supply. Premises also include premises of captive consumer and there is no distinction in this regard under the statute. In other words duty to supply does not come to an end upon the consumer/ owner of the premises decides to avail open access or consume power from own captive generating plant and in terms of the Statutory provision the distribution Licensee has the continued obligation to supply electricity on demand at any time.*

10. *Hon'ble APTEL in petition No**. 1/2006 in case of Hindalco vs WBERC** held that Discom has universal supply obligation towards every* ***owner or occupier of any premises*** *of its area of suppy even if the said consumer is availing supply through captive route. The relevant extract is reproduced as under:*

> *17. The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of*

Section 86(1) (a), Section 42 and Section 49 of The Electricity Act 2003 as well as by loosing sight of the object behind the said provisions. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to ***Sections 42 (2); (4) and Section 62 of The Act****. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area DISCOM / distribution licensee. We have already held so in Appeal No.34 of 2006 Bhusan Steel vs. W.B.E.R.C.*

.....

20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. *Admittedly the appellant's plant in Belurmath is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.*

23. On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP.....

24. There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual relationship with the area distribution licensee or shall cease to be a consumer of the area DISCOM/ Licensee.....

11. It is submitted that the answering respondent who is required to meet the requirement/ demand of all consumers, ***owner or occupier of any premises*** *in its area of supply, enters into long term Power Purchase Agreements (PPA) with generators so as to ensure supply of power on request. While contracting energy through such long term PPAs, the tariff payable to the generators consists of two part viz., capacity charges and energy charges. The answering respondent has to bear the fixed cost*

(capacity charges) even when there is no off take of energy through such source. Therefore, whenever any person takes electricity from any source other than distribution licensee of area, the answering respondent continue to pay fixed charges in lieu of its contracted capacity with generators.

12. *The above leads to a situation where the answering respondent is saddled with the stranded cost on account of its universal supply obligation. The mechanism of additional surcharge is meant to compensate the licensee on this aspect,namely as stated in section 42(4) of the Act to meet the fixed cost of such distribution licensee arising out of his obligation to supply. If this fixed cost of stranded asset is not allowed to be recovered from appellants and other similar consumers consuming power from other source of supply, then in such a case such cost shall be recovered from the other consumers of the answering respondent by increasing their tariff and such other consumers will be cross subsidising the persons taking Electricity from other sources, which would be unfair, unjust and inequitable. This obviously would not have been the intention of the legislature.*

13. *Any immunity from recovery of Additional Surcharge also from persons who have captive generation and consumption would be contrary to the very scheme and provisions of the Act. The Act consciously provides for exemption from charges to captive generation and captive use in a limited aspect namely from payment of cross subsidy surcharge as per sections 38(2)d) – proviso; 39(2)d) – proviso; 40(1)c) – proviso; and 42(2- proviso. However when it comes to section 42(4) dealing with Additional Surcharge there is no such exclusion which makes it abundantly clear that there was no intention to exclude the same for captive generation and captive use.*

14. *The issue of open access and rational behind levy of surcharge came under consideration of the Hon'ble Supreme Court in case of* ***SesaSterlite Limited v OERC & Others (dated 25/04/2014 (2014 8 SCC 444)****.The relevant part of the said judgment is reproduced as under:*

    27. *The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions.* ***There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply.*** *The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs).* ***The mechanism of surcharge is meant***

to compensate the licensee <u>for both of these aspects.</u>

28. *Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers* ***and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply <u>so as to ensure that the consumers do not go out of their fold to get supply from some other source.</u>***

29. *With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorised to frame open access in distribution in phases with surcharge for:*
(a) current level of cross-subsidy to be gradually phased out along with cross-subsidies; and
(b) obligation to supply.

30. *Therefore, in the aforesaid circumstances though CSS is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee.* ***In nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers.*** *What is important is that a consumer situated in an area is bound to contribute to subsidizing a low-end consumer, if he falls in the category of subsidizing consumer. Once a cross-subsidy-surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area.* ***A fortiori, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay Cross Subsidy Surcharge under the Act. Thus,*** *Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee."*

15. *In view of the above it can be safely concluded that:*

a) *Section 42(4) providing for levy of additional surcharge is aimed to meet the adverse financial situation caused by arrangements made for complying with the obligation to supply,*
b) *The additional surcharge is nothing but compensation from a person who avails power other than from distribution licensee of area.*
c) *The compensatory open access charges are payable notwithstanding the fact that line of distribution licensee are being used or not.*
d) *For levy of additional surcharge, it is sufficient that power is being procured from any source other than the distribution licensee of area.*
e) *Even the captive generating plant falls within the four corner of such 'other source' and there is no restriction regarding status of such other source captive or otherwise.*

16. *It is submitted that Section 42(2) of the Act deals with the 'cross-subsidy surcharge' while Section 42(4) deals with 'additional surcharge'. The Act clearly provides exemption from Cross-Subsidy Surcharge to a person who has established a captive generating plant for carrying the electricity to the destination of his own use [vide fourth proviso to Section 42(2)]. However, no such exemption has been provided with respect to 'Additional Surcharge' under Section 42(4). Thus in any view of the matter, the levy of additional surcharge on the appellant is wholly justified.*

SUBMISSIONS ON ISSUES RAISED BY APPELLANT:

A. Levy of 'Additional Surcharge' is not applicable in those cases where power is being drawn by a consumer from its own 'Captive Generating Plant':

RE: Distinction between Captive Generating Plant (CGP) vis a vis a Non Captive Generating Plant:

5. *Petitioner has sought to create difference in the CGP and non captive generating plant with regard to levy of additional surcharge and it is the submission of the petitioner that in case of CGP both cross subsidy surcharge and additional surcharge are exempted* ***(ref. para 3 of petition).***

6. *In this regard it is stated that petitioners have filed present petition under Section 86(1)(f):*

86. Functions of State Commission.–(1) The State Commission shall discharge the following functions, namely:–

.....

(f) adjudicate upon the disputes between the licensees and ***generating companies*** *and to refer any dispute for arbitration;*

It may be seen that aforesaid provision only provides for the adjudication of disputes between generating companies and licensees. There is no separate provision regarding disputes between captive generating plants and licensees. It only means that as per Act generating companies includes captive generating plant. Accordingly by petitioner's own admission there is no difference in captive generating and other plants as far as levy of

additional surcharge is concerned.

7. *In case of **A.P. Gas Power Corporation Ltd v. A.P. Electricity Regulatory Commission (AIR 2006 AP 12)** the Hon'ble Andhra Pradesh High Court held that except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant. Relevant portion of the ruling of Hon'ble Court, vide order dtd. 27/07/2005 is mentioned below-*

*19. A reading of Sections 9, 39, 40 and 42 of the Act would lead to the ensuing conclusion. A person or a company is entitled to set up a power plant for his/ its exclusive use. The power generated by such captive generating plant set up by a person has to be distributed and transmitted - in a given case; by a distribution licensee or transmission licensee. **These licensees are entitled to collect transmission charges or wheeling charges as the case may be including surcharge from generating companies including from persons who set up captive generating plants but surcharge for cross-subsidy is not leviable on captive generating plant.** That is the reason why the Parliament thought it fit to define 'generating plant' set up by any person for his own use as captive generating plant separately. **Except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant.** This is further made clear by Electricity Rules, 2005. If 26 per cent of the ownership in a plant is held by captive users and 51 per cent of electricity produced is used by them, a generating plant can be treated as a captive generating plant. It only means that the electricity generated over and above 51 per cent has to be necessarily go to the grid, in which event a transmission licensee and distribution licensee come into picture. **Even in the case of distribution and transmission of 51 per cent aggregate electricity generated in a captive generating plant, is to be wheeled to the destination of captive use, the same procedures have to be followed. Merely because a captive generating plant at least to the extent of 51 per cent consumes its electricity for captive use, the State Transmission Utility or a transmission licensee or distribution licensee, cannot discriminate while discharging their duties and functions."***

8. *In view of above as far as levy of open access charges is concerned, except to the extent of non-levy of surcharge for cross-subsidy, there is no distinction in law between a non captive generating plant and captive generating plant. Thus, submission of the petitioners in this regard is contrary to the provisions of the Act and accordingly liable to be rejected.*

RE : 'Whether petitioner consuming power from captive generating plant is 'consumer'?

9. *Petitioners are contending that only a consumer is liable to pay additional surcharge and not the captive consumer. In this regard it is stated that the*

Act defines the term 'consumer' as under:

2(15) —consumer means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force ***and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;***

10. In Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015) , Hon'ble Apex Court held as under:

34……The RE Obligation has not been imposed on the appellants in their capacity as owners of the Captive Power Plants.*……*

37. Further, the contention of the appellants that the renewable energy purchase obligation can only be imposed upon total consumption of the distribution licensee and cannot include open access consumers or captive power consumers is also liable to be rejected ***as the said contention depends on a erroneous basic assumption that open access consumers and captive power consumers are not consumers of the distribution licensees……****The cost of purchasing renewable energy by a distribution licensee in order to fulfil its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted,* ***then such open access consumers or captive power consumers, despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such distribution licensee any time they want, are not required to purchase/sharing the cost for purchase of renewable power. The said situation will clearly put the regular consumers of the distribution licensee in a disadvantageous situation vis-à-vis the captive power consumers and open access consumers who apart from getting cheaper power, will also not share the costs for more expensive renewable power.***

11. *Hon'ble Supreme Court in the case of* ***Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior v. State of M.P (AIR 1963 SC 414)*** *held as under:*

5…… ***A producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself……****….."*

12. *Hon'ble Andhra Pradesh High Court in* ***Rane Engineering Valves Ltd,Vs State of Andhra Pradesh and others (Writ Petition Nos. 6095 of 2004 Dated :19-05-2016)*** *held that a producer of electricity can also be a consumer and such person is playing dual role. The relevant part of the said judgment is reproduced as under:*

*25.12. ……****As held in Jijajee Cotton Mills Ltd that a producer of***

electricity can also be a consumer. Such person is playing a dual role……."

13. *In view of above provision of the Act, petitioners are 'consumer' for the purpose of levy of fixed charges on following counts:*

a. Petitioners are maintaining contract demand or standby arrangement (2000 KVA at 33 KV) with the answering respondent and are being supplied with electricity for their own consumption accordingly.

b. Premises of the petitioners are connected with the works of a licensee for the purpose of receiving electricity.

c. Premises of the petitioner is situated in the area of supply of the answering respondent.

d. Captive consumers are also the consumer of the distribution licensee.

e. A person who has set up a captive generating plant has dual rule, one as a consumer and another as a generator. As per Act additional surcharge is payable in the capacity of consumer and not as generator.

14. *In view of above, petitioner is consumer and accordingly liable to pay additional surcharge.*

RE: Whether arrangement of availing power from captive generating plant amounts to 'supply"?

15. *In this regard petitioner is relying upon the following definitions given in the Act:*

*2(70) —supply, in relation to electricity, **means** the sale of electricity to a licensee or consumer;"*

16. *Relying upon the aforesaid definition petitioner is contending that while consuming power through captive route there is no 'sale of electricity' hence additional surcharge is not payable. It is submitted that the petitioner is relying on the incomplete definition of the term 'supply' given in the Act. The complete definition provided in the Act is reproduced as under:*

"2. Definitions.–In this Act, unless the context otherwise requires,–

*2(70) —supply, in relation to electricity, **means** the sale of electricity to a licensee or consumer;"*

17. *It may be seen that as per Act term 'supply' would means sale unless context otherwise requires. If context requires otherwise the meaning of term 'supply' may vary in the different provisions of the Act.*

18. *Issue of contextual meaning of any term defined in any statute considered by the Hon'ble Supreme Court in the case of **The Vanguard Fire and General Insurance Co. Ltd vs M/s. Fraser And Ross And Another (AIR 1960 SC 971)** . The relevant part of the said judgment is reproduced as under:*

"6.... It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them ***and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word "insurer" in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context.*** *In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word " insurer " as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning."*

19. *The above judgments clearly support the view that, it cannot be stated as an absolute proposition of law that the expression* ***`means'*** *wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be provisions in the very same statute in which meaning of any term may be different depending upon the context.*

20. *It is submitted that in the issue under consideration the context is drawl of power from any source other than the distribution licensee of area and additional surcharge is being levied to compensate the distribution licensee. It is noteworthy to mention that even while performing the duties of common carrier a distribution licensee is only concerned with the conveyance of electricity from point of injection to the point of drawl. Distribution licensee has nothing to do with the commercial arrangement (i.e sale or otherwise) between sender and receiver of the electricity. Therefore in the present context meaning of 'supply' cannot be 'sale' as given in the definition clause.*

21. *Petitioners are contending that they are using dedicated transmission line. Therefore it is necessary to refer the definition of 'dedicated transmission*

line' provided in the Act:

*2(16) —dedicated transmission lines|| means any electric **supply**-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations, or generating stations, or the load centre, as the case may be;*

*It may be seen that dedicated transmission line is nothing but a **supply** line. Therefore, while consuming power from the captive generating plant through dedicated transmission line certainly there is 'supply' of electricity by captive generating plant to the premises of the captive consumers even though 'sale of electricity' may not taking place.*

22. *With regard to meaning of term 'supply' used in the Section 42(4) kind attention of the Hon'ble Commission also drawn to the following two definitions provided in the Act:*

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

*Section 2(29)—generate means to produce electricity from a generating station for the purpose of giving **supply** to any premises or enabling a **supply** to be so given;.*

From the combined reading of aforesaid two definitions it can be safely concluded that:

*a. A Captive generating plant **generates** electricity primarily for use of its owners.*

*b. Electricity whenever **generates** it would be for giving **supply** to any premises. In other word, except for the purpose of **supply** there cannot be any generation of electricity.*

Therefore, contention of the petitioner that although they are generating electricity from captive generating plants but there is no 'supply' of electricity is contrary to the aforesaid provisions of the Act.

23. *Hon'ble Supreme Court in the matter of **Civil Appeal No. 1879 of 2003 Karnataka Power Transmission Corpn. & Anr. Vs Ashok Iron Works Pvt. Ltd. (AIR 2009 SUPREME COURT 1905)** held that supply of electricity doesn't mean sale. The relevant part of the said judgment is reproduced as under:*

21. Section 49 of The Electricity (Supply) Act, 1948 makes the following provision :

*[49. **Provision for the sale of electricity by the Board to persons other than licensees.** - (1) Subject to the provisions of this Act and of regulations, if any made in this behalf, the Board **may supply electricity** to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.*

.....

*22. Whether the supply of electricity by KPTC to a consumer is sale and purchase of goods within the meaning of Section 2(1)(d) (i) of the Act, 1986? We do not think so. **Although title of Section or marginal note speaks of "the sale of electricity by the Board to persons other than licensees" but the marginal note or title of the Section cannot afford any legitimate aid to the construction of Section. Section 49 speaks of supply of electricity to any person not being a licensee upon said terms and conditions as a Board thinks fit and for the purpose of such supply free uniform tariffs. This Court has already held in Southern Petrochemical Industries (supra) that supply does not mean sale.***

.....

*24. Learned counsel urged that the definition 'service' is of limited nature and is limited to the providing facilities in connection with electricity. According to him, the facility is an expression which facilitates the supply of electricity to an installation and the definition of service does not cover supply of electricity. **This contention of the learned counsel is founded on erroneous assumption that supply of electricity is a sale of electricity and the use of expression 'supply' is synonym for 'sale'. We have already noticed above, which we need not repeat, that supply of electricity to a consumer by KPTC is not sale of electricity. The expression 'supply' is not synonym for 'sale'.** We reiterate what has been stated by this Court in Southern Petrochemical Industries Co. Ltd. (supra) **that supply does not mean sale.....”***

In view of above pronouncement of Hon'ble Supreme Court it is clear that 'supply' does not always mean sale and term 'supply' cannot be used as synonym for 'sale' as sought to be established by the petitioners.

***24.** In **Hindustan Zinc Supra** Hon'ble Apex Court held that 'Supply' can be availed by three ways. Following is the relevant extract of the said order:*

*35. ..... total consumption in an area of a distribution licensee can be by three ways either **supply through distribution licensee** or **supply from Captive Power Plants** by using lines and transmissions lines of distribution licensee **or from any other source.** The area would always be of distribution licensee as the transmission lines and the system is of distribution licensee, the total consumption is very significant. The total consumption has to be seen by consumers of distribution licensee, **Captive Power** Plants and on supply through*

distribution licensee.

27. *This, Hon'ble Commission in the case of Malanpur (P.No. 02 of 2007) termed the arrangement between captive generating plant and captive user as 'supply':*

> *18. Therefore, the Commission concludes from the combined reading of **Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules,** that captive generating plant and dedicated transmission line can be constructed, maintained and operated by **a person for generation of power and supply to its captive users…….**.*

28. *It is submitted that before enactment of Electricity Act 2003, Madhya Pradesh Vidyut Sudhar Adhiniyam 2000 was in force in the state of Madhya Pradesh. As per section 185 (3) the provisions of the said Act of 2000 so far as not inconsistent with the Electricity Act 2003 is still in force. Section 2 (r) of the MP Act of 2000 defines the term 'supply' has under:*

> *2(r) "Supply" shall include sub-transmission and distribution;*

It is stated that aforesaid definition of term 'supply' is inclusive therefore apart from sale, term supply would also include distribution and other contextual meanings.

29. *Aforesaid conclusion drawn by us found support from the meaning of term 'supply' given in various dictionary:*

Cambridge Dictionary (Source https://dictionary.cambridge.org)

supply

***to provide something that is wanted** or needed, often in large quantities and over a long period of time:*

- *Electrical power is supplied by underground cables.*

Oxford Advance Dictionary

Supply

*Supply v.t (pl. Supplies) ((**सप्लाय**)) to fill up any deficiency, **to furnish what is wanted,***

*n.(pl. Supplied) **providing of what is required** , necessary stores and provision **संचय, सामग्री, आवश्यक पदार्थ, रसद, अवस्यक्ता की पूर्ति, Water Supply ; जल आपूर्ति***

Therefore in the case in hand the term supply is required to assign the same meaning which a common man understand from this term (i.e. providing electricity, to furnish electricity) and not the sale .

30. *It is also noteworthy to mention that in Section 42(4) term **'receive'** is preceded by the term **'supply'**. If for the purpose of section 42(4) 'supply'*

*only means '**sale**' then in that case legislature would have used term '**purchase**' in place of term '**receive**'. Use of term 'receive' further fortifies our conclusion that in the present context 'supply' does not mean sale.*

31. *That, following are the summary of some other provisions of the Act where term 'supply' would have different meaning from what is provided in the definition clause:*

Provisions	***Meaning of term 'supply'***
24. Suspension of distribution licence and sale of utility.–(1) If at any time the Appropriate Commission is of the opinion that a distribution licensee– *(a) has persistently failed to maintain uninterrupted **supply of electricity** conforming to standards regarding quality of electricity to the consumers; or* *……..*	*Here supply means make available electricity and not the sale of electricity. Distribution licensee cannot compromise quality of supply even if it is making available electricity to a captive consumer as common carrier.*
*56. **Disconnection of supply in default of payment**.–(1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, **cut off the supply of electricity** and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:*	*Here the supply means availability of electricity and not the sale. Otherwise distribution licensee cannot disconnect supply even if a captive consumer not makes payment of wheeling charges or other dues of distribution licensee.*
*53. **Provision relating to safety and electricity supply**.–The Authority may, in consultation with the State Government, specify suitable measures for–* *……..;* *(c) **prohibiting the supply** or transmission of electricity except by means of a system which conforms to the specification as may be specified;*	*Here supply means making available electricity. Safety provisions are applicable notwithstanding the sale is being*

	done or not.
Section 139. (Negligently breaking or damaging works): *Whoever, negligently breaks, injures, throws down or damages any material connected with the **supply** of electricity, shall be punishable with fine which may extend to ten thousand rupees.*	*Here expression supply would only mean making available electricity. Any other interpretation would mean that damaging the captive generating plant is not an offence because there is no sale of electricity.*
Section 140. (Penalty for intentionally injuring works): *Whoever, with intent to cut off the **supply** of electricity , cuts or injures or attempts to cut or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with fine which may extend to ten thousand rupees.*	

32. *In view of above it can be safely concluded that whenever a captive generating plant make available electricity to its captive consumer it is nothing but the 'supply' even though it may not be sale.*

33. *In view of above petitioner is liable to pay additional surcharge to the answering respondent.*

B. Levy of 'Additional Surcharge' is not applicable in those cases where there is no open access and no billing of wheeling charges.

RE: Meaning of "open access" and whether use of distribution system necessary for levy of compensatory open access charges:

39. *That, Hon'ble APTEL in case of Chhattisgarh State Power Distribution Co. Ltd. Vs. Aryan Coal Benefications Pvt. Ltd (Appeal No. 119 & 125 of 2009 order dated 09th Feb 2010) held that for levy of compensatory open access charges does not depend on the open access over the lines of distribution licensee. The relevant part of the said judgment is reproduced as under:*

> *16. Section 42 (2) deals with two aspects; (i) open access (ii) cross subsidy. **Insofar as the open access is concerned, Section 42 (2) has not restricted it to open access on the lines of the distribution licensee. In other words, Section 42 (2) can not be read as a confusing with open access to the distribution licensee.***
>
> *17. The cross subsidy surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, **is a compensatory charge.** It does not depend upon the use of Distribution licensee's line. **It is a charge to be paid in compensation** to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from*

the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. ***On this principle it has to be held that the cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not.***

In view of above it may be concluded that for levy of compensatory open access charges open access i.e use of the distribution system is not mandatory.

40. *Hon'ble Supreme Court in* ***Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Others (Civil Appeal No. 5479 of 2013) supra*** *has considered the scheme of open access surcharges and held that both the cross subsidy surcharge as well as additional surcharge is compensatory in nature. It is submitted that petitioners have sought to treat the cross subsidy surcharge and additional surcharge differently whereas Hon'ble Supreme Court in the aforesaid judgment clearly considered the both the surcharges as compensatory in nature. Accordingly open access or use of distribution is not a prerequisite for levy of compensatory open access charges.*

41. *Kind attention of the Hon'ble Commission also drawn to the fact that Section 42(4) uses two terms* ***'consumer'*** *or* ***'class of consumers'*** *alternatively. So, if State Commission by way of Regulations permitted open access to a particular 'class of consumers' and a consumer who is consuming power from other source of supply comes within that* ***'class of consumers'****, additional surcharge shall be payable by such consumer on the consumption done from other source of supply.*

39. *Here, it is also noteworthy to mention that a continuous support from the grid is being provided to the petitioner. In this regard kind attention is drawn towards the findings of Hon'ble UERC in the matter of* ***M/s Amplus Solar Power Pvt. Ltd. & another V.s Uttarakhand Power Corporation Ltd. & another (petition No. 04 of 2018). The relevant part is reproduced as under:***

"Accordingly, the consumer will not be liable to pay Wheeling Charges and transmission charges as the grid will not be used for supply of power from generating plant to the consumer. However, a continuous support from the grid will be provided for reference voltage synchronization to operate inverters. Section 2(47) of the Act defines open access as "the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;".

Hence, the arrangement of taking continuous support of the grid

by the generator for supplying power to the consumer is akin to sale under open access. Therefore, the consumer shall be liable to pay cross subsidy surcharge and additional surcharge, if any,as determined by the Commission from time to time. The consumer is not required to apply for open access since it is not using the lines of the licensee."

40. *Thus petitioners are availing continuous grid support, in the form of contract demand or standby arrangement, to run their respective factories/ manufacturing units. Accordingly, petitioners are liable to pay additional surcharge.*

41. *Without prejudice the submission that use of distribution system/open access is not a prerequsit for levy of compensatory open access charges it is submitted that as per provision of Section 2(72), 2(19) read with Rule 4 of the Electricity Rule 2005, the system between the delivery points on the transmission line/generating station and point of connection to the installations of the consumer forms part of the distribution system notwithstanding of its voltage.*

RE: Additional surcharge can be levied only when there is levy of wheeling charges?:

42. *That, contention of the petitioner is that since wheeling charges are not being billed additional surcharge would also not be applicable is without any merit. In this regard it is settled legal position that the nomenclature that legislature has ascribed to any levy does not determine either the nature of the levy or its true and essential character. The legislature may choose a label for a levy. The label however will not determine or for that matter clarify the nature of the levy. The essential character of levy has to be deduced from the nature of the levy and the event upon which levy shall attract.*

43. Clause 8.5.4 of the Tariff Policy 2016 provides as under:

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

44. *It may be seen that wheeling charges is being levied for recovery of network cost whereas additional surcharge is being levied for stranded power capacity. Accordingly natures of both levies are different and both are being levied for different purposes. Therefore, even if wheeling charges are not being billed, additional surcharge is payable.*

45. *Petitioner is relying upon the judgment of Hon'ble APTEL in the matter of of*

Kalyani Steels Limited vs Karnataka Power Transmission (Petition No. 02/2005 order dated 29/03/2006). The relevant part of the said judgment is as under:

40. In the present case and on the admitted facts, no part of the distribution system and associated facilities of the ***first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the Appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to Appellant's plant.*** *Therefore, the definition as it stands, the Appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the Appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the Appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission.*

46. *It is submitted the aforesaid judgment is not applicable in the present circumstances of the case due to following reasons:*

46.1. In a later judgement Hon'ble Supreme Court in Sesa Sterlite treated the both cross subsidy surcharge and additional surcharge compensatory and held as leviable irrespective of fact that network of distribution licensee used or not.

46.2. In that case consumer was connected directly to CTU :

Hon'ble Maharastra Electricity Regulatory Commission in the matter of ***Indorama Synthetics (India) Limited. V/s Maharashtra State Electricity Distribution Co. Ltd.(Case No. 344 of 2019) ,*** *considered the applicability of additional surcharge in the absence of billing of wheeling charges. Vide order dated dated 31/12/2019 Hon'ble MERC held as under:*

Issue 2:- Whether ASC is applicable to IRSL being an EHV consumer connected to InSTS?

27. IRSL contends that it is connected directly to the 220 KV system of STU/MSETCL as a part of InSTS. Therefore, no part of distribution system and associated facilities is being used by IRSL for drawing/wheeling power through STU, from injecting point to IRSL's plant. Regulation 14.6 (b) of the DOA Regulations provides that wheeling charges shall not be applicable in case a Consumer or Generating Station is connected to the Transmission System directly. ***Since IRSL is not liable to pay wheeling charges, the question of payment of ASC on wheeling charges does not arise.***

37. ***IRSL has further contended that in its Judgment dated 20 November, 2015 in Appeal No. 84 of 2015, the ATE has held that no*** *wheeling charges and additional charges are payable if no part of distribution system and associated facilities of the Distribution Licensee is used and that this Judgment has been upheld by the Hon'ble Supreme Court.*

38. On this contention, the Commission is of view that context of the aforesaid Judgment passed by the ATE is different since the Open Access consumer therein had opted to source power from private generator on long term basis by obtaining Open Access from CTU and not in the Intra-State Transmission Network. Since the consumer therein had become a regional entity, it was not within the jurisdiction of the State Commission and State Commission's Regulations were not applicable for those transactions. *Same is not the case here. In the present case, IRSL continues to be connected to the State's network covered by State Commission's regulatory framework and further it is pursuing its application for CD so as to become a consumer of MSEDCL once again. As per DOA and TOA Regulations it would be binding on IRSL to pay the ASC.*

46.3. *Three judge bench of Hon'ble Apex Court in the matter of* ***Unicorn Industries v.Union of India [2019] 112 taxmann.com 127 (SC) (CIVIL APPEAL NOS. 9237 AND 9238 OF 2019) vide order dated 06/12/2019 overruled the proposition i.e if one kind of duty is exempted, other kinds of duties based thereupon automatically fall:***

Relevant extract of the order of Hon'ble Apex Court in the ***Unicorn Industries v.Union of India*** *:*

"41. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. ***The reason employed in SRD Nutrients (P.) Ltd. (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under***

NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted. *"*

In view of above ruling of Hon'ble Supreme Court additional surcharge is payable even if there is no separate billing of wheeling charges as purpose of levy of additional surcharge is different and there is no exemption in this regard. Further, there is no difficulty in making the computation of additional surcharge.

47. *A reference is drawn towards the Retail Supply Tariff Order 2020-21 issued by the State Commission determining the additional surcharge and the relevant extracts is as under:*

"3.32 The Commission has thus determined the additional surcharge of Rs 0.674 per unit in accordance to the applicable Regulations from the date of applicability of this Retail Supply Tariff order."

It may be seen that additional surcharge is to be levied on per Kwh consumption basis and there is no difficulty in computation of additional surcharge even if there is no billing of wheeling charges. Further the purpose behind levy of additional surcharge and wheeling charges is totally different. Thus additional surcharge is payable even if there is no billing of wheeling charges.

48. *In view of above additional surcharge is payable even if there is no billing of wheeling charges.*

RE: Existence of Stranded capacity:

49. *That, petitioner is claiming that there is no stranded capacity in the instant case. In this regard it is submitted that this Hon'ble Commission while determining the additional surcharge in the Retail Supply Tariff Orders issued from time to time has duly considered the stranding capacity and fixed cost being paid by distribution licensee on that account. The additional surcharge so determined made applicable to all consumer and no exclusion provided with regard to captive consumers. Similarly, the additional surcharge has been made applicable to all consumer notwithstanding the fact that consumer may have contract demand/standby demand with the distribution licensee. Accordingly, these tariff orders have attained finality in this regard. The Tariff order or computation of additional surcharge cannot be challenged in the present proceedings initiated under Section 86(1)(f) of the Act for resolution of dispute.*

RE: Effect of payment of fixed charges (demand Charges/stand by charges):

50. *Petitioner is contending that it is paying demand charges /stand by charges hence no liable to pay additional surcharge {ref para 7(e)}. This claim of petitioner is wholly erroneous on the following grounds:*

50.1. <u>Fixed Cost towards generators not being recovered through Fixed charges and being recovered through energy charges:</u>

50.1.1. *It is submitted that fixed cost of energy is being recovered through energy charges instead of fixed charges. In this regard relevant part of the Regulation 42 to the "Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, {2015(RG-35 (II) of 2015} reproduced as under:*

"42. Determination of tariffs for supply to consumers

42.1. The Commission shall determine the charges recoverable from different consumer categories based on the following principles:

(a) The average cost of energy supplied to consumers and estimated distribution losses shall be recovered as energy charge;

<u>Emphasis supplied</u>

50.1.2. *It may be seen that the cost of energy supplied to consumer along with the distribution loss is being recovered through energy charges and not the fixed charges. Therefore, claim of the petitioner that fixed charges (demand charges/stand by charges) for the contract demand is taking care of its share of fixed cost of liability of the distribution licensee towards its generators is wholly erroneous.*

50.2. <u>Fixed charges (demand charges/standby charges) are being recovered for the supply being availed from distribution licensee and not for the consumption from other source of supply:</u>

50.2.1. *In this regard kind attention is drawn towards the clause 1.5 of the 'General Terms and Conditions of High Tension tariff' provided in the tariff order 2020-21. The same is reproduced as under:*

> ***1.5 Billing demand:*** *The billing demand for the month shall be the actual maximum kVA demand of the consumer during the month or 90% of the contract demand, whichever is higher. In case power is availed through open access, the billing demand for the month shall be the actual maximum kVA demand during the month* ***<u>excluding the demand availed through open access for the period for which open access is availed</u>*** *or 90% of the contract demand, whichever is higher, subject to clause 3.4 of the M.P. Electricity Supply Code, 2013.*

50.2.2. *It may be seen that as per tariff order fixed charges are always billed to any consumer after deducting the demand availed from any other*

source. Hence, fixed charges being paid by the petitioner cannot be attributed to the demand /consumption from other source of supply.

50.3. <u>Fixed charges are not sufficient to recover the fixed cost of the Distribution Licensees:</u>

50.3.1. *The following is structure of the fixed cost and variable cost being incurred by distribution licensees of State as per Tariff Order 2019-20 (ref table 7 read with table 44 of the Tariff order 2019-20) issued by this Hon'ble Commission:*

PROPORTION OF FIXED COST AS PER TARIFF ORDER 2019-20

S.No.	Particular	Amount (Rs. In Crs)	% of Total ARR
1	Total ARR for FY 2019-20	36671.06	100.00%
2	Variable cost (Variable cost of power purchase net of sale of surplus power)	11317.91	30.86%
3	Fixed cost [(1)-(2)]	25353.15	69.14%

PROPORTION OF FIXED CHARGES ACTUALLY BILLED DURING FY 2019-20 FOR WHOLE STATE

S.No.	Particular	Amount (Rs. In Crs)	% of Total ARR
1	Revenue from Sale of Power billed account of fixed Charges and energy charges	35888.45	100.00%
2	Energy charges (Variable Charges)	30163.42	84.05%
3	Fixed charges (Demand charges)	5725.03	15.95%

50.3.2. *It may be seen that while the proportion of the fixed cost of the distribution licenses of the State is approximately 70%, proportion of revenue being actually recovered through fixed charge is only about 16%.*

50.3.3. *It is clear from the above analysis that the Fixed Charges recovery in comparison with the actual Fixed Cost of distribution licensees in the state is significantly lower. Therefore liability of additional surcharge cannot be escaped on account of payment of fixed charges on reduced contract demand.*

<u>RE: Effect of Section 9 of the Act on the liability of Open Access charges:</u>

51. *That, petitioners are contending that open access availed by any captive generating plant/captive consumer is governed by the provisions of Section 9 and not by the provisions of Section 42. Hence, captive consumers are exempted from levy of open access charges i.e cross subsidy surcharge and additional surcharge.*

52. *In this regard it is stated that Section 9 comes within the Part III of the Act, which deals with the subject matter of 'Generation'. The said section is reproduced as under:*

9. Captive Generation: -- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be;

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

53. *It may be seen that Section 9(2) merely confers right of open access to the destination of use. However, what the 'open access' is as per scheme of the Act is not provided in the Section 9. Section 2(47) of the Act, defines the term 'Open Access' as under:*

2(47) —open access means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation ***in accordance with the regulations specified by the Appropriate Commission;***

54. *As per aforesaid definition it may be seen that open access shall always be subject to regulation issued by this Hon'ble Commission. The aforesaid definition of open access cover every person engaged in the generation i.e captive or otherwise. Hence, open access under section 9(2) is also subject to Regulations of the Hon'ble Commission. As can be seen from the Open Access Regulation issued by this Hon'ble Commission wheeling charges, additional surcharge and cross subsidy surcharge are three different open access charges being levied for three different purposes. Except cross subsidy surcharge which is exempted by the Act itself captive consumers are liable to pay all other open access charges.*

55. *It is submitted that provisions of Section 9 are in the nature of enabling provision to set up the plant and for evacuation of power from such plant.*

None of these provisions are dealing with the open access charges for supply of power from captive generating plant to captive consumers. Thus, it can only be concluded that as far as issue of levy of open access charges is concerned, respective provisions of the Act (i.e Section 38- Central Transmission Utility, Section 39-State Transmission utility, Section 40- Transmission licensee, Section 42-Distribution licensee), are equally applicable for the captive generating plant and non captive generating plant. This, conclusion found supports from the fifth proviso to section 39 (2)(d), fifth proviso to section 39 (2)(d), fifth proviso to section 40 (c) and fourth proviso to section 42(2) of the Act vide which specific exemption has been granted to captive consumer from the levy of cross subsidy surcharge. Since, there is a specific mention of captive generating plant in Sections 38/39/40/42 of the Act, it cannot be contended by the petitioner that captive generating plants are not governed by these provisions and solely comes under Section 9. Further, in that case there was no need to provide exemption from the cross subsidy surcharge vide fourth proviso to section 42(2).

56. *In view of above, it can be safely concluded that Section 9 of the Act does not provides any immunity to any person setting up a captive generating plant from the levy of any statutory charges. Accordingly, reliance upon the Section 9 to escape the liability of additional surcharge is misplaced. As such petitioner is liable to pay additional surcharge to the answering respondent.*

57. ***Judgements relied upon by the petitioner either over ruled by Hon'ble Apex Court or decided in different factual circumstances hence not applicable :***

57.1. ***Judgment of Hon'ble APTEL in case of Kalyani Steels Limited vs Karnataka Power Transmission (Petition No. 02/2005 order dated 29/03/2006):***

Extract of Kalyani Steels	*Remark*
37. As regards the second point, as to liability of pay surcharge on transmission charges claimed by the Respondents, it is seen that Section 39 prescribes functions of State Transmission Utility and one of them being to provide non-discriminatory Open Access. Section 42(2) provides that a State Commission shall introduce Open Access. Proviso to Sub-section (2) of Section 42 enables the State Commission to allow Open Access even before elimination of cross subsidies on payment of surcharge in addition to the charges for wheeling as may be determined by the State Commission. Sub-section (4) of Section 42 provides for additional surcharge on the charges of wheeling as may be specified by the Commission. Sub-section (4) of Section 42 reads thus: ***(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such***	*(1) Kalayni Steel creates the distinction in the levy of cross subsidy surcharge and additional surcharge whereas Hon'ble Supreme Court in Sesa Sterlite supra treated both the charges similarly being compensatory in nature. Therefore, Kalayni Steel stands*

consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. ***A plain reading of this Sub-section would show that a consumer is liable to pay additional surcharge, only if he is liable to pay charges of wheeling and not otherwise.*** *38. Per contra proviso to Sub-section (2) of Section 42 provides for payment of surcharge in addition to charges for wheeling as may be determined by the State Commission. Sub-section (2) of Section 42 reads thus:* *(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operations constraints:* ***PROVIDED that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:*** ***.....*** ***As seen from the first proviso of Sub-section (2) of Section 42 for Open Access, surcharge is to be imposed in addition to the charges for wheeling. Therefore, even if wheeling charges are not payable, the open access consumer has to pay surcharge.***	*overruled by Hon'ble Apex court and no more a good law.*
40. In the present case and on the admitted facts, no part of the distribution system and associated facilities of the ***first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the Appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to Appellant's plant.*** *Therefore, the definition as it stands, the Appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the Appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the Appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission.*	*(2) In case of Kalyani Steel, petitioner was connected directly to central Transmission utility and not the intrastate transmission/ distribution network. Hon'ble MERC in the Indorama Supra has clearly distinguished such cases from the cases where consumer is connected to the intrastate transmission/*

	distribution system.

57.2. Judgment of Hon'ble APTEL in case of M/s JSW Steel Ltd. Vs Maharashtra Electricity Regulatory Commission (Appeal No. 311/315 of 2018 order dated 27/03/2019):

S.No	*Extract of JSW Steel*	*Remark*
1	*55. From reading of sub-section (2) of Section 42 which refers to open access for conveyance of electricity, whereas in Section 42(4), the words are chosen cautiously and carefully which refers to a condition. In other words, Section 42(4) is conditional* ***upon supply of electricity as defined in the Act****. In the case of captive generating plant, it is possible to have captive consumers in terms of Rule 3 of 2005 Rules read with Section 9 of the Act.*	*Hon'ble APTEL considered the meaning of term supply as 'sale'. However attention of the Hon'ble APTEL not invited on the judgment of Hon'ble Supreme Court in the matter of* ***Karnataka Power Transmission Corpn supra*** *in which Hon'ble Apex Court held that supply does not mean sale.*
2	***71. It is relevant to refer to Section 39 of the Act which speaks of surcharge in general and not with reference to cross subsidy surcharge. Similar provisions are made in Sections 38 and 40. In these three provisions, i.e., 38, 39 & 40 it refers to open access in the context of sub-rule (2) of Section 42. It also refers to surcharge and cross subsidy in general but it does not restrict it to sub section (2) of Section 42. In that context, the surcharge, referred to, would include additional surcharge referred at sub-section (4) of Section 42 of the Act.*** *Therefore, it is clear that the provisions with reference to surcharge, cross subsidy, referred to in sections 38, 39 and 40, is in the context of open access, which is allowed for conveyance of electricity, but not in the context of either cross subsidy surcharge or additional surcharge. In other words, these provisions i.e, Section 38(2)(d)(ii) and Section 39(2)(d)(ii) and Section 40(c)(ii) and proviso to sub-section (2) of Section 42 of the Act deal with the manner of procedure how this surcharge has to be utilised. .....*	*With due respect to the Hon'ble APTEL it is submitted that while recording these findings attention of Hon'ble APTEL not invited on the some relevant provisions of the Act as well as applicable judgment of the Hon'ble Apex Court on the aspect that surcharge referred in Section 38, 39 and 40 cannot be said to include the additional surcharge because as per first proviso to Section 38 (1) & Section 39(1) read with third proviso to Section 41 transmission licensee cannot be enter into the business of purchase and sale of power and accordingly question of levy of additional surcharge for obligation to supply does not arise in respect of transmission open access. Relevant part is reproduced as under:* *"38. Central Transmission Utility and functions.–(1) The Central Government may notify any Government company as the Central Transmission Utility:* ***Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading***

		in electricity ***……."*** *"39. State Transmission Utility and functions.–(1) The State Government may notify the Board or a Government company as the State Transmission Utility:* ***Provided that the State transmission Utility shall not engage in the business of trading in electricity:*** *41. Other business of transmission licensee.–A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilisation of its assets:* ***Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity.***
3	***71……. The utilisation of additional surcharge is also meant for sharing the burden of fixed cost of power purchase and also for meeting the requirements of current level of cross subsidy existing in the tariff of the distribution licensees. …….***	*As per para 25 of judgment of Sesa Sterlite supra Hon'ble Supreme Court clearly held that cross subsidy surcharge and additional surcharge are being levied for following two different purposes:* ***a.*** *Cross subsidy surcharge to take care of the requirements of current levels of cross-subsidy,* ***b.*** *Additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply.* *Therefore, while recording findings that Additional surcharge is also meant for sharing the burden of cross subsidy attention of the Hon'ble APTEL not invited towards the above pronouncement of Hon'ble le Apex Court.*

4	*71.....The obligation of distribution licensee to supply power on the tariff approved by the Commission, which includes fixed cost of such distribution licensee and the same gets stranded when State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply. If the consumer or group of consumers change their source of supply since distribution licensee has the obligation to meet fixed cost if such quantum of power gets stranded as consumer or group of consumers go out of the purview of distribution licensee of such area, the statute imposes an obligation on such consumer or consumers to pay additional surcharge. This would not apply to captive consumers.*	*Hon'ble Supreme Court in Hindustan Zinc supra categorically held that captive consumers are also the consumer of the distribution licensee. Thus, while treating captive consumer differently attention of Hon'ble APTEL not invited towards the pronouncement of Hon'ble Apex Court in Hindustan Zinc Supra.*
		(1) The judgment of Hon'ble APTEL in JSW Steel case is contrary to its own co-ordinate bench judgment in the Petition No. 01 of 2006 in which vide order dated 11.06.2006 Hon'ble APTEL upheld order of the West Bengal Electricity Regulatory Commission, levying additional surcharge on captive user. Accordingly, this judgment is not a binding precedent.
		(1) The operation and implementation of JSW judgment of Hon'ble APTEL has been stayed by the Hon'ble Supreme Court. As intimated by the concerned officer of the Maharashtra Discom that in the light of stay order of Hon'ble Supreme Court, captive consumers are making payment of additional surcharge to the Discom. Accordingly, Discoms of Madhya Pradesh cannot be differentiated with regard to payment of additional surcharge by the captive consumers.

C Petitioner's 52 MW captive power plant is based on co-generation and is therefore, liable to be the promoted and protected as per the provisions of Section 86(1)(e) (ref para 4):

58. *It is the submission of the petitioner that its 52 MW captive power plant is*

based on co-generation and is therefore, liable to be the promoted and protected as per the provisions of Section 86(1)(e). The eligibility of the petitioner's plant as 'co-generation plant' is not the subject matter of instant petition. However, it is stated that Section 86(1)(e) does not provides any immunity from any statutory charges payable as per the different provisions of the Act. In this regard it is relevant to mention the provisions of the Regulation 11.2(d) of the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Regulations 2021). The same is reproduced as under:

> *The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.*

It may be seen that this Hon'ble Commission specifically clarified that captive consumers are liable to pay additional surcharge.

59. *Further, Regulation 5.2 of the very same Regulations 2021 provides as under with regard to the ownership of the power evacuation facilities developed by any developer of power plant:*

> *5.2. As per incentive policy for encouraging generation of power in Madhya Pradesh through Non-conventional Energy sources (solar, wind, bio-energy, etc.) issued vide notification dated 17.10.2006 by the Government Madhya Pradesh, the power evacuation will be an integral part of the project and all expenses for power evacuation facility shall be borne by the Developer. Such infrastructure laid, notwithstanding that cost of which has been paid for by the Developer, shall be the property of the concerned Licensee for all purposes. The Licensee shall maintain it at the cost of the Developer and shall have the right to use the same for evacuation of power from any other Developer subject to the condition that such arrangement shall not adversely affect the existing Developer(s).*

60. *It is settled legal position that Regulation once notified shall be treated as part of the Electricity Act 2003. Accordingly, as per explicit provision of the Regulations it is clear that except from the levy of cross subsidy surcharge captive consumers are liable to pay all applicable charges including additional surcharge. Further power evacuation infrastructure is the part of the distribution system.*

RE: Issue is already been decided in favour of answering respondent:

34. *Hon'ble APTEL vide order dated 11.06.2006 in case of* ***HINDALCO Industries Limited Vs WBERC Petition No. 01/2006****, upheld the levy of*

additional surcharge on the electricity consumed through captive route. Para 11 of the said judgment recorded the finding of the West Bengal Electricity Regulatory Commission which had been challenged by the consumer before APTEL. The said para is reproduced as under:

*11. The Commission determined the wheeling charges at 83.54 paise/kwh and the same shall be subject to appropriate annual revision. The Commission also concluded that the HINDALCO is liable to pay additional surcharge and the distribution licensee has been directed to submit a report to the Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer **from captive route** and thereafter quantum of additional surcharge payable by the open access customer shall be assessed and determined.*

Hon'ble APTEL has framed the question and answered the same with regarding to levy of additional surcharge in the para 14 and 28 of the said judgment in the following manner:

14. The following points are framed for consideration in this appeal:-

.....

(D) Whether appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003 on being permitted to receive supply from a person other than the distribution licensee of the area?

.....

28. As regards point D regarding payment of additional surcharge, being statutory liability in terms of Sec. 42(4) the learned counsel did not Press the point but contended that in terms of National Tariff Policy, the additional surcharge is payable only if it is conclusively demonstrated that the obligation of a licensee continue to be stranded, we are unable to agree, hence this Point is answered against appellant holding that the appellant is liable to pay additional surcharge on the charges of wheeling, as may be fixed by State Commission in terms of Section 42(4) of the Act.

43. As a result of our discussions, we record our findings as hereunder:

.....

(IV) On point 'D', we hold that the appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003.

36. *This Hon'ble Commission in the Petition No. 02/2007 (M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.) has considered the issue of levy of additional surcharge on the electricity consumed from own Captive Generating Plant without using the distribution system of the licensee. Hon'ble Commission has noted the submission of the*

petitioners in the para 3 and 4 of order dated 22.05.2007. The same is reproduced as under:

3. It has been mentioned in the Petition that the Petitioner's Project is for captive generation of power, for its current captive user shareholders namely SRF, Montage and Supreme. The other sponsor shareholders are Wartsila India Ltd. and Compton Greaves Ltd. The installed capacity of the project is 26.19 MW but fuel tie up has been granted for 20 MW only. Out of this available capacity, the Captive Power Plant, (CPP) users are expected to consume a minimum of 13.90 MW, which translates to 69.5% of the available capacity. ***SRF site being contiguous to the Petitioner's site, it is supplied power through a 6.6 KV cable connection, while supply to other CPP Users shall require 33 kV dedicated transmission line to be constructed.*** *The Petitioner has submitted that the Captive users of the petitioner company have contributed requisite equity throughout the development of the project and shall always maintain the minimum of 26% of shareholding; thus satisfying all the relevant statutory requirements.*

4. It is also submitted that the petitioner Company is a Special Purpose Vehicle owning, operating and maintaining a generating station and has no other business or activity. ***Neither distribution license under section 14 of the Act is required by the Petitioner nor cross subsidy surcharge or additional surcharges under section 42 (2) and 42(4) of the Act are payable by the petitioner to the respondents.***

Thereafter considering the provision of the Act and Electricity Rule 2005 Hon'ble Commission upheld the levy of additional surcharge in the followings terms:

"17. The Commission is not in agreement with the argument of the respondent that he is entitled to recover the cross subsidy surcharge as per provisions of Section 42(2) of the Act. It is provided in the 4th proviso of Section 42(2) that such charge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use. Besides, the meaning of the words "primarily for his own use" has been made clear in Rule 3 as mentioned above. Therefore, the respondent is not entitled to recover cross subsidy surcharge under section 42(2) of the Act in this case. The petitioner is a generating plant qualified as a captive generation plant within the meaning of Rule 3 and as such no License is required to supply power from captive generating plant through dedicated transmission line to its captive users. ***The Commission agrees with the respondent that as per Section 42(4) of the Act, where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling as may be***

specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply……"

18. Therefore, the Commission concludes from the combined reading of Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules, that captive generating plant and dedicated transmission line can be constructed, maintained and operated by a person for generation of power and supply to its captive users. ***However, the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard.***

37. *In view of aforesaid judicial pronouncement petitioners are liable to pay additional surcharge on the consumption of electricity through captive route.*

42. *Petitioner is placing reliance upon a later Judgment of coordinate bench of Hon'ble APTEL dated 27/03/2019 in the matter of M/s JSW Steel Ltd. Vs Maharashtra Electricity Regulatory Commission P No. 311 & 315 of 2018. It is submitted that this later judgment of Hon'ble APTEL is given without noticing the earlier coordinate bench judgment in the case of Hindaco supra. Accordingly, the later judgment in JSW Steel supra cannot be treated as binding precedent and present dispute is need to decided by this Hon'ble Commission considering the judgment of Hon'ble APTEL in Hindalco Supra. It is further submitted that the implementation, operation of the JSW judgment of this Hon'ble APTEL dated 27.3.2019(M/s JSW Steel) has admittedly been stayed by the Hon'ble Supreme Court vide its order dated 01.07.2019 in the Civil Appeal No. 5074-5075/2019.*

RE: Precedent value of judgment which has been given without noticing the earlier coordinate bench judgment:

43. Five judge bench of Hon'ble Apex Court in National Insurance Company Limited V.s Pranay Sethi and Ors. SLP (Civil) NO. 25590 of 2014 vide order dated Oct 31, 2017 held as under:

1. Perceiving cleavage of opinion between ***Reshma Kumari and others v. Madan Mohan and another*** *and* ***Rajesh and others v. Rajbir Singh and others*** *, both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Company Limited v. Pushpa and others thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us.*

……

15. The aforesaid analysis in Santosh Devi (supra) may prima facie show that the two-Judge Bench ***<u>has distinguished the observation</u>*** *made in Sarla Verma's case but on a studied scrutiny, it becomes clear that it has really expressed a different view than what has been laid down in Sarla Verma (supra). If we permit ourselves to say so, the different view has been expressed in a distinctive tone, for the two-Judge Bench*

had stated that it was extremely difficult to fathom any rationale for the observations made in para 24 of the judgment in Sarla Verma's case in respect of self-employed or a person on fixed salary without provision for annual increment, etc. This is a clear disagreement with the earlier view, and we have no hesitation in saying that it is absolutely impermissible keeping in view the concept of binding precedents.

16. Presently, we may refer to certain decisions which deal with the concept of binding precedent.

17. In State of Bihar v. Kalika Kuer alias Kalika Singh and Others ((2003) 5 SCC 448) , it has been held:-

"10. … an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. ***The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. …****"*

The Court has further ruled:-

"10. … Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

29. We are compelled to state here that in Munna Lal Jain (supra), the three-Judge Bench should have been guided by the principle stated in Reshma Kumari which has concurred with the view expressed in Sarla Devi or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari being earlier in point of time would be a binding precedent and not the decision in Rajesh.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in ***Santosh Devi*** *should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in* ***Sarla Verma,*** *a judgment by a*

coordinate Bench. ***It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.***

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

44. *In view aforesaid pronouncement of constitution bench of Hon'ble Apex Court it is clear that since Jindal Steel Supra is decided by Hon'ble APTEL without taking note of Hindalco supra, which was delivered at earlier point of time, the decision in Jindal Steel is not a binding precedent.*

45. *Again* ***Hon'ble Supreme Court in the matter of Dr. Vijay Laxmi Sadho Appellant v. Jagdish (AIR 2001 SC 600)*** *held as under:*

*28. As the learned single Judge was not in agreement with the view expressed in Devilal's case, it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distrees that the said course was not followed. It is well settled that if a Bench of coordinate jurisdiction disagress with another Bench of coordinate jurisdiction whether on the basis of "**different arguments"** or otherwise, **on a question of law,** it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."*

46. *In the present case binding judgment of Hindalco supra has not placed before Hon'ble APTEL while deciding the Jindal Steel hence now as held by Hon'ble Supreme Court in* ***Pranay Sethi supra and Vijay Laxmi Sadho*** *petitioner cannot disagree with the judgment of Hindalco based on 'different argument' or otherwise on a question of law.*

47. *In view of above factual matrix and judicial pronouncement it is clear that instant dispute is already been decided by Hon'ble APTEL in favour of answering respondent in the Hindalco supra and the said judgment is a binding precedence.*

RE : Other relevant judicial pronouncements in support of claim of Respondent :

61. *The similar contention of dependency of levy of additional surcharge on wheeling charges came before consideration of Hon'ble Rajasthan High Court in the matter of D.B. CIVIL WRIT PETITION NO.3160/2016 (Hindustan Zinc Limited v. The Rajasthan Electricity Regulatory Commission, Jaipur & Ors. Vide order dated 29/08/2016 rejecting the contention of the petitioners*

Hon'ble High Court held as under:

35. While coming to the specific regulations, learned counsel appearing on behalf, of the petitioner submits that regulation 17 provides that "a consumer availing open access and receiving supply of electricity from a person other than the Distribution Licensee of his area of supply ***shall pay to the Distribution Licensee an additional surcharge, in addition to wheeling charges and*** *cross subsidy surcharge, to meet the fixed cost of such Distribution Licensee arising out of his obligation to supply as provided under sub-section(4) of section 42 of the Act".*

36. According to this provision, the consumer availing open access and receiving supply of electricity, is subjected to an additional surcharge in addition to wheeling charges and cross subsidy surcharge. Section 42(4) of the Act of 2003 ***restrict liability to pay additional surcharge on the charges of wheeling only.*** *The additional surcharge imposed under regulation 17, thus, is beyond the competence to levy additional surcharge under Section 42(4).*

37. ***The respondent Commission*** *defended the additional surcharge with assertion as under:-*

"11/A. That with reference to ground KK(i) and (ii), it is denied that Regulation 17(1) is ultra vires the powers of the State Commission as being beyond the scope of Section 42(4) of the Act of 2003 read with National Tariff Policy. The reasons for this have been adverted to in the preliminary submissions and are not being repeated herein in order to avoid prolixity. Without prejudice to the aforegoing submissions, it is submitted that the contention of the petitioner that captive use of self-generated power through the usage of wheeling network of distribution licensee is excluded from the purview of levy of additional surcharge, is totally misconceived. It is submitted that the Act of 2003 does not exempt captive generating plants from being liable to pay the additional surcharge on the charges of wheeling as would be clear from a reading of Section 42(4) thereof, which is extracted below :

"42. Duties of Distribution Licensees and Open Access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed costs of such distribution licensee arising out of his obligation to supply."

It would be clear from a plain reading of the aforesaid section that there is no exemption from the levy of additional surcharge as far as captive generating plants are concerned."

38. On consideration of the provisions of regulation 17 in light of Section 42(4) of the Act of 2003, we noticed that Regulation 17(2) nowhere indicates that determination of additional surcharge would be independent of the charges of wheeling. ***It refers additional surcharge in addition to wheeling charges, but, the expression "additional surcharge on the charges of wheeling" does not necessarily mean that the additional surcharge to meet the fixed costs of the distribution licensees are also required to be calculated alongwith the wheeling charges or should be inextricably linked with the wheeling charges. The additional surcharge can very well be determined independently and dehors the wheeling charges. The tariff policy also nowhere indicate that the additional surcharge should be inter-linked with the wheeling charges or should be decided alongwith and inextricably linked with wheeling charges.*** *……".*

62. *MPERC (Terms and Conditions for Intra State Open Access in Madhya Pradesh) Regulations, 2005 provides as under:*

13: CHARGES FOR OPEN ACCESS

13.1 The licensee providing open access shall levy only such fees or open access charges as may be specified by the Commission from time to time. The principles of determination of the charges are elaborated hereunder. The sample calculation are enclosed as annexure –I.

b. Wheeling Charges –. The Wheeling charges for use of the distribution system of a licensee shall be regulated as under, namely: -

……

……

f. Surcharge – The Commission shall specify the cross subsidy surcharge for individual categories of consumers separately.

g. Additional Surcharge – The Commission shall determine the additional surcharge on a yearly basis.

It may be seen that similar to Rajasthan, open access Regulation of Madhya Pradesh as well as tariff order issued by this Hon'ble Commission prescribed the levy as ***"Additional Surcharge"*** *and not the* ***"Additional surcharge on charges of wheeling".***

63. *Similarly, Hon'ble Haryana Electricity Regulatory Commission in the matter of M/s Toshiba Corporation V.s Managing Director Dakshin Haryana Bijli Vitran Nigam Limited (Case No. HERC/PRO-23 of 2012) upheld the liability of additional surcharge even if there is no use of distribution system. The*

relevant part of the said judgment is reproduced as under:

*In view of above discussions the Commission holds that the Petitioner can supply power from its proposed generating plant to the industrial consumer **through dedicated transmission lines** considering the load center as a consumer under section 10 (2) read with section 42 (2) and shall be liable to pay the cross subsidy surcharge to the distribution licensee **and the additional surcharge as applicable under the regulations framed by the Commission.** Accordingly the issue framed at (iii) is answered in negative i.e. cross–subsidy and additional surcharge as decided by the Commission from time to time shall be payable by the Petitioner.*

Having observed as above, the Commission orders as under:

i).....

ii).....

iii).....

iv)** Open access may be sought by consumers collectively or the Generator **for the limited purpose of energy accounting to facilitate levy of cross – subsidy surcharge and additional surcharge.

v).....

*vi) Cross – subsidy surcharge **and additional surcharge** as decided by the Commission for relevant years shall be payable by the Consumers / Generator to the distribution licensee(s) of the area.*

64. *Aforesaid order of Hon'ble HERC has been challenged before Hon'ble APTEL in the matter of Dakshin Haryana Bijli Vitran Nigam Limited, Haryana v Toshiba Corporation Through Its Smart Community Division-1, Tokyo and others (Appeal No. 254 of 2013). Vide order dated 29/05/2015 Hon'ble APTEL confirmed the order of the Hon'ble HERC in the following terms:*

*22. ..... Though 'Toshiba' has clearly stated that it shall not use the distribution or transmission network of distribution or transmission licensee of the area of supply, but the State Commission even then had made it liable to pay cross subsidy surcharge and other additional surcharge as decided by the State Commission under the concerned Regulations to the distribution licensee, the appellant herein. **In the impugned order proper arrangement has been made to ensure that the distribution licensee, the appellant herein, would be properly compensated through the payment of cross subsidy surcharge and additional surcharge, if any, found fit by the State Commission.***

65. *The aforesaid order of Hon'ble APTEL has been challenged before Hon'ble Supreme Court in Civil Appeal No. 5318 of 2015. Vide order dated 20/07/2015 Hon'ble Apex Court dismissed the civil appeal confirming the order of the Hon'ble APTEL. The relevant part of the said order is reproduced as under:*

We have heard senior counsel appearing for the appellant. We

do not find any merit in this appeal.
The same is, accordingly, dismissed

RE: Binding nature of Hon'ble Supreme Court's Judgments:

66. *The Hon'ble Supreme Court in* ***Suganthi Suresh Kumar vs. Jagdeeshan AIR 2002 SC 681*** *held as follows: -*

"9. It is impermissible for the High Court to overrule the decision of the Apex Court ***on the ground that the Supreme Court laid down the legal position without considering any other point.*** *It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia v. Union of India [(1988) 2 SCC 587 : AIR 1988 SC 1353] that the High Court cannot question the correctness of the decision of the Supreme Court* ***even though the point sought before the High Court was not considered by the Supreme Court."***

67. *Hon'ble Supreme Court in* ***Ballabhadas Mathurdas Lakhani vs Municipal Committee, Malkapur (AIR 1970 SC 1002)*** *approving the binding nature of judgment of Hon'ble Supreme Court even if relevant provisions were not brought to the notice of the court held as under -*

4.....The decision was binding on the High Court and the High Court could not ignore it because they thought that ***"relevant provisions were not brought to the notice of the Court".***

68. *Further it has been held in the various judgment of Hon'ble Apex Court that a pronouncement by Hon'ble Apex Court even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the all other courts of the country as per article 141 of the Constitution. The relevant extract of these judgments are reproduced as under:*

a. ***Peerless General Finance and Investment Co. Ltd. vs. Commissioner of Income Tax AIR Online 2019 SC Online 511*** *(Civil Appeal No. 1265 of 2007, decided on 19.07.2019):*

"10 ***While it is true that there was no direct focus of the court on whether subscriptions so received are capital or revenue in nature, we may still advert to the fact that this court has also on general principles, held that such subscriptions would be capital receipts and if they were treated to be income this would violate the Companies Act.*** *It is, therefore, incorrect to state, as has been stated by the High Court, that the decision in Peerless General Finance and Investment Co. Limited vs. Reserve Bank of India [(1992) 2 SCC 343] must be read as not having laid down any absolute proposition of law that all receipts of subscription at the hands of the assessee for these years must be treated as capital receipts.* ***We reiterate that though the Court's focus was not directly on this, yet, a pronouncement by this***

Court, even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the High Court…."

b. *Sarwan Singh Lamba and others Appellants v. Union of India and others Respondents. (AIR 1995 SUPREME COURT 1729):*

(B) Constitution of India, Art.141 - ***Obiter dictum by Supreme Court - Is expected to be obeyed and followed.***

19. Now we come to the next question, viz., whether non-compliance with the direction regarding the High Powered Selection Committee vitiates the amendment. ***Normally even an obiter dictum is expected to be obeyed and followed.***

c. *Sanjay Dutt v. State Through C. B. I. ((1994) 5 SCC 402)*

8. ***Since even the obitor dicta of this Court is said to be binding upon other courts in the country*** *and also because the interpretation placed upon Section 5 by the learned judge amounts to reading the words into section 5 which are not there and further because interpretation of Section 5 one way or the other is likely to affect a large number of cases in the country, we think it appropriate that the matter is pronounced upon by the Constitution Bench so as to authoritatively settle the issue.*

d. *Hon'ble High Court of Madras in its recent judgment in the matter of Qdseatamon Designs Private Limited, Chennai vs P.Suresh (Application No. 6025 of 2018 in Civil Suit No. 632 of 2017 dated 20-11-2018) held as under:*

(q) Therefore, the issue is further narrowed down as to whether sub silentio is an exception to Article 141.

……

(w) Therefore, I have no hesitation in my mind that statement of law made by Supreme Court is declaration of law within the meaning of Article 141. As of today, this principle alone can be followed. In other words, it is not for the High Court to hold that a judgment of Supreme Court is per incuriam or to overlook the statement of law made therein on the ground that some issues pass sub silentio. It is a matter of judicial discipline that this Commercial Division follows the statement of law contained in MAC Charles case as declaration of law within the meaning of Article 141. That the aforesaid point passes sub silentio in MAC Charles cannot be a ground to say that the statement of law made in MAC Charles ceases to be a declaration of law made by Supreme Court within the meaning of Article 141.

69. *In view of above, various pronouncements of supreme Court relied upon by the answering respondent are binding while adjudicating the instant petition.*

70. *In view of above submission this Hon'ble Commission is requested to dismiss the petition and render justice.*

RE: Prayer for Interim relief

39. *It is submitted that prayer of interim stay/relief is devoid of merits. Further there is neither a prima facie case nor balance of convenience lies in favour of the petitioner and the petitioner is not entitled to any interim relief pending disposal of the appeal.*

40. *The petitioner has submitted that {ref para 3 of Application under Section 94 (2)} Hon'ble APTEL vide interim order in the Appeal No. 212 of 2021 (filed by petitioner's Chemical division) after carefully scrutinizing all the documents available on the record was pleased to stay the operation relating to the demand notice of the respondent. Accordingly petitioner is seeking the interim relief/stay in the instant proceedings. This submission of the petitioner is misplaced and contrary to the record.*

41. *In this regard the relevant part of the said order dated 09.08.2021 in the Appeal No. 212 of 2021 is reproduced as under:*

Mr. Sanjay Sen, learned senior counsel arguing for the Appellant submits that in a similar matter in Appeal No. 198 of 2021, there was a protective order so far as the proposed action of the Respondent discom pertains to additional surcharge. On going through the details why O.P. was filed and then appeal, we note that Original Petition came to be filed when the matter was pending before the Respondent Commission and Appellant apprehended some coercive action. Subsequently, appeal was filed because of the disposal of the petition before the Respondent Commission wherein Appellant was saddened with the liability to pay additional surcharge. According to the petitioner though they are captive consumers and they are not having open access benefits, they are not liable to pay any additional surcharge in light of the earlier judgment of this Tribunal in Appeal No. 311/2018. However, Mr. G. Umapathy learned counsel for the Respondent No.2 brings to our notice that operative portion of the judgment of the Tribunal is stayed by the Apex Court. ***Be that as it may, the fact remains till disposal of the petition before the Respondent Commission, the Appellant enjoyed the protective order. Now the Appellant is in Appeal before us aggrieved by the final order of the Respondent Commission. Respondent No.2 Counsel seeks time to file objection to stay application sought by the Appellant. In the interest of justice, we are of the opinion till the IA is heard on merits and disposed of, the Respondent should not take any coercive steps against the Appellant.***

42. *It may be seen that interim protection has been granted by the Hon'ble APTEL , solely on the ground of protection granted earlier in the original*

petition (OP 16 of 2020), ***till application of interim relief heard on merits.*** *IA in this regard still pending before Hon'ble APTEL. Therefore, it cannot be said that Hon'ble APTEL expressed any prima facia view or balance of convenience in the favour of petitioner after scrutinizing all the documents available on the record. Therefore petitioner is not entitled for any relief based on the order dated 09.08.2021 in the Appeal No. 212 of 2021.*

43. *The submission of the petitioner that it is entitled to the grant of interim relief in the light of the interim order dated 26.07.2021 passed by Hon'ble APTEL in the Appeal No. 198 of 2021 and other clubbed appeal is also misplaced as that order is a non speaking order and passed by Hon'ble APTEL solely on the ground of protection granted earlier by the Hon'ble APTEL in the 'Original Petitions' (OP No. 14 of 2020 and 15 of 2020) filed by the appellants earlier doing pendency of proceedings before this Hon'ble Commission. Accordingly petitioner can not avail any benefit from that order as there is no such original petition has been filed in the instant case. The relevant part of the said interim order of the Hon'ble APTEL is reproduced as under:*

20. The issue pertains to levy of additional surcharge on the applicants for the power consumed by the applicants from their captive generating station. On earlier occasion, this Tribunal did pass protective interim orders, we are of the opinion that the present applications deserve to be allowed. We stay the operation of the impugned order of MPERC dated 14.05.2021 in Petition No. 62 of 2020, Petition No. 61 of 2020 and Petition No. 12 of 2020.

44. *It is also pertinent to mention that answering respondent has filed a civil appeal (C.A No. 4851 of 2021) against the interim order of the Hon'ble APTEL dated 26.07.2021 and same is pending before Hon'ble Supreme Court.*

45. *In light of the above, it is stated that the balance of convenience lies in favour of the answering Respondent in light of the settled position of law, provision of the Regulations and the judgments relied herein above. Thus in the respectful submission of the answering respondent, no case for grant of any interim relief is made out. On the contrary grant of any interim relief pending disposal of the petition would cause irreparable hardship to the answering respondent.*

46. *It is submitted that answering respondent is already facing hardship on account of lockdown imposed due to Covid-19 pandemic. Therefore any interim relief in the instant matter will adversely affect the ability of answering respondent to serve its consumer in accordance with the mandate given under the Electricity Act 2003. In this regard, attention is drawn to the observation of Hon'ble Apex Court in the Matter of United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110:*

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees,

etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation."

47. *It is submitted that answering respondent is losing additional surcharge every-month which results in loss of revenue leading eventually to a tariff enhancement for the consumers continuing to receive power from the distribution company. It is well settled that three mandatory aspects have to considered while granting interim relief viz prima facie case, balance of convenience, and irreparable hardship. In the present case, all the three aspects are in favour of the answering respondent in light of the settled position of law, Regulations 2021 and the judgments of the Hon'ble Supreme Court/Hon'ble APTEL/Hon'ble MPERC.*

48. *In view of above submission this Hon'ble Commission is requested to dismiss the prayer of interim relief and render justice."*

13. Petitioner by affidavit dated 15th December' 2021 broadly submitted the following in its rejoinder to the reply filed by Respondent:

"1. It is submitted at the outset that the instant petition is not on the issue of levy of cross subsidy surcharge or the exemption available to a CPP. However, seeks to challenge the illegal action of respondent in levying additional surcharge on wheeling when there is no wheeling being undertaken for the amount of power generated captively and transmitted to its load centre through the dedicated transmission lines.

2. In this regard the petitioner reiterates the relevant paragraphs of the instant petition, wherein, it has been categorically submitted that additional surcharge is payable only if the specific conditions as mentioned in Section 42(4) of the Electricity Act are met out.

3. In other words, the State Commission has to permit a consumer such as the petitioner to avail supply of power under open access from another source and secondly there has to be a supply of electricity which under the Electricity Act, 2003 means the sale of electricity and this electricity must be wheeled through the distribution system and only if these primary conditions are met out, then only in that event, additional surcharge on wheeling as mentioned under Section 42(4) are leviable.

4. At the cost of repetition, it is submitted that the petitioner has its own captive power plant and dedicated transmission lines and is not using the distribution system of the distribution licensee to take open access or wheeling the power to its manufacturing centre. Moreover, CPP Power used

in standalone mode and not doing any parallel operation with Grid.

5. *Therefore, the attempt on the part of respondent to submit that there is no exemption on wheeling for a captive power plant and that there is no immunity for the petitioner from the statutory charges which are not exempted is completely erroneous and misleading as the issue is not pertaining to exemption but of exigibility/ levy of additional surcharge on wheeling as it is the entire case of the petitioner that the conditions as mentioned in Section 42(4) are not met out for levy of the additional surcharge on wheeling.*

6. *In this regard, it is pertinent to note that the Hon'ble Supreme Court in a similar matter of Maharashtra State Electricity Distribution Co. Ltd. V. M/s. JSW Steel Limited & Ors. [Civil Appeal No. 5074-5075 of 2019] settled the conundrum pertaining to the issues raised in the instant case.*

7 *That it is evident from the mere perusal of the abovementioned judgment of the Hon'ble Apex Court, that Captive power users, such as the Petitioner in the present case, cannot be subjected to the liability to the arbitrary demand of the Respondent to pay an additional surcharge. A copy of the Judgment in the matter of Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors [Civil Appeal Non. 5074-5075 of 2019] is attached herewith as Annexure RJ/1.*

8. *Therefore, the submissions of the Respondent are utterly made with the aim of confusing this Hon'ble Tribunal, and the assertion of levy of additional surcharge on wheeling with the exemptions granted to a CPP is incorrect and misleading. It is submitted that the Respondent has clearly misunderstood the entire concept of the levy of additional surcharge on wheeling and has therefore admittedly incorrectly issued the instant demand notice dated 23/07/2021.*

9. *Further the attempt on the part of the respondent to mislead this Hon'ble Commission by placing reliance on the Supreme Court judgment in the case of 'Sesa Sterlite' in severely and most vehemently opposed by the petitioner herein for the simple reasons that firstly, the proposition has been settled by the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited &Ors. Secondly, the case of Sesa Sterlite was on completely different facts and was not at all related to additional surcharge on wheeling and the Hon'ble Supreme Court did not state anywhere in the judgment that additional surcharge on wheeling is a compensatory charge or is leviable even in case the dedicated transmission lines are used, as is being incorrectly averred by the Respondent. And hence, the judgment of the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited &Ors, enjoys an authority and a binding effect.*

10. *It is most respectfully submitted that the Tariff Policy 2016 (as relied on by the Respondent) also states that additional surcharge is leviable only when*

the conditions under Section 42(4) were met out and the stranded costs are not being met. In other words, for the levy of additional surcharge on wheeling the conditions of section 42(4) have to be specifically met out and then the Licensee has to demonstrate that its stranded costs are not being met.

11. *It is most respectfully submitted petitioner has amply demonstrated that the conditions as mentioned in section 42(4) are not attracted to the case of the Petitioner and that the Petitioner is paying the demand charges and stand by charges and there is no stranding of the fixed cost, therefore, the levy of additional surcharge even on this ground fails and it is most respectfully submitted that the entire levy is illegal and without any basis and the demand notice dated 23/07/2021 deserves to be quashed.*

12. *It is submitted that there is no application or order permitting the petitioner herein to receive supply from a person other than the distribution licensee as the petitioner is drawing power from its own dedicated transmission lines from its captive power plant in terms of Section 9 of the Electricity Act and is not taking power from any other third source and, therefore, the entire return filed by respondent is confusing and misleading.*

13. *It is further submitted that the term "supply" has been defined the Electricity Act and the attempt on the part of the respondents to submit that supply does not always means sale of electricity in view of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 is incorrect for the simple reason that the Electricity Act is a Central Act and overrides the State legislation to the extent it is expressly inconsistent with the Central legislation. The term "supply" has been clearly defined in the Electricity Act and it shall only mean sale of electricity and cannot have any other meaning except as specified under the Electricity Act, 2003 and the attempt on the part of the Respondent to aver that this Hon'ble Commission consider the definition of 'Supply' as given in the MP Adhiniyam is again an attempt on the part of the Respondent to mislead this Hon'ble Commission.*

14. *The averment of the respondent that the levy of additional surcharge cannot be challenged in the instant petition is incorrect as the demand notice has been issued dated 23/07/2021 and simply because certain tariff orders have been passed prescribing the additional surcharge on wheeling and various other charges, does not mean that the petitioner is prohibited from challenging the demand notice dated 23/07/2021, as the entire levy is illegal. It is submitted that in the tariff orders the Hon'ble Commission has determined the wheeling charges and additional surcharges and various other charges along with applicable tariff on the various categories of customers and the tariff orders may have attained finality, however, there was no levy of additional surcharge on wheeling on petitioner in those tariff orders and therefore, the averment of the respondent that since the tariff orders have attained finality, therefore, the instant proceedings are not maintainable, are incorrect and misleading.*

15. It is further submitted that the respondent is confusing the grant of open access and the exemption of CSS granted to a CPP with the levy of additional surcharge on wheeling. It is further submitted that the Respondent has submitted in its reply that additional surcharge is leviable in all circumstances, however it is most respectfully submitted that no additional surcharge on wheeling is leviable when no wheeling charges are leviable and this law has settled by the Hon'ble APTEL. In other words, there is no levy of additional surcharge when there is no charge leviable.

16. It is submitted that Section 9 provides a right to establish, maintain and operate a captive power plant and dedicated transmission lines and, therefore, in this view of the matter, no charges of wheeling or additional are leviable when the power is being drawn through the dedicated transmission lines. It is submitted that the Respondent by the instant actions is seeking to completely violate the provisions of the Electricity Act, 2003 for their own revenue generation.

17. Further it is submitted that the averment of the Respondent that as per Rule 4 of the Electricity Rules, 2005 read with section 2(19) and 2(72) of the Act, 2003, the delivery points on the transmission lines/ generating stations and point of connection to the installations of the consumer forms a part of the Distribution System and therefore the levy of additional surcharge on wheeling is justified is completely incorrect. It is submitted that the Respondent is misinterpreting the provisions of Rule 4 of the Electricity Rules, 2005 read with section 2(19) and 2172) of the Act, 2003 to aver that even the dedicated transmission lines of the CPP of the Petitioner to its load centre are forming part of the Respondents Distribution System. It is submitted that the above submissions of the Respondent are completely contrary to the provisions of the Electricity Act, 2003 and section 9. It is specifically reiterated that the dedicated transmission lines of the Petitioner CPP are not forming part of the Respondent Distribution System.

18. Further the reliance of the Respondent on the case of Hindustan Zinc is also misleading and incorrect.

19. It is further lastly submitted that the case of Hindalco as decided by the Hon'ble APTEL on 11.06.2006 and the case of Malanpur as DEC 202 decided by this Hon'ble Commission on 22.05.2007 do not come to the rescue of the respondent as the Hon'ble APTEL in para 28 of the judgement, the Hon'ble APTEL has said that the liability under Section 42(4) is only payable in terms of Section 42(4) and it is the entire case of the petitioner that the conditions as mentioned under Section 42(4) are not met out, therefore, the reliance of the respondent on the above two cases is misconceived."

14. Respondent vide letter dated 14.03.2022 has broadly submitted the following in its additional submission:

"1. The instant matter came up for hearing before this Hon'ble Commission on dated 22.02.2022. The relevant part of the daily order dated 24.02.2022 passed by this Hon'ble Commission upon hearing the parties is reproduced as under:

3. The petitioner submitted that although the Commission has already decided similar matters in earlier petitions, however, in the meanwhile Hon'ble Supreme Court has pronounced judgment dated 10.12.2021 in the matter of MSEDCL Vs. M/s. JSW Steel Limited & Ors. in Civil Appeal Nos. 5074-5075 of 2019 wherein it has been held that "such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003."

Therefore, in light of the aforesaid judgment pronounced by Hon'ble Supreme Court, interim relief directing the Respondent not to take any coercive action against the petitioner may be granted till the disposal of this petition. In addition, application for amending the petition be allowed so that updated status regarding outstanding dues may also be placed before the Commission. The representative who appeared for the Respondent has requested to file additional submission in this matter. Request of the Respondent is allowed and the Respondent is directed to serve copy of its additional submission on other side also simultaneously.

2. It may be seen that petitioner has referred the judgement passed by this Hon'ble Commission in its earlier petition rejecting the similar relief as sought in the instant petition. Petitioner, however placed reliance upon judgment of the Hon'ble Supreme Court dated 10.12.2021 in the matter of MSEDCL Vs. M/s. JSW Steel Limited & Ors. in Civil Appeal Nos. 5074-5075 of 2019. Since, petitioner is relying solely on the judgment in JSW case in support of relief claimed in the petition, the instant written submission is being filed only on said submission of the petitioner. Further, all the submission made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.

RE: Issue of applicability of additional surcharge on the captive consumption between instant parties already been decided by this Hon'ble Commission in Petition No. 64 of 2020:

3. It is submitted that instant petitioner and petitioner in the petitioner No. 64 of 2020 decided by this Hon'ble Commission vide order dated 17.05.2021 is same legal entity i.e ***M/s Grasim Industries Ltd****. Both petitions have been filed mentioning the registered office of* ***petitioner at Birlagram, Nagada-456331, Dist-Ujjain (MP) India.***

4. It is submitted that this Hon'ble Commission vide order 17.05.2021 in the petition No. 64 of 2020 has already been adjudicated the issue raised in the instant petition between very same parties. To establish that issue directly

and substantially in the both the petition is same relevant part of both the petitions is reproduced as under:

Petition No. 49 of 2021

33. Hence, in view of above, it is respectfully submitted that additional surcharge is not leviable on captive users. Even otherwise, in the facts of the present case, additional surcharge cannot be levied on power consumed by PETITIONER'S Unit from its onsite CPP as the requirements of Section 42(4) are not met.

Petition No. 64 of 2020

36. Hence, in view of above, it is respectfully submitted that additional surcharge is not leviable on captive users. Even otherwise, in the facts of the present case, additional surcharge cannot be levied on power consumed by PETITIONER'S Unit from its onsite CPP as the requirements of Section 42(4) are not met.

5. *This Hon'ble Commission vide order dated 17.05.2021 in the petition No. 64 of 2020 has confirmed the levy of additional surcharge on the consumption of power from captive generating plant. The relevant extract of the said judgment is reproduced as under:*

   30. *In view of aforesaid observations and examination of facts and circumstances in the matter* ***and in light of provisions under Section 42 of the Electricity Act 2003, the Commission finds no merit in the contention of petitioner and additional surcharge is therefore, leviable on the petitioner.*** *With the aforesaid observations and findings, the prayer is disallowed and the subject petition is dismissed."*

6. *It is submitted that in the aforesaid petition Hon'ble Commission has based its decision on the relevant statutory provisions, judicial pronouncements and evidences/pleadings advanced by the both the parties. While adjudicating the dispute Hon'ble Commission has inter alia relied upon, the Section 43 of Act, 2003, MPERC Regulations, the judgment of Hon'ble APTEL in Hindalco vs WBERC [Appeal No. 1/2006], the judgment of Hon'ble Supreme Court in Sesa Sterlite Limited v OERC & Others ((2014 8 SCC 444) and the judgement of the Hon'ble Supreme Court in Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission [2015 (12) SCC 611], to hold that the captive consumers being consumers of the Distribution Licensee are liable for payment of Additional Surcharge.*

7. *In this regard kind attention of the Hon'ble Commission drawn to the Section 10 & 11 of the Civil Procedure Code 1908, which provides as under :*

   11. *Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties,* ***or between parties under whom they or any of them claim,*** *litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently*

*raised, **and has been heard and finally decided by such Court.***

10. Stay of suit. *No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [1][India] have jurisdiction to grant the relief claimed, or in any Court beyond the limits of [1][India] established or continued by [2][the Central Government [3]* * *.] and having like jurisdiction, or before [4][the Supreme Court].*

Explanation.--The pendency of a suit in a foreign Court does not preclude the Courts in [1][India] from trying a suit founded on the same cause of action.

1. Subs. by Act 2 of 1951, s. 3, for "the States".
2. Subs. by the A.O. 1937, "the G.G. in C."
3. The words "or the Crown Representative" omitted by the A.O. 1948.
4. Subs. by the A.O. 1950, for "His Majesty in Council".

*8. It is submitted that this Hon'ble Commission in the **petitioner's own case** (Petition No. 64 of 2020 order dated 17.05.2020) has already confirmed the liability of open access charges on captive consumption. Thus, there cannot be two orders in respect of same person/legal entity from this Hon'ble Commission on the same subject matter.*

9. The petitioner has filed the appeal against the said order dated 17.05.2021 in the petition No. 64 of 2020 before Hon'ble Appellate Tribunal for Electricity vide Appeal No. 212 of 2020 and same is still pending. Even the stay application is still pending for adjudication on merit before Hon'ble APTEL. The relevant part of the order dated 9th August, 2021 in Appeal No. 212 of 2020 is reproduced as under:

*.... **In the interest of justice, we are of the opinion till the IA is heard on merits and disposed of, the Respondent should not take any coercive steps against the Appellant.***

10. In this regard kind attention of the Hon'ble Commission drawn to the judgment of Hon'ble Punjab high Court in the matter of Raj Spinning Mills, Amritsar v. A.G. King Ltd., Excelsior Mill AIR 1954 PUNJAB 113. The relevant part is reproduced as under:

"4. Counsel for the petitioners has submitted that Section 10 of the Code of Civil Procedure applies to these two suits (1) because the matter in issue In the second suit is also directly and substantially in issue in the previously instituted suit and is between the same parties, and (2) the word 'suit' includes the word 'appeal'. The relevant issues in the two suits are as follows. In the first suit the issue was 'Did the defendants commit a breach of contract?', and in the second suit brought by the opposite party the issue is --Has the plaintiff performed its part of the contract and the defendant is guilty of the breach of contract?" This

shows that the matter in issue in the two suits is directly and substantially the same and therefore the test of 'res judicata' which has been applied in several cases would be relevant in this case also. This test was laid down by the Calcutta High Court in --'(Sm. Jinnat Bibi v. Howrah Jute Mill Co., Ltd.', AIR 1932 Cal 751 (A)), where Patterson, J., said at p. 752:

"One test of the applicability of Section 10 to a particular case is whether on the final decision being reached in the previous suit, such decision would operate as 'res judicata' in the subsequent suit and there can be no doubt that if this test is applied Section 10 must be held to be applicable to the present case."

The same rule was laid down by Padhye, J., in -- 'Laxmi Bank Ltd., Akola v. Harikisan', AIR 1948 Nag 297 (B)'. This test is, in my opinion, satisfied in the present case.

5. *The next question is whether the word 'suit' in Section 10 would include the word 'appeal'. In Mulla's Civil Procedure Code at page 34 it is stated that the word 'suit' includes 'appeal'. It also includes an appeal to His Majesty in Council, and reference is there made to -- 'Jamini Nath v. Midnapur Zamindary Co.', AIR 1923 Cal 716 (C). In this case Rankin, J., observed as follows:*

"The presence or absence of these words -- 'whether superior or inferior' -- does not, in my judgment, affect the question one way or the other. I think that the reference at the end of the section to 'His Majesty in Council' shows that" for this purpose 'suits' include 'appeals';" and the 'learned Judge referred to a Judgment of a Division Bench of that Court in -- 'Bepin Behary v. Jogendra Chandra', AIR 1917 Cal 248 (D), where the same rule was laid down. In a case decided by their Lordships of the Privy Council, namely -- 'Annamalay Chetty v. B. A. Thornhill', AIR 1931 P. C. 263 (E), it was observed:

"Their Lordships regret that the second action was not adjourned pending the decision of the appeal in the first action as that would have simplified procedure and saved expense.

Their Lordships also said:
"In their Lordships' opinion the former view is the correct one and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form 'res judicata' as between the same parties".

What happened in this case was that another suit was brought between the same parties pending an appeal on the same cause of action and ***their Lordships said that the proper course was to adjourn the second action pending the decision of the appeal in***

the first action. The same rule was laid down in the other Calcutta case which I have mentioned, -- 'AIR 1932 Cal 751 (A)', and also by Puranik, J., in -- 'Krishnarao Namdeorao V. Shridhar Ramchandra', AIR 1947 Nag 154 (F).

6. I am therefore of the opinion that the learned Judge was in error by refusing to exercise jurisdiction by an erroneous interpretation of section 10, and I would therefore allow this petition and make the rule absolute.

7. ……..

Soni, J.

8. I agree. Where Section 10 applies the Court has no option but to stay the proceedings. *Whether the stay of such proceedings should be qualified or not in order to obviate dis honest litigants to take advantage of the provisions of the section, is a matter of policy which the Legislature alone can set right."*

11. In the instant case petitioner is M/s Grasim Industries Ltd. As per Section 179 of the Company Act 2013 the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. A different unit or department of same company is not a separate party but the same party acting under same board of directors.

12. Hon'ble Supreme Court in Mohanlal Goenka Appellant v. Benoy Kishna Mukherjee and others (AIR 1953 SUPREME COURT 65) held as under:

23. There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as 'res judicata*……;*

13. Relying on the aforesaid judgment of Hon'ble Supreme Court, Hon'ble Madhya Pradesh High Court in State of M. P v. Mulamchan (AIR 1973 MADHYA PRADESH 293) held as under:

16. The issue in the present suit as also in the writ proceeding was the same. ***A decision on a question of law is res judicata in a subsequent proceeding between the same parties,*** *where the cause of action is the same. The words "matter in issue" as employed in Section 11, Civil P. C., mean the right litigated between the parties.* ***It has reference not only to the facts on which the right is claimed or denied, but also to the applicability or non-applicability of a rule of law to the given set of circumstances.***

17. Where a decision on a question of law in relation to a given set of facts attains finality, it operates as res judicata in a later suit or proceeding between the same parties. This will be so even if it

> ***was erroneous.*** *In Bindeswari v. Bageshwari, AIR 1936 PC 46 it was held that "where the decision of the Court in a previous suit determined that the section had never applied to a transaction, a Court in a new suit between the same parties with regard to the same transaction cannot try anew the issue as to its applicability in face of the express prohibition in Section 11 of the Code." In Mohanlal v. Benoy Kishna, AIR 1953 SC 65 their Lordships have laid down thus :-* ***"There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata." (Para 23)***
>
> ***It follows from this that even if in the earlier case an issue of law was wrongly interpreted in ignorance of a binding precedent, or if in a subsequent binding precedent the law has been interpreted otherwise, the earlier decision on the question of law, which has attained finality, will operate as res judicata between the parties in a subsequent suit or proceeding.***

14. *In view of above no relief can be granted to the petitioner in deviation of what has already been decided by this Hon'ble Commission in petition No. 64 of 2020. It would amounts to review of the earlier order in indirect manner which is not permitted in the law. It is settled legal position that what cannot be done directly cannot be done indirectly.*

15. *Similarly, Appeal No. 198 of 2020, 202 of 2020 and 204 of 2020 have also filed by the other appellants (M/s UltraTech) against the order of this Hon'ble Commission in the Petition No. 62 of 2020, 12 of 2020 and 61 of 2020 respectively. The relevant extract of the order of Hon'ble APTEL dated 21.01.2022 in these other Appeal is as under:*

> *By directions in the Order dated 07.01.2022 in the four matters already pending before this Bench, we had sought views of the parties on the suggestions mooted for remit of the cases in which the impugned orders were passed by the Respondent Commission* ***for fresh consideration in the light of the Judgment dated 10.12.2021 in Civil Appeal No. 5074-5075 of 2019 (Maharashtra State Distribution Company Limited vs. JSW Steel Limiter &Ors.) of Hon'ble Supreme Court.*** *Though the Respondent Commission leaves the matter for remit or otherwise to this Tribunal, there are some reservations expressed by other parties.* ***Having heard the learned counsel for the parties, we feel this batch needs to be heard on priority basis. It shall, therefore, be included in List-A (List of matters requiring Priority Hearings), to be taken up in its turn.***

16. *It may be seen that earlier judgments of this Hon'ble Commission on subject matter including the issue of applicability of judgment of Hon'ble Supreme*

Court in Civil Appeal No. 5074-5075 of 2019 is under consideration of the Hon'ble APTEL. Further, Hon'ble APTEL directed that matter to be heard on the priority basis.

17. *Thus, Hon'ble Commission is requested not to decide the very same issue again in the instant petition between same parties.*

RE: THE HON'BLE SUPREME COURT'S JUDGEMENT DATED 10.12.2021 IN CA NO. 5074 OF 2019 ('JSW JUDGEMENT') IS NOT APPLICABLE IN THE INSTANT CASE

18. *It is settled legal position that Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. In this regard following observation of the Hon'ble Supreme Court in K. T. M. T. M, Abdul Kayoom and another v. Commissioner of Income Tax, Madras {AIR 1962 SUPREME COURT 680} is relevant in the instant case:*

> ***19. ..... Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo)* by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive……"***

19. *The submission of the petitioner that the issue involved in the present petition is covered in its favour by the findings of the Hon'ble Supreme Court in the JSW Judgment is untenable. It is submitted that JSW Judgment has passed by Hon'ble Supreme Court is based on the following findings:*
    a. *captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003 are not liable to pay additional surcharge (Para 14).*
    b. *Captive generating plant are not subject to the regulatory jurisdiction of the Commission (para 9)*

RE: INSTANT PETITIONER IS 'CONSUMER' WITHIN THE MEANING OF SECTION 2(15) OF ACT, 2003

20. *In this regard Hon'ble Supreme Court in the JSW case held as under:*

> ***"14.....Therefore, it is to be held that such captive consumers/captive users, who form a separate class <u>other than the consumers defined under Section 2(15) of the Act, 2003,</u> shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003."***

21. *It may be seen that as per aforesaid judgment of Hon'ble Supreme Court those captive consumer/captive user who form separate class other than the consumers defined under Section 2(15) shall not be subject to the levy of*

additional surcharge. In other words any person who is a consumer under Section 2(15) is liable to pay additional surcharge on the consumption done from any source other than the distribution licensee of area. The Section 2(15) of the Act provides as under:

*"2(15) —**consumer means any person who is supplied with electricity for his own use by a licensee** or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"*

22. *It is submitted that in the instant case petitioner is maintaining stand by contract demand and availing supply from the answering respondent. Accordingly petitioner is a consumer within the meaning of Section 2(15) of the Act.* ***Petitioner itself admitted this fact that petitioner is consumer of answering respondent (ref para 7(c) page 9 of the petition). The relevant part of the petition is reproduced as under:***

"(c) From 14.4.2018 onwards till date the Petitioner's Unit of Staple Fibre Division is a direct consumer of the Respondent Licensee connected at to the Respondent at 33 KV……."

23. *Thus, being a consumer within the meaning of Section 2(15) of the Act petitioner is liable to pay additional surcharge to the answering respondent and JSW case has no applicability in the present circumstances of the case.*

RE: ENABLING PROVISIONS REGULATING CAPTIVE GENERATING PLANT AND LEVY OF ADDITIONAL SURCHARGE IN MPERC REGULATIONS WHILE THERE WAS NO CONSIDERATION OF MPERC's REGULATIONS IN JSW JUDGEMENT

24. *Hon'ble Supreme Court in the JSW case held as under:*

"9…… it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the Sate Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate."

25. *It is submitted that in the state of Madhya Pradesh Hon'ble Madhya Pradesh Electricity Regulatory Commission (MPERC) has issued the MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005 ('OA Regulation 2005'). The relevant provisions of the said Regulations are reproduced as under:*

*"Open Access Customer" means a person **permitted under these regulations** to receive supply of electricity from another person other than the distribution licensee of his area of supply, or **a***

generating company (including captive generating plant) *or a licensee, who has availed of or intends to avail of open access.*

3: ELIGIBILITY FOR OPEN ACCESS AND CONDITIONS TO BE SATISFIED

3.1 Subject to the provisions of these regulations, ***open access customers*** *shall be eligible for open access to the intra state transmission system of the State Transmission Utility (STU) or any other transmission licensee and intra state distribution system of the state distribution licensees or any other distribution licensee.*

3.2 Such open access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission in accordance with the regulations framed for the purpose.

3.3 Subject to operational constraints and other relevant factors, open access shall be allowed in the following phases:

i. For Non-Conventional Energy Sources:
The non-conventional energy generators and users shall be provided with open access with immediate effect and they shall be governed by the existing policy of State Government. The non-conventional energy generators shall be provided access to the transmission and sub-transmission system in the same manner as had been provided to them by the erstwhile integrated Madhya Pradesh State Electricity Board in accordance with State Government Policy in this regard on the same terms and conditions."

ii. For Captive Generating Plants of Conventional Energy:
Open access for the captive power plants shall be provided with immediate effect.

iii. For all other open access customers:
Open access to users other than at Sl. No. 3.3(i) and 3.3(ii) shall be provided as per the time table below

.....

Sr No	***Phases***	***Customer with contracted power under open access for transmission and wheeling and at voltage***	***Date from which open access is to be granted***
7	***VII***	***Users requiring 1 MW and above and situated anywhere in the State***	***October 1, 2007***

13: CHARGES FOR OPEN ACCESS

13.1 The licensee providing open access shall levy only such fees or open access charges as may be specified by the Commission from time to time. The principles of determination of the charges are elaborated hereunder. The sample calculation are enclosed as annexure –I.

a. Transmission Charges –The transmission charges for use of the transmission system of the transmission licensee for intra-state

transmission shall be regulated as under, namely: -

.....

b. Wheeling Charges –. The Wheeling charges for use of the distribution system of a licensee shall be regulated as under, namely: -

……..

……..

f. Surcharge – The Commission shall specify the cross subsidy surcharge for individual categories of consumers separately.

g. Additional Surcharge – The Commission shall determine the additional surcharge on a yearly basis.

……

26. It may be seen that in the State of Madhya Pradesh Hon'ble MPERC grants permission of consumption from any source other than the distribution licensee of area by way of aforesaid Regulations. The requirement of such permission made applicable to the generating company as well as captive generating plant and in this regard term 'generating company' includes captive generating plant. In other words as far as issue of consumption of power from other source is concerned as per Regulations applicable in the State of Madhya Pradesh there is no difference in the Generating Company and Captive Generating plant. It may further be seen that as per provisions of the aforesaid Regulations such consumption from other source is subject to the payment of additional surcharge.

27. It is submitted that neither the MPERC Regulation's nor the Regulation making power of MPERC in this regard was under consideration of the Hon'ble Supreme Court in JSW case. Therefore JSW judgement is not applicable in the present circumstances of the case.

28. At this juncture it would be appropriate to refer the relevant provisions of MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations ,2010 :

(i) Regulation 12.2 of aforesaid Regulations after 7th amendment and prior to 7th amendment is reproduced below:

(a) Prior to the 7th Amendment, the said regulation provided as under:

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

(b) Amended Regulation 12.2 of MPERC cogeneration Regulations, 2010 provides as under:

"12.2 Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act,

2003 shall be applicable at the rate as decided by the Commission in its retail supply tariff order."

(Emphasis Supplied)

29. *It is explicitly clear from the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 that the exemption from payment of open access charges provided to Captive and Open Access Consumers prior to the said amendment has been withdrawn and it has been provided in the seventh amendment that the open access charges if any, under Section 42 of the Act shall be applicable in terms of retail supply tariff order issued by the this Commission. The validity and legality of aforesaid amendment (Writ Petition No.9870/2018) was challenged before the Hon'ble High Court of MP but the same has been upheld by the Hon'ble High Court.*

30. *It is relevant to mention that Hon'ble MPERC recently notified the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Regulations 2021). The provisions of the Regulation 11.2(d) of the said Regulations are reproduced as under:*

> ***The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003*** *and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.*

31. *It may be seen that aforesaid Regulations 2021 specifically provided that the captive consumers are liable to pay additional surcharge. It is settled legal position that Regulation once notified shall be treated as part of Act and order issued by the regulatory Commission should be in conformity with the Regulations.*

32. *In this regard kind attention of the of the Hon'ble Commission drawn to the pronouncement of Constitution bench of Hon'ble Supreme Court in the matter of PTC India Limited v Central Electricity Regulatory Commission, through Secy {(2010) 4 Supreme Court Cases 603}. In this judgment, Hon'ble Supreme Court held that Regulation stands on a higher pedestal vis-'-vis an Order (decision) of Regulatory Commission. The relevant part of the said judgment is reproduced as under:*

> 65. *The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application",* ***a Regulation stands on a higher pedestal vis-'-vis an Order (decision) <u>of CERC in the sense that an Order has to be in conformity with the regulations.</u>*** *However, that would not mean that a regulation is a pre condition to the order (decision). Therefore,*

we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). ***In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act.....***

92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

(iii) ***A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts*** *and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.*

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze)..... .

Conclusion:

93. For the aforesaid reasons, we answer the question raised in the

reference as follows:

> *The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003.* ***The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.***

33. Though the above principles emerge in the context of regulations framed under Section 178 by the CERC, the law laid down in the judgment is applicable to the regulations framed under Section 181 by the State Electricity Regulatory Commissions. It may be seen that Hon'ble Supreme Court clearly held that Regulation making power of the Hon'ble Commission is very wide. It is reiterated that neither the MPERC Regulation's nor the Regulation making power of MPERC in this regard was under consideration of the Hon'ble Supreme Court in JSW case. Therefore, JSW judgement is not applicable in the present circumstances of the case and instant petition is to be decided considering the Regulations prevailing in the State of Madhya Pradesh.

34. Similarly, Hon'ble Supreme Court in West Bengal Electricity Regulatory V/s. CESC (2002) 8 SCC 715 has held that even the High court exercising its power of appeal under a particular statute cannot exercise suo motu the constitutional power under Article 226 or 227 of the Constitution. The relevant part of the said judgment is reproduced as under:

> *50. From the above observations of this Court in the said judgment extracted hereinabove, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so.* ***Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition.*** *In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the*

Commission has not given any indiscriminate hearing to the consumers.

35. ***Hon'ble APTEL in the STATE LOAD DESPATCH CENTRE Vs GUJARAT ELECTRICITY REGULATORY COMMISSION (APPEAL NO.33 OF 2015 Dated: 30th November, 2015)*** *so long as a Regulations is in the field State Commission is bound by its Regulations:*

15. .....The State Commission is bound by its regulations. If the State Commission is of the opinion that there is a lacuna in the regulation it can amend it or issue a new regulation, but so long as a regulation is in the field it has to follow it and cannot get over it by any other methods.

36. *Hon'ble APTEL in Appeal No. 170 of 2010 in Madhya Pradesh Power Generation Company Ltd, Vs. Madhya Pradesh Electricity Regulatory Commission held that a subordinate legislation validly made becomes a part of the Act. It is further held by the Hon'ble APTEL that State Commission while exercising one jurisdiction cannot assume another jurisdiction. The relevant part of the said judgment is reproduced as under:*

39..... Mr. Ramachandran has taken us to a good number of decisions which we shall now consider. He has referred to Utter Pradesh Power Corporation Limited Vs. National Thermal Power Corporation of India Limited and others reported in (2009) 6 SCC 235. One important observation made at paragraph 56 of the judgment is that:

"It is now a well settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such."

.....

..... It is not deniable that the Commission has manifold powers, namely, administrative, supervisory, legislative and adjudicatory but each power, according to us, must be exercised at appropriate field; ***simply because a Commission has many powers, it cannot be said that while exercising one power it oversteps its limit in that power and assumes another jurisdiction.*** *This was what has been exactly said in WB Electricity Regulatory Commission Vs. CERC reported in (2002) 8 SCC 715....."*

37. *Full bench of Hon'ble APTEL in the Judgment in OP No.1 of 2011 Dated: 11th Nov, 2011 observed as under:*

"30. In view of the above admitted fact situation, we raised four questions to these 3 State Commissions seeking clarification.

(A).....

(B).....

(C).....

(D) Whether the State Commissions are the proper authority to declare

that their Regulations are wrong, so long as those Regulations are in force?

31. There is no answer to these questions either in their affidavits or in the written submissions filed by these State Commissions. We are really surprised over the conduct of these State Commissions who now plead as against their own Regulations approved by the legislature. Another surprising feature is that these Commissions, have failed to take note of the findings given by this Tribunal in the several judgments indicating the necessity to follow their Regulations, which are binding on them.

61. It is quite strange on the part of the State Commissions to contend that they may not follow their own Regulations as they would not prevail over Section 64 of the Act and therefore, they have to keep quite without taking any steps for performing their functions. This plea is made by these Commissions even though they have got the powers to take a suo-moto action for determination of tariff by virtue of the Regulations and the policies. As indicated above, Section 64 provides for procedure to ultimately achieve the purpose which is more important. It is quite surprising to notice that the State Commissions have taken up the stand to plead before this Tribunal that their own Regulations are wrong. How can they take such a stand, so long as those Regulations approved by the legislature are in force? ...."

38. Kind attention also drawn to following dictum of Hon'ble Supreme Court in the matter of The State of Manipur & Ors. Versus Surjakumar Okram & Ors. (Civil Appeal Nos. 823-827 of 2022):

"23. The principles that can be deduced from the law laid down by this Court, as referred to above, are:

I. A statute which is made by a competent legislature is valid till it is declared unconstitutional by a court of law.

....."

39. It is also a settled legal position that this Hon'ble Commission cannot relax substantive provision of the Regulations exercising its inherent power. In this regard kind attention of the Hon'ble Commission is drawn towards the judgment of Hon'ble Supreme Court in the matter of Gujarat Urja Vikas Nigam Limited v Solar Semiconductor Power Company (India) Private Limited and others (Civil Appeal No. 6399 of 2016) Citation : 2017 Indlaw SC 865. The relevant part is reproduced as under:

53. Under Regulations 80 to 82, the inherent powers of the State Commission are saved. Under Regulation 80, which is akin to Section 151 CPC, the power of the State Commission is only intended to regulate the conduct of the Commission, that is, to regulate its own procedure. That power cannot travel beyond its own procedure so as to alter the terms and conditions of the PPA entered into between the

parties to grant substantive relief to the first respondent by extending the control period of Tariff Order (2010) beyond 28.01.2012.

54. *By a reading of Regulation 80, it is clear that inherent powers of the State Commission are saved to make such orders as may be necessary:- (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers being very wide and incapable of definition, its limits should be carefully guarded. Inherent powers preserved under Regulation 80 (which is akin to Section 151 of the Code) are with respect to the procedure to be followed by the Commission in deciding the cause before it. The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. The inherent powers are not substantive provision that confers the right upon the party to get any substantive relief. These inherent powers are not over substantive rights which a litigant possesses.*

55. *The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of process of the Court. It cannot be used to create or recognize substantive rights of the parties.*

40. *In view of above, it is submitted that in the instant case petitioner is not challenging the vires of the Regulations. Therefore, instant petition is to be decided considering the Regulations prevailing in the State of Madhya Pradesh.*

41. *It is also noteworthy to mention that this Hon'ble Commission while deciding earlier petitions on the same subject matter (Petition No. 64 of 2020) has relied upon the aforesaid Regulations.*

42. *Thus, as per provisions of the Regulations prevailing in the State Of Madhya Pradesh petitioner is liable to pay additional surcharge and no relief can be granted to the petitioner on the basis of Judgment of Hon'ble Supreme Court given in the case of State of Maharashtra.*

RE: JSW CASE IS DECIDED BY THE HON'BLE SUPREME COURT WITHOUT TAKEN NOTE OF EARLIER BINDING JUDGMENT OF ITS OWN CORDINATE BENCH:

43. *Without prejudice the submission that petitioner is a consumer thus JSW case is not applicable, it is submitted that while passing the JSW Judgment, attention of the Hon'ble Supreme Court was not drawn towards the earlier binding precedent of coordinate bench, i.e., the judgment in the case of* ***Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission [2015 (12) SCC 611].*** *In the Hindustan Zinc case Hon'ble Supreme Court clearly held that Captive generating plants are under regulatory jurisdiction of the Commission and captive consumers are also the consumer of the distribution licensee.*

44. *It is noteworthy to mention that this Hon'ble Commission while deciding*

earlier petitions on the same subject matter (Petition No. 64 of 2020) has relied upon the Judgment of Hon'ble Apex Court in the Hindustan Zinc supra. A comparative chart of findings of Hon'ble Supreme Court in the both of above judgments is attached as ***Annexure-R/1*** *for ease of reference.*

45. *Five judge bench of Hon'ble MP High Court in Jabalpur Bus Operators Association and others v. State {AIR 2003 MADHYA PRADESH 81} has considered the issue of precedent value of any judgment passed by a bench of the Hon'ble Supreme Court without taking note of earlier coordinate bench judgment and held as under:*

> ***8.....In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. <u>Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts.</u>***

46. *Similarly, Five judge bench of Hon'ble Supreme Court in [National Insurance Company Limited V.s Pranay Sethi and Ors. SLP (Civil) NO. 25590 of 2014 [(2017) 16 Supreme Court Cases 680] vide its order dated 31.10.2017 held as under:*

> 1. *Perceiving cleavage of opinion between Reshma Kumari and others v. Madan Mohan and another and Rajesh and others v. Rajbir Singh and others , both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Company Limited v. Pushpa and others thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us.*
> 14. *The aforesaid analysis in Santosh Devi (supra) may prima facie show that the two-Judge Bench has distinguished the observation made in Sarla Verma's case but on a studied scrutiny, it becomes clear that it has really expressed a different view than what has been laid down in Sarla Verma (supra). If we permit ourselves to say so, the different view has been expressed in a distinctive tone, for the two-Judge Bench had stated that it was extremely difficult to fathom any rationale for the observations made in para 24 of the judgment in Sarla Verma's case in respect of self-employed or a person on fixed salary without provision for annual increment, etc. This isa clear disagreement with the earlier view, and we have no hesitation in saying that it is Absolutely impermissible keeping in view the concept of binding precedents.*
> 15. *Presently, we may refer to certain decisions which deal with the concept of binding precedent.*
> 17. *In State of Bihar v. KalikaKuer alias Kalika Singh and Others ((2003) 5 SCC 448) , it has been held:-*
> *"10. ... an earlier decision may seem to be incorrect to a Bench of a*

coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. …"

The Court has further ruled:-

"10. … Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

27. We are compelled to state here that in Munna Lal Jain (supra), the three- Judge Bench should have been guided by the principle stated in Reshma Kumari which has concurred with the view expressed in Sarla Devi or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari being earlier in point of time would be a binding precedent and not the decision in Rajesh.

59. In view of the aforesaid analysis, we proceed to record our conclusions:-

59.1. The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2 As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

47. In the instant case, while passing the JSW judgment, admittedly attention of the Hon'ble Supreme Court was not invited towards the earlier coordinate bench judgment in the Hindustan Zinc supra. As JSW Judgment has not taken note of the decision in Hindustan Zinc supra, which was delivered at earlier point of time, the instant petition should be decided following the finding of Hon'ble Supreme Court in the Hindustan Zinc Supra.

RE ANSWERING RESPONDENT HAS UNIVERSAL SUPPLY OBLIGATION (USO) TOWARDS PETITIONER WHILE NO SUCH ISSUE OF 'USO' WAS UNDER CONSIDERATION IN JSW CASE

48. It is submitted that although the levy of additional surcharge is provided in the Section 42 (4) of the Act, 2003, Section 43(1) of the Act, 2003 is foundation for levy of additional surcharge. Section 43 of the Act provides that distribution licensee (DISCOM) has a universal supply obligation (USO) and required to supply power as and when demanded by any owner /occupier of premises in its area of supply. It is noteworthy to mention that this Hon'ble Commission while deciding earlier petitions on the same subject matter (Petition No. 64 of 2020) has relied upon the Section 43 of the Act.

49. The Levy of additional surcharge is provided in Section 42 (4) of the Act which reads as under:

42(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

50. From bare perusal of Section 42(4), it may be seen that the State Commission is empowered to levy additional surcharge to meet the fixed cost arising out of obligation to supply. Section 43 provides for the obligation to supply. The relevant provision of Act, 2003 is reproduced as under:

43. Duty to supply on request.–(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application ***by the owner or occupier of any premises,*** *give supply of electricity to such premises, within one month after receipt of the application requiring such supply:*

51. It may be seen that the distribution licensee has a duty to supply to each and every premises in its licensed area of supply. Premises also includes premises of captive consumer and there is no distinction in this regard under the statute. In other words duty to supply does not come to an end upon the consumer/ owner of the premises decides to avail open access or consume power from own captive generating plant and in terms of the Statutory provision the distribution Licensee has the continued obligation to supply electricity on demand at any time.

52. In the instant case petitioner is the consumer of answering respondent and premises of the petitioner is connected with the works of the licensee. Thus, answering respondent has universal supply obligation towards the appellant. This Hon'ble APTEL in ***Hindalco case (Appeal 1 of 2006)*** *held that a person whose premises is connected with the network of the licensee is a consumer and Discom has universal supply obligation towards such consumers even if the said consumer is availing supply through captive route. The relevant extract is reproduced as under:*

17. The Commission has proceeded on a wrong premise that it has no

jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of Section 86(1) (a), Section 42 and Section 49 of The Electricity Act 2003 as well as by loosing sight of the object behind the said provisions. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to ***Sections 42 (2); (4) and Section 62 of The Act****. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area DISCOM / distribution licensee. We have already held so in Appeal No. 34 of 2006 Bhusan Steel vs. W.B.E.R.C.*

.....

20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. ***There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Belurmath is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003.*** *The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.*

23. On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP.....

24. There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual relationship with the area distribution licensee or shall cease to be a consumer of the area DISCOM/ Licensee.....

53. In view of above, it is submitted that if there is universal supply obligation

there shall always be levy of additional surcharge. In other words before deciding that levy of additional surcharge is not applicable on the petitioner declaration to this effect also required that licensee has no universal supply obligation towards the petitioner.

RE: <u>Sum become 'first due' only when bill raised for billing not done earlier:</u>

54. That, petitioner has raised the plea of limitation. It is now settled legal position that amount become first due only when bill is raised and period of limitation starts from the date of first due only. In this regard Section 56 of the Act is reproduced as under:

> *Section 56. (Disconnection of supply in default of payment): -- (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:*
>
> *Provided that the supply of electricity shall not be cut off if such person deposits, under protest, -*
>
> *(a) an amount equal to the sum claimed from him, or*
>
> *b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him and the licensee.*
>
> *(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 **<u>when such sum became first due</u>** unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied **<u>and the licensee shall not cut off the supply of the electricity.</u>***

*55. It may be seen that bar under section 56(2) is applicable only after two year from the date when the amount becomes '**first due**'. Section 56(2) has no applicability on supplementary billing of escaped billing as the said demand become first due only when demand notice/ supplementary bill in this regard issued by the licensee. Unless any demand is raised specifying the time limit for payment no such demand can be said as **'due'** and person consuming electricity cannot be termed as neglectful of their responsibilities of payment. Thus, aforesaid section has no application in making*

supplementary demand for escaped billing. It is now a settled legal position through various judicial pronouncements that there is no limitation for making the demand by way of supplementary bill.

56. That, the issue of limitation on demand of earlier escaped billing came under consideration of Hon'ble Supreme Court in the case of M/S. Swastic Industries vs Maharashtra State Electricity (1997) 9 SCC 465. The relevant part of the said judgment is reproduced as under:

> *"The admitted position is that the respondent- Electricity Board had issued a supplementary bill to the petitioner on February 5, 1993 demanding payment of Rs. 3,17,659/-. The petitioner objected to the bill by his letter dated February 16, 1993, However, when letter was issued for payment of the said amount, the petitioner paid it under protest and filed the complaint paid it under protest and filed the complaint before the State Consumers Disputes Redressal Commission. The Commission by order dated May 24, 1995 allowed the complaint and held that the claim was barred by limitation of 3 years. Feeling aggrieved, the Electricity Board filed an appeal.* ***The National Commission relying upon the judgment of a Division Bench of the Bombay High Court in M/s. Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd. Vs. The Municipal Corporation of Greater Bombay & Anr. (Air 1978 Bom. 369) has held that there is no limitation for making the demand by way of supplementary bill.*** *Section 24 of the Indian Electricity Act, 1910 gives power to the Board to issue such demand and to discontinue the supply to a consumer who neglects to pay the charges. It is contended by the learned counsel for the petitioner that Section 60-A of the Electricity (supply) Act, 1948 prescribes a limitation of 3 years for the Board to institute any suit, after its constitution , for recovery of the arrears. Thereby the limitation of 3 years is required to be observed. The Board in negation of Section 60A of Supply Act cannot be permitted to exercise the power under Section 24 of the Electricity Act, 1910. We find no force in the contention.*
>
> *……*
>
> *This is an enabling provision by way of suit. Despite the fact that Section 24 of the Indian Electricity Act clearly empowers the Board to demand and collect any charge from the Consumer and collect the same towards the electrical energy supplied by the Board in the following terms:*
>
> > *"Where any person neglect to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy, to him, the licensee may, after, giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge of other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the*

supply until such charge other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but longer."

It would, thus, be clear that the right to recover the charges is one part of it and right to discontinue supply of electrical energy to the consumer who neglects to pay charges is another part of its. The right to file a suit is a matter of option given to the licensee, the Electricity Board. Therefore, the mere fact that there is a right given to the Board to file the suit and the limitation has been prescribed to file the suit, it does not take away the right conferred on the Board under Section 24 to make demand for payment of the charges and on neglecting to pay the same. They have the power to discontinue the supply or cut-off the supply, as the case may be, when the consumer neglects to pay the charges. The intendment appears to be that the obligation are actual. The board would supply electrical energy and the consumer is under corresponding duty to pay the sum due toward the electricity consumed. Thus the Electricity Board, having exercised that power, since admittedly the petitioner had neglect to pay the bill for additional sum, was right in disconnecting the supply without recourse to filling of the suit to recover the same. The National Commission, therefore, was right in following the judgment of the Bombay High Court and allowing the appeal setting aside the order of the State Commission. Moreover, there is no deficiency of service in making supplementary demand for escaped billing. Therefore may be negligence or collusion by subordinate staff in not properly recording the reading or allowing pilferage to the consumers. That would be deficiency of service under the Consumer Protection Act. We do not find any illegality warranting interference.

The Special Leave Petition is accordingly dismissed.

57. That, issue of applicability of section 56(2) in case of escaped billing also came under consideration of Hon'ble Appellate Tribunal of Electricity in Appeal Nos. 202 & 203 of 2006 in the case of Ajmer Vidyut Vitran Nigam Limited Vs M/s Sisodia Marble & Granites Pvt. Ltd. & Ors. Vide order dated 14/11/2006 Hon'ble APTEL held as under:

"14. We have heard the learned counsel for the parties. The basic question for determination is what is the meaning of the words 'first due' occurring in Section 56(2) of the Electricity Act 2003; Regulation 39(1) of the Regulations, 2004 and condition No. 49 of the Terms and Conditions for supply of Electricity, 2004. In case the words 'first due' is construed as meaning consumption, it would imply that the electricity charges would become due and payable, the moment electricity is consumed. In that case failure to pay charges will entail consequences leading to disconnection of electricity to consumers even though the consumer will only know the units consumed by him

and will not know the exact amount payable by him as per the approved tariff as the actual computation depends upon different parameters such as peaking/non-peaking rates; HT/LT rates etc. The responsibility to determine the amount payable by the consumer is that of the licensee. The consumer cannot be expected to discharge the duties of the distributor or the supplier of electricity. Moreover, it will create an anomalous situation as it would be difficult to determine the last date by which the payment is to be made by the consumer and in case last date is not known, it will be difficult to levy surcharge for delayed payment. Besides there will be problem in issuing notice for disconnection for failure to pay the charges on consumption. It appears to us that it could never be the intention of the legislature to equate the words 'first due' with consumption. The consumption of electricity will certainly create a liability to pay but the amount will become due and payable only after a bill or demand is raised by the licensee for consumption of electricity by the consumer in accordance with the Tariff Order. Such a bill/ demand will notify a date by which the dues are to be paid without surcharge.

15. *It is to be noted that a meter records the consumption of energy uninterruptedly on a continuous basis by the consumer and for such consumption the liability for payment of corresponding amount of charges by the consumer is continuously created but will not be due for payment unless the amount is raised through bill or a demand notice.*

16. *In H.D. Shourie vs. Municipal Corporation of Delhi, AIR 1987 Delhi 219, the Delhi High Court has ruled that electricity charges become first due after the bill is sent to the consumer and not earlier thereto. In this regard the High Court held as under:*

> *"A bill for consumption of electricity can be sent even three years after the electricity has been consumed. The electricity charges become due after the bill is sent and not earlier. This being so, the proviso to S. 455 of Act (66 of 1957) will apply only when the bill has been sent and the remedy available with the licensee for filing a suit to recover the said amount would come to an end after three years elapse after the electricity charges have become due and payable. To put it differently, the provisions of S. 455 would come into play after the submission of the bill for electricity charges and not earlier".*

The judgement further holds that,

> *"The amount of charges would become due and payable only with the submission of the bill and not earlier. It is the bill which stipulates the period within which the charges are to be paid. The period which is provided is not less than 15 days after the receipt of the bill. If the word "due" in S. 24 is to mean consumption of electricity, it would mean that electricity charges would become due and payable the moment electricity is consumed and if charges in respect*

thereof are not paid then even without a bill being issued a notice of disconnection would be liable to be issued under S. 24. This certainly could not have been the intention of the Legislature. Section 24 gives a right to the licensee to issue not less than 7 days' notice if charges due to it are not paid. The word "due" in this context must mean due and payable after a valid bill has been sent to the consumer. It cannot mean 7 days notice after consumption of the electricity and without submission of the bill. Even though the liability to pay may arise when the electricity is consumed by the consumer, nevertheless it becomes due and payable only when the liability is quantified and a bill is raised. Till after the issue and receipt of the bill the authority has no power or jurisdiction to threaten disconnection of the electricity which has already been consumed but for which no bill has been sent".

The same judgement further provides that the arrear of charges in case of a defective meter cannot be more than six months irrespective of period of defect in the meter. It reads thus;

"The maximum period for which a bill can be raised in respect of a defective meter under S. 26 (6) is six months and no more. Therefore, even if a meter has been defective for, say, a period of five years, the revised charges can be for a period not exceeding six months. The reason for this is obvious. It is the duty and obligation of the licensee to maintain and check the meter. If there is a default committed in this behalf by the licensee and the defective meter is not replaced, then it is obvious that the consumer should not be unduly penalized at a later point of time and a large bill raised. The provision for a bill not to exceed six months would possibly ensure better checking and maintenance by the licensee".

1 Thus, in our opinion, the liability to pay electricity charges is created on the date electricity is consumed or the date the meter reading is recorded or the date meter is found defective or the date theft of electricity is detected but the charges would become first due for payment only after a bill or demand notice for payment is sent by the licensee to the consumer. The date of the first bill/demand notice for payment, therefore, shall be the date when the amount shall become due and it is from that date the period of limitation of two years as provided in Section 56(2) of the Electricity Act, 2003 shall start running. ***In the instant case, the meter was tested on 03.03.2003*** *and it was allegedly found that the meter was recording energy consumption less than the actual by 27.63%. Joint inspection report was signed by the consumer and licensee and thereafter, the defective meter was replaced on 05.03.2003.* ***The revised notice of demand was raised for a sum of Rs. 4, 28,034/- on 19.03.2005****. Though the liability may have been created on 03.03.2003, when the error in recording of consumption was detected,* ***the amount become***

payable only on 19.03.2005, the day when the notice of demand was raised. *Time period of two years, prescribed by Section 56(2), for recovery of the amount started running only on 19.03.2005. Thus, the first respondent cannot plead that the period of limitation for recovery of the amount has expired."*

58. That, the aforesaid order of the Hon'ble APTEL has been challenged by the consumers before Hon'ble Supreme Court in Civil Appeal no. (D.No.13164/2007). Vide order dated 17/05/2007, Hon'ble Supreme Court has dismissed the civil appeal confirming the order of Hon'ble APTEL.

59. Issue of applicability of section 56(2) of the Act in case of supplementary billing also came under consideration of Hon'ble High Court of Madhya Pradesh Bench at Gwalior in the case of Kapoor Saw Manufacturing Co. MPSEB and others (2006 SCC Online MP 612). Vide judgment dated 13/07/2006, Hon'ble High Court has upheld the supplementary bill raised on account of error in the matter of calculating tariff. 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."***

60. That, in view of aforesaid judicial pronouncement, amount becomes first due only when the notice of demand/supplementary bill is raised. In the instant case demand letter ***(Annexure P/1 page 38-40)*** *issued on dated 23.07.2021. Thus, petitioner cannot plead that demand is time-bar.*

61. In view of above submission and in the present circumstances of the case petitioner is liable to pay additional surcharge. Hon'ble Commission is requested to dismiss the petition and render justice. "

Commission's Observations and Findings

15. The Commission has observed the following from the petition and the submissions of the petitioner and Respondent in this matter:

(i) M/s. Grasim Industries Ltd. filed this petition under Sections 9, 42 and 86(1)(f)

of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005 against levy of Additional Surcharge by MP Paschim KVVCL Indore on the power consumed by Grasim Industries Ltd. (Staple Fiber Division – Nagda) from its 52 MW onsite Captive Power Plant.

(ii) In FY 1976-77, the Petitioner's Staple Fibre Division established its first unit of Captive Power Plant - and in the year 2009, the capacity of the CPP was increased and a second CPP unit was established increasing the installed capacity to 52 MW. On 17.4.2018, the petitioner and Respondent (then MPSEB) entered into a HT Supply Agreement for supply of electricity on Emergency Stand by Power basis for Petitioner's own use. The petitioner was not a consumer of the Respondent DISCOM till 16.4.2018 and it became an Emergency Stand-by Consumer of the Respondent from 17.4.2018 when it executed the HT Supply Agreement for Stand by Power. One of the conditions for Stand by Power is that the power cannot be drawn by petitioner regularly on a continuous basis for the entire year and is only drawable for start-up of plant in emergency conditions.

(iii) The petitioner owns 100% of the CPP and consumes entire power generated for its own use. The status of petitioner as CPP in terms of Rule 3 of the Electricity Rules, 2005 is undisputed in this matter since the petitioner has complied with the captive qualification criteria set out in Rule 3 of the Electricity Rules. The Petitioner has its own dedicated transmission lines for transmitting power from the CPP to its staple fibre manufacturing unit and both the CPP and the manufacturing unit are located within the same premises. Respondent Discom has also not raised any dispute on CPP status of the Petitioner.

(iv) The petitioner has placed following reasons against levy of Additional Surcharge by Respondent on the power consumed from its CPP in this matter*:*

(a) There is no element of supply/ 'sale' involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e. in terms of Rule 3 of the Electricity Rules) does not amount to "supply of electricity" as contemplated under Section 42(4). Supply is defined in the Electricity Act as "sale of electricity to a licensee or consumer"'.

(b) Captive user is different from a consumer receiving supply of electricity on Open Access.

(c) Even assuming though not admitting, that if availing Open Access, a captive user's Open Access is a right under Section 9(2) and is not subject to the State Commission's discretion under Section 42(4). In other words, Section 42(4) is not applicable to captive users. However, in the instant case, the lines for transmitting power are that of the Petitioner and are dedicated and the lines or system of the Licensee or DISCOM are not used for transmitting power from the CPP to the Load Centre.

(d) Electricity is not wheeled through licensee's network and/ or no

wheeling charges have been determined for a class of consumers.

(e) Hon'ble Supreme Court in a similar matter of Maharashtra State Electricity Distribution Co. Ltd. V. M/s. JSW Steel Limited & Ors. [Civil Appeal No. 5074-5075 of 2019] settled the conundrum pertaining to the issues raised in the instant case and it is evident from the aforesaid judgment dated 10th December 2021 of the Hon'ble Apex Court that Captive users such as the petitioner in the present case, cannot be subjected to demand of the Respondent to pay an additional surcharge.

(f) The reliance placed by Respondent on the judgment passed by Hon'ble Supreme Court in case of 'Sesa Sterlite' is opposed by the petitioner on the ground that the case of Sesa Sterlite was on completely different facts and was not at all related to additional surcharge on wheeling and the Hon'ble Supreme Court did not state anywhere in the judgment that additional surcharge on wheeling is a compensatory charge or is leviable even in case the dedicated transmission lines are used, as is being incorrectly averred by the Respondent. Hence, the judgment of the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors, enjoys an authority and a binding effect.

16. The reply of Respondent to the above contention of petitioner is based on the following orders/Judgments:

(a) Hon'ble Supreme Court's Judgment in the matter of Sesa Sterlite v. OERC [(2014) 8 SCC 444]

(b) Hon'ble Supreme Court's Judgment in the matter of Hindustan Zinc Ltd. v. RERC [(2015) 12 SCC 611]

(c) Judgment dated 11.06.2006 passed by Hon'ble APTEL in Appeal No. 1 of 2006 -in the matter of Hindalco Industries Limited v. WBERC.

(d) MPERC's Order dated 22.05.2007 in Petition No. 02 of 2007 in the matter of M/s. Malanpur Captive Power Limited, Mumbai Vs MP Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal.

(e) MPERC Order dated 17.05.2021 in Petition No.64 of 2021 filed by Grasim Industries Ltd.

17. While citing above Orders/ Judgments, the Respondent has broadly placed the following arguments for applicability of Additional Surcharge on the power consumed by the petitioner from its CPP in this matter:

(a) Judgment of Hon'ble Supreme Court in a similar matter of Maharashtra State

Electricity Distribution Co. Ltd. V. M/s. JSW Steel Limited & Ors. [Civil Appeal No. 5074-5075 of 2019] is not applicable in the present matter.

(b) The Respondent who is required to meet the requirement/ demand of all consumers, **owner or occupier of any premises** in its area of supply, enters into long term Power Purchase Agreements (PPA) with generators so as to ensure supply of power on request. While contracting energy through such long term PPAs, the tariff payable to the generators consists of two part viz., capacity charges and energy charges. The Respondent has to bear the fixed cost (capacity charges) even when there is no off take of energy through such source. Therefore, whenever any person takes electricity from any source other than distribution licensee of area, Respondent continue to pay fixed charges in lieu of its contracted capacity with generators.

(c) In the above situation, the Respondent is saddled with the stranded cost on account of its universal supply obligation. The mechanism of additional surcharge is meant to compensate the licensee on this aspect, namely as stated in section 42(4) of the Act to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(d) Any immunity from recovery of Additional Surcharge from such persons who have captive generation and consumption would be contrary to the very scheme and provisions of the Act. The Act consciously provides for exemption from charges to captive generation and captive use in a limited aspect namely from payment of cross subsidy surcharge as per sections 38(2)d) – proviso; 39(2)d) – proviso; 40(1)c) – proviso; and 42(2- proviso. However when it comes to section 42(4) dealing with Additional Surcharge, there is no such exclusion which makes it abundantly clear that there was no intention to exclude the same for captive generation and captive use.

(e) In view of provisions of the Electricity Act, petitioner is 'consumer' for the purpose of levy of fixed charges on following counts:

(i) Petitioner is maintaining contract demand or standby arrangement (2000 KVA at 33 KV) with the answering respondent and are being supplied with electricity for their own consumption accordingly.

(ii) Premises of the petitioners are connected with the works of a licensee for the purpose of receiving electricity.

(iii) Premises of the petitioner is situated in the area of supply of the answering respondent.

(iv) Captive consumers are also the consumer of the distribution licensee.

(v) A person who has set up a captive generating plant has dual rule, one as a consumer and another as a generator. As per Act additional surcharge is payable in the capacity of consumer and not as generator.

18. The Commission has noted from the documents on record that the petitioner (M/s. Grasim industries Ltd. Nagda) has executed an agreement on 21.03.2018 with Respondent

(Madhya Pradesh Pashchim Kshetra Vidyut Vitaran Company Limited) for standby support power supply. It is mentioned in the aforesaid standby support power supply agreement that by virtue of its status, the petitioner falls within the category A of Captive Power Plant as per chapter IV of the Regulations dealing with other matter including "standby support". Further, Category 'A' in Regulation 4.3 of Madhya Pradesh Electricity Regulatory Commission (Power Purchase and other matters with respect to conventional fuel based captive power plant) Regulations, (Revision-I) 2009 {RG-30(I) of 2009} is applicable for Islanded CPPs (physical connection to grid required if CPP User requests Stand-by support).

19. At the hearing held on 22.02.2022, it was submitted by the petitioner that although the Commission has already decided similar matters in earlier petitions, however, in the meanwhile Hon'ble Supreme Court has pronounced judgment dated 10.12.2021 in the matter of MSEDCL Vs. M/s. JSW Steel Limited & Ors. in Civil Appeal Nos. 5074-5075 of 2019 wherein it was held that *"such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003."* Therefore, in light of the aforesaid judgment pronounced by Hon'ble Supreme Court, interim relief directing the Respondent not to take any coercive action against the petitioner was granted till the disposal of this petition and the arguments were concluded by both the parties followed by their written submissions.

20. While deciding earlier petition 64 of 2020, it was noted by the Commission that Hon'ble Appellate Tribunal for Electricity in Judgment dated 27.03.2019 in Appeal No. 311 & 315 of 2018 in the matter of *M/s JSW Steel Ltd. & Ors.* v. *MERC & Anr.*. held that Additional Surcharge is not leviable on Captive Users. It was further noted that the aforesaid Judgment of Hon'ble Appellate Tribunal was challenged before the Hon'ble Supreme Court by Maharashtra State Electricity Distribution Company Limited in Civil Appeal No. 5074-5075/ 2019 and the Hon'ble Apex Court had passed an interim order on 01.07.2019 in the said Civil Appeal staying the operation and implementation of the aforesaid Hon'ble Appellate Tribunal's Judgment dated 27.03.2019.

21. While deciding the instant petition, the Commission has observed that Hon'ble Supreme Court has now decided the aforesaid matter and vide Judgment dated 10th December'2021 (Civil Appeal Nos. 5074-5075 of 2019) in the above matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors, Hon'ble Supreme Court has held as under:

> "*11. Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electivity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the*

Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee/ licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.

12. The term "consumer" is defined in Section 2(15), which reads as under:

"(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of licensee, the Government or such other person, as the case may be;"

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/ or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person – distribution licensee of his area of supply. So far as captive consumers/ captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers/ captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers, captive users, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/

captive user, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/ invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/ or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 41(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

15. In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed……."

22. In view of foregoing observations and in light of the above-mentioned Judgment of Hon'ble Supreme Court, it is held the Additional Surcharge is not applicable on captive use by Petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed for manufacturing unit from its 52 MW onsite Captive Power Plant. With the aforesaid observations and findings, the subject petition along with IA No. 08 of 2021 stands disposed of.

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