

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition filed under section 86 (1) (F) of The Electricity Act, 2003, seeking directions against Madhya Pradesh Pashchim Kshetra Vidyut Vitaran Co. Ltd. qua its ex facie illegal and arbitrary levy of Additional Surcharge on the power consumed by Grasim Industries Ltd (Nagda) from its 65 MW onsite Captive Power Plant.

Petition No. 64 of 2020

ORDER

(Date of Order: 17th May 2021)

Grasim Industries Limited
Unit: Chemical Division, Nagda
having its registered office at
Birlagram, Nagda- 456331, Dist- Ujjain (M.P.) India

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- **Petitioner**

Vs

M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Compound, Pologround, Indore – 452001

- **Respondent**

Shri Sanjay Sen, Senior Advocate and Shri Ayush Dev Bajpai, Advocate appeared on behalf of the petitioner.

Shri Shailendra Jain, Deputy Director appeared on behalf of the Respondent.

The subject petition is filed under Section 9, 42 and 86 of the Electricity Act'2003 read with Rule 3 of the Electricity Rules, 2005 seeking directions to the Respondent (MPPaKVVCL) against levy of Additional Surcharge on the power consumed by Grasim Industries Ltd. (Nagda) from its 65 MW onsite Captive Power Plant.

2. The petitioner broadly submitted the following in the subject petition:

*"1. The present Petition is being filed by Grasim Industries Ltd (hereinafter referred to as "Petitioner") under Section 9, 42 and 86 of the Electricity Act, 2003 ("**Electricity Act**") read with Rule 3 of the Electricity Rules, 2005 ("**Electricity Rules**") seeking:*

*(a) A declaration that Additional Surcharge is not leviable on the quantum of power consumed by Petitioner's manufacturing works (Chemical Manufacturing Processes) at Nagda, from its 65 MW onsite Captive Power Plant ("**CPP**").*

(b) *Quashing of Madhya Pradesh Pashchim Kshetra Vidyut Vitran Co. Ltd's. ("MPPKVVCL" / "Respondent") letter dated 14.09.2020 bearing reference No. MD/WZ/05/COMM/11867, levying an amount of Rs. 36,89,21,479/- upon the Petitioner as Additional Surcharge on wheeling for the power consumed by Petitioner from its CPP for the period FY 2017-18 to FY 2019-2020 ("Demand Notice"). A copy of the Demand Notice is annexed hereto and marked as **Annexure P – 1**.*

(c) *A direction to MPPKVVCL to forthwith stop the illegal and arbitrary levy of Additional Surcharge on the quantum of power consumed by PETITIONER from its CPP.*

2. *It is stated that, PETITIONER is part of the conglomerate Aditya Birla Group and is one of the largest Chlor Alkali manufacturing company in India. PETITIONER has a manufacturing unit/plant at Nagda and for the purpose of meeting its power requirements the Petitioner had established a captive power plant in the year 1992 and 1996 for 25 and 40MW respectively.*

3. *PETITIONER owns 100% of the CPP and consumes the entire power generated for its own use of manufacturing and 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 1992 and has been generating power since then. On 14.09.2020, PETITIONER was issued a Demand Notice from MPPKVVCL levying Additional Surcharge to the tune of Rs. 36,89,21,479/- on the captive power consumed by its load centre (manufacturing center) during FY 2017-18 to FY 2019-20. 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 of 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 MPPKVCL on captive consumption by PETITIONER for the period FY 2017-18 to FY 2019-20 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 14.6.2006 onwards till date the Petitioner's Unit is a direct consumer of the Respondent Licensee connected at 132 kV EHT. 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 31.12.2019, 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 contract demand maintained by PETITIONER's Unit with the licensee.

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.

II. Brief Facts

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

(a) In the year 1970, the Petitioner manufacturing unit was commissioned and, in the year, 1992, the CPP plant was established and it reached the capacity of 65 MW in the year 1996. On 14.6.2006, PETITIONER and MPPKVVCL (then MPSEB) entered into a HT Supply Agreement for supply of electricity at bulk upto maximum of 2,500 KVA for PETITIONER's own use. A copy of the said HT Supply Agreement dated 14.6.2006 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. 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 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.

....”

(c) 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.

Illustration: 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.”

*(d) On 20.03.2008, PETITIONER and MPPKVVCL entered into a first Supplementary Agreement whereby the contract demand was increased from 2,500 KVA to 10,000KVA. Thereafter there were further supplementary agreements wherein the Petitioner increased its contracted demand with the Licensee. The last such supplementary agreement was entered into on 23.9.2020 wherein the CD was raised from 63,000 KVA to 65,000 KVA. It is pertinent to mention herein that the Petitioner is regularly consuming the power supply from the Respondent Licensee and is regularly paying all bills including the fixed costs as raised by it in its monthly bills. It is also pertinent to mention herein that the Petitioner has also regularly paid the Supply Affording Charges levied on it whenever it has increased its Contracted Demand. It is submitted that whenever, contract demand with Respondent Licensee is enhanced, the Respondent Licensee is levying supply affording charges @ Rs.750/KVA (one time) as per para 4.3.2 of notification no. 1902/MPERC/2009 dtd. 07th Sep'09. Further, as per tariff order, recurring 1% additional charge on total of fixed charges and energy charged billed in the month, also applicable in case contract demand exceeds 50,000 KVA on 132 kV line. A copy of the said First Supplementary Agreement dated 20.03.2008 and the last supplementary agreement dated 23.9.2020 is annexed hereto and marked as **Annexure P-3 and P-4**. It is submitted that the CPP operations of the Petitioner are on islanding mode and hence they do not run parallel with the grid.*

(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-5**.

(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 MPPKVCL **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 -6.**

(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 –7**.

(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 -8.***

(i) *On 19.06.2020, certificates were issued by PETITIONER's Chartered Accountants (S B C J & Associates) 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 19.06.2020 is marked and annexed hereto as **Annexure P-9.***

(j) *It is further submitted that the Petitioner has been paying all bills raised by the Respondent Licensee towards the power supplied by it to the Petitioner including demand charges. It is submitted that the Respondent Licensee is also levying fixed charges on monthly basis as per tariff order applicable on 90% of contracted*

*demand or maximum demand recorded during the month, whichever is higher. As per current tariff order, fixed charges are levied at Rs.660/KVA. A sample copy of the monthly bills for monthly bills of July, 2017, May 2018, January, 2019 and February 2020 are attached for the reference of this Hon'ble Commission as **Annexure-P-10**.*

(k) On 28.09.2020, PETITIONER received MPPKVVCL's Demand Notice dated 14.09.2020. 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 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. Hence the present Petition.

*(l) On 05.10.2020, PETITIONER submitted its Reply to MPPKVVCL's Demand Notice dated 14.09.2020, inter alia, requesting withdrawal of Demand Notice dated 14.09.2020, however the same was rejected by the Respondent Licensee vide its letter dated 12.10.2020 and hence it is submitted that there is no delay in the filing of the instant petition. A copy of PETITIONER's letter dated 05.10.2020 and the Respondent Reply dated 12.10.2020 are annexed hereto and marked as **Annexure P-11 and P-12**.*

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 of 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 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 Vikram 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 14.6.2006 till date the Petitioner Unit is a direct consumer of the Respondent Licensee and is connected at 132 kV level with the Transmission Network.*

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. It is noteworthy that, while determining Wheeling Charges payable by consumers, this Hon'ble Commission has specifically not determined any Wheeling Charges for EHT consumers (i.e. consumers connected at 132 kV such as PETITIONER). This Hon'ble Commission has held that generators and consumers connected at 132 kV or above are only required to pay Transmission Charges and no Wheeling Charges are determined for such consumers as there is no usage of the distribution network. PETITIONER's Unit is the generator and the consumer connected at 132 kV and is not liable to pay Wheeling Charges. 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 MPPKVVCL'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. 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. MPPKVVCL 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."

3. With the above-mentioned submissions, the petitioner prayed the following in the subject petition:

- (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 65 MW onsite Captive Power Plant.
- (b) Set aside/ quash MPPKVVCL's Demand Notice/ letter dated 14.09.2020 bearing reference No. MD/WZ/05/COMM/11867, retrospectively levying Additional Surcharge of Rs.36,89,21,479 /- on PETITIONER's Unit for the power consumed by PETITIONER from its 65 MW onsite Captive Power Plant for the period FY 2017-18 to FY 2019-20.
- (c) Pass such other and further order(s) as this Hon'ble Commission may deem fit in the facts and circumstances of the present case.

4. At the motion hearing held on 24.11.2020, Ld. Counsel who appeared for the petitioner submitted that the issues involved in this petition are almost similar to those issues raised in Petition No. 61 of 2020 and Petition No. 62 of 2020. He submitted that the Hon'ble Appellate Tribunal for Electricity have granted interim protection to the petitioner in OP No. 16 of 2020. Having heard the petitioner, the petition was admitted and the Respondent was directed to follow the directives of the Hon'ble Appellate Tribunal for Electricity in this matter, if any. The petitioner was also directed to serve copy of petition to the Respondent within three days and report compliance of service to the Commission. The Respondent was directed to file reply to the subject petition within 15 days thereafter. The petitioner was asked to file rejoinder on the aforesaid reply within seven days. The case was fixed for arguments on **19th January'2021** along with other similar petitions. The interlocutory applications filed with the subject petition was disposed of.

5. At the hearing held on 19.01.2021, the Commission has observed the following:

- (i) Vide letter dated 18.12.2020, the Respondent filed reply to the subject petition.
- (ii) Vide letter dated 13.01.2021, the petitioner filed rejoinder to the above reply.

6. At the hearing held on 19.01.2021, the Commission has observed the following:

- (i) Ld. Senior Counsel who appeared for the petitioner at the outset stated that he supports the arguments placed by the Ld. Counsel who appeared in other petitions Nos. 12 of 2020, 61 of 2020 and 62 of 2020 which were heard on the same day. He put forth some additional points and concluded his arguments. He requested to allow him to file a written note in support of the arguments.
- (ii) The representative for the Respondent also relied on the same arguments placed by him in other petitions Nos. 12 of 2020, 61 of 2020 and 62 of 2020 which were heard on the same day.

7. In view of the above, the Respondent was directed to file his written submission within three days along with all Judgments/orders cited in his arguments. The Respondent was also directed to serve copy of aforesaid written submission on the petitioner simultaneously. The petitioner was directed to file written submission within three days, thereafter. The case was reserved for order on filing of written submissions by both the parties within the above stipulated date.

8. The Respondent (M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.) submitted the following in its reply to the petition:

- 1. *"That, the petitioner has filed present petition challenging the legality and validity*

of levy and billing of additional surcharge by the answering respondent on the consumption of power from the source other than the distribution licensee of area.

2. *That, from perusal of averment made in the petition along with relief claimed, it is apparent that the primary grievance raised by the petitioner vide instant petition is with respect to the billing of additional surcharge on the part of its supply availed from the petitioner's own power generating Plant. That, broadly petitioner has challenged the billing of additional surcharge payable under Section 42(4) of the Electricity Act 2003 (The Act) on the following two grounds:*
 - a) *That levy of 'Additional Surcharge' is not applicable in those cases where power is being drawn by a consumer from its own 'Captive Generating Plant'.*
 - b) *That levy of 'Additional Surcharge' is not applicable in those cases where open access is not availed and there is no billing of wheeling charges.*
3. *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.*

RE: Distinction between Captive Generating Plant vis a vis a Non- Captive Generating Plant:

4. *That, vide instant petition petitioner has sought to create a distinction in the captive generating plant and non captive generating plant (ref para 2 to 7, 33). It is the petitioner's case that in case of non captive generating plant, consumer is required to be pay both cross subsidy surcharge as well as additional surcharge whereas in case of captive generating plant, captive consumer is not liable to pay both cross subsidy surcharge as well as additional surcharge. To deal with this issue it is necessary to set out various definitions and provisions of the Electricity Act, 2003 (The Act) hereunder:*

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.*

(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;

38. Central Transmission Utility and functions.-(1).....

(2) The functions of the Central Transmission Utility shall be-

*(a) to undertake transmission of electricity through inter-State transmission system;
(b) to discharge all functions of planning and co-ordination relating to inter-State transmission system with-*

(i) State Transmission Utilities;

(ii) Central Government;

(iii) State Governments;

*(iv) **generating companies;***

(v) Regional Power Committees;

(vi) Authority;

(vii) licensees;

(viii) any other person notified by the Central Government in this behalf;

(c);

(d) to provide non-discriminatory open access to its transmission system for use by-

*(i) **any licensee or generating company on payment of the transmission charges; or***

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Central Commission:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central Commission:

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.

Section 39. (State Transmission Utility and functions):

(1).....

(2) The functions of the State Transmission Utility shall be -

.....

(b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with -

(i) Central Transmission Utility;

(ii) State Governments;

(iii) generating companies;

(iv) Regional Power Committees;

(v) Authority;

(vi) licensees;

(vii) any other person notified by the State Government in this behalf;

.....;

(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges ; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

xxxx

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission:

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.

Section 40. (Duties of transmission licensees):

It shall be the duty of a transmission licensee -

(a).....

(b).....

(c) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee **or generating company** on payment of the transmission charges;

or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Appropriate Commission:

xxx

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate Commission:

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.

Section 42: (Duties of Distribution licensees 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-subsidy and the operational constraints) as may be specified within the one year from the appointed date and in specifying the extent of open access in successive phases and in determining the charges of wheeling, it shall have due regard to all relevant facts including such cross-subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of surcharge, in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of the current level of cross-subsidy within the area of supply of distribution licensee

XX XXX XXX:

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:

XX XXX XXX.

(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.

Emphasis supplied

5. *From the bare perusal of section 40, 39 and 42 of the Act, it may be seen that it shall be the function of State Transmission Utility/transmission licensee/distribution licensee to provide non-discriminatory open access to its transmission system/distribution system for use by any licensee or generating company or consumer as the case may be. It is also competent for the State Utility/transmission*

licensee/distribution licensee to recover the transmission charges/wheeling charges and surcharges as specified by State Electricity Regulatory Commission but as per fifth proviso to Section 39(2)/40(c) (i) or fourth proviso to section 42(2) of the Act, when State Transmission Utility/transmission licensee/distribution licensee provides open access to a person who has established a captive generating plant for carrying the electricity to the destination of his own use, cross-subsidy surcharge cannot be levied. Except to the extent of prohibition for collection of surcharge for the purpose of cross-subsidy, Section 39, 40 or 42 of the Act treats captive generating plant and non captive generating plant equally. So to say, the "generating company" appearing in Section 39(2)(d) or 40 (c) (i) or 2 (47) also includes a captive generating plant. If such an interpretation is not opted, it would result in absurdity. For instance, in a given case, State Transmission Utility or transmission licensee may deny open access to its transmission system to a captive generating plant on the ground that no such obligation is cast on it or there is no mention of captive generating plant/captive consumer in section 2(47). In such an event, Section 9(2) of the Act, which confers a right on a person with captive generating plant to have open access, would be rendered redundant and meaningless. Thus, it may be concluded that as far as duties of distribution/transmission licensees are concerned there is no provision which enumerates two different types of functions of State Transmission Utility/transmission licensee/distribution licensee, one in respect of captive generating plant and other in respect of non captive generating plant.

6. *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. Therefore, petitioner being captive generating plant cannot claim any immunity from any of statutory charges which is otherwise not exempted by the Act. Accordingly, petitioner is required to pay additional surcharge to the respondent.*

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

7. *That, petitioner is contending that in the instant case there is no use of distribution system/ open access ,for supply of power from petitioner's generating plant to the petitioner's manufacturing unit hence additional surcharge cannot be levied. In this regard it is submitted that issue of necessity of use of distribution system for the levy open access surcharges came under consideration of Hon'ble APTEL in case of Chhattisgarh State Power Distribution Co. Ltd. Vs . Aryan Coal Beneficiations Pvt. Ltd (Appeal No. 119 & 125 of 2009). Vide order dated 09th Feb 2010 Hon'ble APTEL held that levy of compensatory open access charges does not depend on the open access on 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 a prerequisite and such charges are payable irrespective of whether the lines of the distribution licensee are used or not.

8. Hon'ble Supreme Court in *Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Others* (Civil Appeal No. 5479 of 2013) 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. The relevant part of the said judgment is reproduced as under:

25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their 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 for both these aspects.***

9. It is submitted that Hon'ble Supreme Court in the aforesaid judgment clearly considered the both the surcharges (cross subsidy surcharge as well as additional surcharge) as compensatory in nature. In the very same judgment Hon'ble Supreme Court further held as under:

28. Therefore, in the aforesaid circumstances though CSS is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. **In 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 and 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.

10. It may be seen that Hon'ble Supreme Court explicitly held that compensatory charges is to be levied even if line of the distribution licensee is not being used for supply of power. In the instant case levy of cross subsidy surcharge is exempted vide fourth proviso to Section 42(2) however there is no such exemption for additional surcharge. Thus, additional surcharge being compensatory in nature is payable even if no part of distribution system has used for consumption of power from other source of supply.
11. Thus, from the above it is apparent that cross subsidy surcharge and additional surcharge are compensation payable to the distribution licensee irrespective of the fact whether its line is used or not. In the present case although cross subsidy surcharge is exempted but there is no such exemption with regard to additional surcharge.
12. Here, it is also noteworthy to mention that although grid has not used for conveyance of electricity from other source of supply, the generating plant is

*operating parallelly with the grid. Accordingly, continuous support from the grid is being provided to the petitioner. The fact narrated in the petition (ref para 10(d)) that the power plant is operating in islanding mode is incorrect and contrary to the record. As already been seen that 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 M/s Grasim Industries is akin to open access. Therefore, the petitioner is liable to pay additional surcharge as determined by the Commission from time to time.*

13. *In view of above petitioner is liable to pay additional surcharge even if no open access is availed over the distribution system for conveyance of power from generating plant to manufacturing unit.*

RE: Levy of ‘Additional Surcharge’ is not applicable where there is no billing of wheeling charges:

14. *That, petitioner is submitted that it is not using distribution system and there is no wheeling (as there is no use of distribution system) hence no wheeling charges are being billed to the petitioners. Petitioner is contending that since wheeling charges are not being billed additional surcharge shall also not be applicable. The proposition put forth that simply because one kind of charge (wheeling charge in the present case) is not being billed, other kind of charges automatically fall, cannot be accepted as there is no difficulty in making the computation of additional surcharge which is payable as per the rate determined by the Hon’ble Commission in the Retail Supply Tariff Orders issued from time to time. The relevant part of the tariff order of FY 2019-20 is reproduced as under:*

*“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.”*

15. *That, it may be seen that calculation of additional surcharge is to be done based on the units (kWh) consumed by any consumer from source other than the distribution licensee and there is no dependency on the wheeling charges in this regard. Thus, petitioner is liable to pay the additional surcharge even if no wheeling charges is being billed separately.*
16. *That, the Sesa Sterlite judgment supra makes it amply clear that a consumer who consume the power from any source other than the distribution licensee of area even through a “dedicated transmission line” without using the distribution system would*

be liable to pay Additional Surcharge under the Act. Accordingly petitioner is liable to pay the additional surcharge as:

- 16.1.** *Premises of petitioner is situated within the area of the respondent distribution licensee.*
- 16.2.** *Petitioner is maintaining the contract demand with the answering respondent and premises of petitioner is connected to the network of the licensee for receiving such supply.*
- 16.3.** *Petitioner is entitled to avail any quantum of power from respondent and respondent is under obligation to supply such power on demand.*
- 16.4.** *If the petitioner were to take electricity supply from the respondent instead of taking the same from its own generating plant, then the tariff charged from the petitioner would also include the element of fixed cost of power purchase.*

17. *That, this Hon'ble Commission in exercise of power conferred by the Act has notified the MPERC (Terms and Conditions for Intra State Open Access in Madhya Pradesh) Regulations, 2005 (here in after referred as 'OA Regulation 2005') and subsequent amendment thereof. The OA 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.*

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*

.....”.

18. *That, as per aforesaid provisions of OA Regulation 2005 wheeling charges, cross subsidy surcharge and additional surcharge are three independent charges. In other word levy of any one charge is not the conditional upon the levy of any other charge.*

19. *That, clause 8.5.4 of the National Tariff policy provides that the fixed cost of power*

purchase would be recovered through additional surcharge and the fixed costs related to network assets would be recovered through wheeling charges. The said clause is reproduced 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."

20. Thus, additional surcharge and wheeling charges are being levied for two different purposes. Accordingly additional surcharge is payable even if the wheeling charges are not being billed separately.

21. That, the fact that premises of petitioner is connected at 132 KV voltage level is also not makes any difference with regard to liability of additional surcharge as the answering distribution licensee has universal supply obligation towards all consumer of its 'area of supply' irrespective of the quantum and voltage of the supply. Further 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 for all statutory purpose notwithstanding of its voltage.

22. The issue of levy of additional surcharge in the case where no part of distribution system has been used and there is no billing of wheeling charges came into consideration of this Hon'ble Commission recently in the matter of M/s. Narmada Sugar Private Limited Vs M.P. Poorva Kshetra Vidyut Vitaran Co. Ltd (Judgement dated 27/03/2019 in review petition No. 02 of 2019). Relying upon the judgment of the Hon'ble Supreme Court in the Sesa Sterlite Supra this Hon'ble Commission upheld the levy of additional surcharge even in the case where no use of distribution system. Relevant part of the said judgment is reproduced as under:

*"11. The Commission had issued an Order on dated 22.5.2007 in respect of Petition No.02/2007. In this order, the Commission clarified that the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard. **The Commission also clarified that this additional surcharge would be levied even when dedicated transmission line is used.** In the Open Access Regulations, 2005, the Commission specified the charges applicable for the Open Access which includes the levy of additional surcharge as determined by the Commission on yearly basis.*

12. In the Civil Appeal No. 2479 of 2013 (*Sesa Sterlite Limited V/s Orissa Electricity Regulatory Commission and others*), the Hon'ble Supreme Court analyzed the rational behind levy of cross-subsidy surcharge and additional surcharge. The Hon'ble Supreme Court clarified that the Open Access can be allowed on payment of the surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt. In the rational for cross subsidy surcharge, the Hon'ble Supreme Court mentioned in the aforesaid order that the mechanism of cross subsidy surcharge and additional surcharge are meant to compensate the licensee towards the requirement of current level of cross-subsidy and fixed cost arising out of the universal supply obligation on the Distribution Licensee. The extract of the Hon'ble Supreme Court's clarification in this regard is as under:-

"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 Commission. 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 for both these aspects".

13. The Tariff Policy, 2016 envisages the following regarding additional surcharge:-

"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 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 network assets would be recovered through wheeling charges."

14. Section 42(4) of the Electricity Act, 2003 has specific provision for levy of the additional surcharge on a consumer or class of consumers in case State Commission permits them to receive supply of electricity from person other than distribution licensee of his area of supply to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

15. In Order dated 22nd May, 2007 (Petition No. 02/2007) the Commission states the following:-

"While the Commission would consider levying additional surcharge on wheeling charges, yet it is the responsibility the licensee to demonstrate that they have an obligation in terms of existing power purchase commitments or they bear fixed costs consequent to such a contract.

Hence, the Commission directs the licensee to demonstrate such commitments in order to levy additional surcharge on wheeling charges in terms of Section 42(4) of the Act".

16. Seventh amendment to Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 [ARG-33(I)(vii) of 2017] stipulates as below:

"12.2 Wheeling charges, Cross subsidy surcharge, 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 from time to time in its retail supply tariff order."

17. Accordingly, the Commission has already determined the additional surcharge under Chapter "A3: Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge" of the Retail Supply Tariff Order for FY 2017-18 issued on 31st March, 2017 and under Chapter "A4: Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge" of the Retail Supply Tariff Order for FY 2018-19 issued on 03rd May, 2018.

18. Under the above circumstances, the Commission is of the view that the additional surcharge has already been determined in the retail supply tariff orders from time to time. As such, the aforesaid issue may be raised either through review of the retail supply tariff order of the Commission or while the process of determination of retail supply tariff for FY 2019-20 is initiated."

23. In view of above submission petitioner is liable to pay additional surcharge even if no wheeling charges are being billed separately.

RE: Levy of 'Additional Surcharge' in the cases where power is being drawn by a consumer from its own 'Captive Generating Plant':

24. That, the petitioner is contending that additional surcharge is not applicable on the consumption of power through captive route as arrangement between captive generating plant and captive consumer not comes within the four corner of Section 42 (4) of the Act. The said section 42(4) is again reproduced as under for ease of reference:

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.

25. To answer the issue under consideration following questions need to address:

25.1. Whether there is any element of 'Permit'/permission from Commission exist in case of a captive consumer consuming power from Captive Generating Plants:

- 25.1.1. In this regard it is submitted that as per aforesaid provision of the Section 42(4) for levy of additional surcharge it is not necessary that permission of open access shall be granted to individual consumers by Hon'ble Commission through its order on case to case basis. It is also not necessary that additional surcharge is applicable only when consumer avails open access.

- 25.1.2. 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 consume power from other source of supply comes within that '**class of consumers**', additional surcharge shall be payable by such consumer. In other words, the fact that any particular consumer who has not availed open access for consumption of power from other source of supply shall also liable to pay additional surcharge if additional surcharge is determined for that class of consumers.

25.2. 'Whether petitioner M/s Grasim Industries Limited is a 'Consumer'?

- 25.2.1. That, the petitioner vide instant petition has sought to create distinction in the consumer and captive user (ref para 19(f) the petition). 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;**

In the present case premises of the petitioner connected with the works of licensee. Further petitioner is also maintaining the contract demand with the distribution licensee. Thus petitioner is a consumer.

25.2.2. In Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015) , it was contended by appellant captive generating plant that the Act has totally liberalized the establishment of captive power plants and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, it not the consumer of distribution licensee & cannot be regulated by the Regulatory Commission. Rebutting the submission Hon'ble Supreme 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.

25.2.3. *Applying the aforesaid principles laid down by the Hon'ble Apex in the present circumstances of the case it is clear that:*

- a. captive consumer is also a consumer of the distribution licensee.*
- b. person who has setup the captive generating plant has dual role/capacity, one as a generating plant and other as a consumer.*
- c. Similar to the RPO obligation additional surcharge is not being levied in the capacity of generator but being levied in the capacity of consumer.*
- d. if additional surcharge not levied on captive consumers the regular consumer of the distribution licensee would be in a disadvantageous position.*

25.2.4. *Petitioner itself vide para 10(k) of the petition admitted that petitioner is a 'consumer'. Once any person has satisfied the definition of 'consumer' any other status (i.e captive user) of that person not relevant as far as levy of statutory charges is concerned. Hon'ble Supreme Court in Sesa Sterlite case supra clearly held that even the licensee who is a consumer liable to pay open access charges.*

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

25.3. *Whether arrangement of availing power from captive generating plant amounts to 'supply'?*

25.3.1. *Petitioner is contending that in the transaction of consuming power from captive generating plant there is no element of 'supply'(ref para 16 to 23 of the petition) hence additional surcharge is not applicable. Petitioner is solely relying on the definition of term 'supply' given in the Act. The said definition 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;"

Petitioner is trying to establish that since 'supply' means 'sale' and in case of consumption of power from captive generating plant there is no element of sale involved hence they are not liable to pay additional surcharge. This contention of petitioner is grossly erroneous.

25.3.2. *It is submitted that aforesaid Section 2 of the Act, which contains the definition of supply, opens with the phrase "**unless the context otherwise require**". Therefore, depending upon the context meaning of any term defined in the definition clause may be varied.*

25.3.3. *In the issue under consideration the context is drawl of power from other*

source of supply. It is noteworthy to mention that 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 and distribution licensee has nothing to do with the commercial arrangement (if any) between sender and receiver of the electricity. Therefore in the present context meaning of '**supply**' cannot be '**sale**' as given in the definition clause.

25.3.4. In this regard following other definitions provided in the Act are relevant:

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 aforesaid definitions it is clearly emerges that a power plant set up to **generate** electricity primarily for own use become a captive generating plant. Further, when a power plant **generates** electricity it shall always be for giving **supply** to any premises not otherwise. In other words there cannot be any generation except for the supply.

25.3.5. 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.

25.3.6. This, Hon'ble Commission in the case of (M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd. (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. However, the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard.

25.3.7. 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 provision of the said act 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 other contextual meanings as discussed above.

25.3.8. In view of above submission it is stated that expression 'supply' not always means sale of electricity. Further in the present context, fact and circumstance of the case there is 'supply' of power by generating plant of petitioner to the manufacturing unit of the petitioner.

RE: Universal supply obligation towards the all consumers irrespective of their status (i.e captive or otherwise):

26. It is submitted that 'universal supply obligation' of the distribution licensee is foundation of the levy of additional surcharge. The whole petition is silent on this issue. In this regard the relevant provisions of the Act are reproduced as under:

"Section 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.

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.**"

27. From the combined reading of Section 43(1) and Section 42(4), it may be seen that:

27.1. Duty to supply on request is towards every owner or occupier of any premises situated in the area of Distribution Licensee. Undisputedly petitioner's

- manufacturing unit is situated within the area of supply of the respondent Discom.*
- 27.2.** *There is no provision in the Act which provides that this duty to supply shall come to an end when a consumer of distribution licensee avail power from any other source including captive generating plant.*
- 27.3.** *The levy of additional surcharge is provided in the Act only with a view to meet the fixed cost of distribution licensee **arising out of his obligation to supply.***
- 28.** *The issue regarding effect of consumption of power through captive route on the universal service obligation or consumership of any consumer situated in the area of supply of distribution licensee came under consideration of Hon'ble APTEL in the case of petition No. 1/2006 in case of Hindalco **Industries Limited** vs WBERC. Considering the various statutory provision of the Act, Hon'ble APTEL held as under:*
- 15. It is convenient to take up points A to C as they overlap each other. Concedingly open access **from the appellant's CPP in Orissa** to its plant in Belurmath in West Bengal is an inter-State transmission, as defined in Section 2(36) of The Electricity Act 2003. There is no controversy that the appellant has applied for short term open access. For the remaining portion of the transmission facility within the State of Orissa as well as the Powergrid is concerned, already open access has been approved.*
- 16. Only in respect of the section of the length of 5 KM which falls within the State of West Bengal an application was moved by appellant before the State Commission. It is pointed out by the appellant that 2 KMs out of 5 KMs length is the dedicated transmission line built up at the cost of appellant as seen from the appellant's stand.*
- 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 losing 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 Belurmah 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. The appellant has unequivocally made it clear that the appellant is willing to pay the charges prescribed by the area distribution licensee including demand charges, energy charges and other charges for the connected load of 8.5 MW in the same manner as in the case of identically placed industrial consumers in the area and the appellant is ready and willing to remit the charges payable to the area distribution licensee.

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. Section 49 of The Act provides for an agreement being entered into when open access is allowed to consumers for supply or purchase of electricity on such terms and conditions including tariff as may be agreed upon. We do not find any justifiable reason for the direction issued by the Regulatory Commission in this respect. The West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 also do not impose such a condition. In fact, Regulation 12 of the said Regulations provides for entering into a commercial agreement with a distribution licensee and abide by various conditions relevant thereto. Regulation 13.4 also in no way provides for issue of such a direction.

25. We are unable to appreciate the view of the Commission that the appellant cannot demand supply of back-up power from the CESC Ltd. as a matter of right even though nothing could prevent the appellant to enter into a separate agreement for supply of back-up power on terms and conditions mutually acceptable to both. None of the provisions of The Act or the Rules framed there under or the Regulations framed by the West Bengal State Electricity Regulatory Commission has been placed before us to show that the appellant should sever its relationship as a consumer with CESC on its being granted open access. So long as the appellant is

agreeable to pay the charges prescribed in this behalf to an identical industry, the appellant, an existing consumer cannot be directed to sever its relationship with area distribution licensee. The construction placed on Section 42 (3) of The Electricity Act runs counter to the very section. The object and scope of the provision has been lost sight and as an existing consumer the appellant could continue its relationship. Such a construction cannot be appreciated as it runs counter to plain meaning of the provisions of the Act. Section 42(3) enables an existing consumer of an area DISCOM Licensee requires supply of electricity from a generating company or any licensee other than the area licensee, such consumer may require the Distribution Licensee for wheeling of electricity in accordance with Regulations framed by Regulatory Commission and area DISCOM is to act as a common carrier.

26. All that Section 42 (3) provides that a distribution licensee shall be a common carrier providing non-discriminatory open access when the consumer seeks for open access and wheeling power in accordance with the Regulations made by the State Commission. Hence, we hold that the WBEC Commission has no justification nor authority nor warrant nor jurisdiction to direct the appellant to sever its status as a "consumer" with WBSEB. Such a condition is not contemplated to be imposed while allowing an application for open access in terms of The Electricity Act 2003 or Regulations framed there under either by CERC or WBEC.

Emphasis supplied

29. From the perusal of the observation of Hon'ble APTEL, it can be safely concluded that the answering respondent being a distribution licensee of area, has an universal service obligation towards the all consumers situated in the area of supply even after availing the open access. This fact is also irrelevant that said open access is availed through captive route. Therefore, any person being owner or occupier of any premises in the area of distribution licensee, who is consuming power even through captive route, can ask as a matter of right any quantum of electricity supply from the respondent and respondent is under obligation to supply the same. It is further held that the person who availed power from other source of supply shall not cease to be a consumer of the area DISCOM/ Licensee. We have already discussed that '**obligation to supply**' is the foundation of additional surcharge. Each and every owner/occupier of any premises or consumer towards which a distribution licensee has obligation to supply is liable to pay additional surcharge to such distribution licensee. Therefore, petitioner is liable to pay additional surcharge to the respondent.

RE: Effect of payment of fixed charges (demand Charges) against the contract demand:

30. Petitioner is contending that it is paying demand charges for the contract demand which take care of its share of fixed cost of liability of the distribution licensee

towards its generators (ref para 29-31). This claim of petitioner is wholly erroneous and misconceived on the following grounds:

30.1. Fixed Cost towards generator not being recovered through Fixed charges and being recovered through energy charges:

30.1.1. 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;

Emphasis supplied

30.1.2. 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) 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.

30.2. Fixed charges (demand charges) are being recovered for the supply being availed from distribution licensee and not for the consumption from other source of supply:

30.2.1. 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 2019-20. 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 **excluding the demand availed through open access for the period for which open access is availed** or 90% of the contract demand, whichever is higher, subject to clause 3.4 of the M.P. Electricity Supply Code, 2013.

30.2.2. 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.

30.3. Fixed charges are not sufficient to recover the fixed cost of the Distribution Licensees:

30.3.1. 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%

30.3.2. 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%.

30.3.3. 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.

30.4. Levy of additional surcharge cannot be challenged in the present proceedings:

30.4.1. *That, Tariff orders (FY 2017-18 w.e.f 10/04/2017, FY 2018-19 w.e.f 11/05/2018, FY 2019-20 w.e.f 17/08/2019) approving additional surcharge on all the consumers (including captive consumers) have never been challenged by any captive consumer including petitioner. Further, the additional surcharge so determined made applicable to all consumer notwithstanding the fact that consumer may have contract demand with the distribution licensee. Accordingly these orders have attained finality in this regard. The Tariff order cannot be challenged in the present proceedings initiated under Section 86(1)(f) of the Act for resolution of dispute.*

30.4.2. *That, while approving the additional surcharge, Hon'ble Commission duly considered the availability of power and stranded capacity thereof. If the petitioner has any grievance regarding stranded capacity of power or petitioner is of the view that while determining the additional surcharge consideration to the contract demand with the distribution licensee is also required to be given, it should have raised these grievances before this Hon'ble Commission in the proceedings of the determination of the additional surcharge and such issues cannot be raised in the present proceedings.*

30.4.3. *In view of above, particularly regulation and Tariff Orders of this Hon'ble Commission prevailing in the state of Madhya Pradesh, petitioner is liable to pay additional surcharge to the respondent.*

RE: Effect of Section 9 of the Act on the liability of Open Access charges:

31. *That, petitioner is 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 (ref para 6). Hence, they are not liable to pay open access charges as per provisions of Section 42.*

32. *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.

33. *It may be seen that Section 9(2) merely confers right of open access to the destination of use. However, what '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;***

34. *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, right of open access under section 9(2) is also subject to Regulations of the Hon'ble Commission.*

35. *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).

36. *In view of above, it can be safely concluded that Section 9 do not provide 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.*

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

37. *Hon'ble APTEL vide order dated 11.06.2006 in case of **HINDALCO supra**, has 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 Bangal 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.

38. This Hon'ble Commission in the case of *Malanpur supra* 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 factual controversy in the para 3 and 4 order dated 22.05.2007 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 following 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.

39. In view of above, issue sought to be raised in instant petition has already been decided in favour of answering respondent by the Hon'ble APTEL as well this Hon'ble Commission. Accordingly, petitioner is liable to pay additional surcharge to the answering respondent.

40. That, in view of the submissions made in the instance reply, para-wise reply has not been submitted. The answering respondent crave leave of this Hon'ble Commission to submit para-wise reply, additional reply as and when need arises / directed by Hon'ble Commission for proper adjudication of present petition.

41. In view of above submission, it is submitted that as far as levy of the additional surcharge is concerned petitioner is liable to pay additional surcharge notwithstanding the fact that it is availing power from a generating plant which also have the captive status. In other words, except to the extent of non-levy of surcharge for cross-subsidy, no other benefit available to a consumer drawing power from its own captive generating plant.

9. The petitioner broadly submitted the following in its rejoinder to the above reply filed by the 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, but 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 para 11 to 15 of the instant petition where 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 the 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 (refer para 7 of reply) is completely erroneous and misleading as the issue is not pertaining to exemption but of eligibility/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. *It is submitted that the fact that the Respondent has completely misconstrued the issue of levy of additional surcharge on wheeling is apparent and demonstrated from the submissions made in para 8 of the reply as the Respondent has incorrectly relied on the case of 'Aryan Coal' as decided by Hon'ble APTEL in Appeal no. 119 of 2009 dated 9.2.2010. A perusal of the judgement of the Hon'ble APTEL, as quoted by the Respondent itself clearly highlights that the Hon'ble APTEL was dealing with the levy of CSS under section 42(2) of the Act, 2003 and not with the issues of levy of additional surcharge on wheeling under section 42(4) of the Act, 2003. Therefore, the reliance of the Respondent on the case of Aryan Coal is completely incorrect.*
7. *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' is severely and most vehemently opposed by the petitioner herein for the simple reason 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.*
8. *It is submitted that the case of Sesa Sterlite was only with respect to the levy of cross subsidy surcharge for which the Hon'ble Apex Court held that it is a Compensatory Charge and also the case of Sesa Sterlite was on different facts, and the attempt on the part of the respondent to submit that the Hon'ble Supreme Court has held that the additional surcharge on wheeling is also leviable as a compensatory charge in all circumstances (when no wheeling undertaken) is nothing but an attempt to mislead this Hon'ble Commission.*
9. *Even the reliance of the respondents on the case of Narmada Sugar as adjudicated by this Hon'ble Commission in Petition No.2 of 2019 is incorrect for the simple reason that there is immense difference in facts between the case of Narmada Sugar and the*

instant case and the plant of Narmada Sugar was not operating in an islanding mode or when there is no wheeling charge leviable.

- 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.*
- 11. 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.*
- 12. 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 14.9.2020 deserves to be quashed.*
- 13. In this regard it is further submitted that the Respondent has specifically admitted in its reply at para 13 that the Petitioner is not using the grid or the distribution system of the Respondent, for conveyance of electricity from its CPP to its load centre of consumption. This admission itself establishes the case of the Petitioner beyond any reasonable doubt that the conditions of section 42(4) of the Act 2003 are not met out for levy of additional surcharge on wheeling.*
- 14. It is further submitted that the Respondent has in para 13 of its reply has disputed the fact that the petitioner CPP is operating in an islanding mode during the relevant years of 2017-18 onwards and for this view of the matter the Petitioner is attaching the letter dated 2.4.2014 issued by the Respondent by virtue of which its request for discontinuance of operation in parallel with grid was accepted by the Respondent. This amply demonstrates that the Petitioner CPP is operating in an islanding mode and is not connected to the grid and therefore it is submitted that there is no wheeling of power from the CPP to the load centre through the distribution system of the Respondent. A copy of the letter dated 2.4.2014 of the Respondent is attached as Annexure-RP-1.*
- 15. Further, the contention of the respondent that the petitioner's plant is not operating in an islanding mode and is operating in parallel with the grid and this operation in parallel with the grid is akin to taking open access and therefore additional surcharge on wheeling is payable, is the most incorrect and absurd submission in facts and law and completely violative of the provisions of the Electricity Act, 2003. It is submitted that it appears that the Respondent is only seeking to somehow impose this illegal levy on the Petitioner for undertaking its revenue generation. It is reiterated that the Petitioner is operating in an islanding mode and not in parallel with the grid.*
- 16. It is most respectfully submitted that the averment of the respondent that the permission required under section 42(4) for levy of additional surcharge is not required to be granted to the individual consumers on a case-to-case basis, is incorrect as it defeats the entire statutory provision.*

17. *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.*
18. *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.*
19. *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 14.09.2020 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 14.9.20, 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.*
20. *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.*
21. *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 2(72) 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.

22. *Further the reliance of the Respondent on the case of Hindustan Zinc is also misleading and incorrect.*
23. *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 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.*
24. *All adverse contentions and averments and allegations raised by the respondent in their reply are denied, if not specifically admitted. The Petitioner specifically reiterates the contents of its Petition which are not being reproduced herein for the sake of brevity.*
25. *In view of the submissions made hereinabove, the relief prayed for by the petitioner may kindly be granted and the petition be kindly allowed.*

10. The Respondent has relied on the same arguments placed by him in other similar nature of petitions Nos. 12 of 2020, 61 of 2020 and 62 of 2020 which were heard on the same day. Accordingly, the written submission commonly filed by the Respondent is mentioned below:

1. *That, petitioner has challenged the billing of additional surcharge payable under Section 42(4) of the Electricity Act 2003 (The Act) broadly on the following two grounds:*
 - 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'.*
 - b) *Levy of 'Additional Surcharge' is not applicable in those cases where there is no open access and no billing of wheeling charges.*

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: Rational behind levy of additional surcharge:

2. *As per sub section (1) of section 43 of the Electricity Act 2003 (The Act), a distribution licensee (DISCOM) has universal supply obligation (USO) and required to supply power as and when demanded by the any **owner /occupier** of premises in its area of supply. The relevant provision of the 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:

Note: That, petitioner itself vide para 41 to the written submission on interim Relief (petitioner No. 12/2020) admitted that Electricity Act does not prohibit a person from being part captive user and part from distribution licensee.

i. To meet requirement of all consumers of its area of supply, DISCOM enters into long term Power Purchase Agreements (PPA) with sellers (generators/ traders etc.) so as to ensure supply of power on request.

ii. While contracting energy through such long term PPAs, the tariff payable to the generators consists of two part i.e. capacity charges and energy charges. Therefore, the DISCOMs have to bear the fixed cost even when there is no off take of energy through such source.

iii. Whenever any person takes electricity through any other source, the DISCOMs continue to pay fixed charges in lieu of its contracted capacity with generation stations. This leads to the situation where the DISCOM 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.

RE: Relevant Statutory provisions:

3. Relevant Section 42 of the Act reproduced as under:

“Section 42: (Duties of Distribution licensees and Open Access):

(1)

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

Provided that such open access shall be allowed on payment of surcharge, in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the

requirements of current level of cross subsidy within the area of supply of the distribution licensee:

.....

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:

xxx xxx xxx”.

(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.

Emphasis supplied

4. It may be seen that there are two kinds of surcharge, one is cross subsidy surcharge and another is additional surcharge. Vide fourth proviso to Section 42(2) a consumer consuming power from its own captive generating plant is not liable to pay cross subsidy surcharge but there is no such exemption for additional surcharge. Thus such consumers are liable to pay additional surcharge.

RE: Distinction between Captive Generating Plant vis a vis a Non Captive Generating Plant:

5. Petitioners have contended that there is difference in the CPP and IPP (generating Company) and in case of CPP both cross subsidy surcharge and additional surcharge are exempted (**ref Annexure A to written submission to interim relief of petition No 12/2020**).
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.

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 petitioners consuming power from captive generating plant are '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 view of above provision of the Act, petitioners are 'consumer' on following two counts:

- a. Petitioners are maintaining contract demand or standby arrangement 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.

11. Hon'ble Appellate Tribunal For Electricity (APTEL) in the case of petition No. **1/2006 in case of Hindalco vs WBERC** 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 losing 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.....

12. 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.

13. 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.....”

14. 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.....”

15. It is submitted that 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.

16. In view of above, M/s UltraTech and other petitioners are consumer and accordingly liable to pay additional surcharge.

RE: Whether arrangement of availing power from captive generating plant amounts to ‘supply’?

17. In this regard petitioners are 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;”

Relying upon the aforesaid definition petitioners are 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 petitioners are 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;”

It may be seen that as per Act term supply means sale only to the extant context permitted the same. 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. Again Hon’ble Supreme Court in the case of National Insurance Co. Ltd vs Deepa Devi & Ors (AIR 2008 SC 735) held as under:

*“10.....If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood **from the common sense point of view.**”*

20. 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.

21. 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 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 (if any) between sender and receiver of the electricity. Therefore in the present context meaning of 'supply' cannot be 'sale' as given in the definition clause.

22. 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.

23. Petitioner itself (P. No. 12/2020) in written note of argument on the issue of interim relief admitted that captive generating plant is **supplying** electricity to M/s Ultratech. The relevant part is reproduced as under:

3. It is submitted that ASPL has been setup as an Special Purpose Vehicle ("SPV") by UTCL along with Amplus Energy Solutions Private Limited ("AESPL"). ASPL has a 15 MWp DC (12.75 MWp AC) Captive Solar Power Generating Plant installed within UTCL's Dhar Unit premises i.e. onsite and **is supplying electricity** to UTCL through internal dedicated HT wires. The said CPP is neither connected to the transmission or the distribution network, and hence there is no wheeling of electricity on these networks. The onsite Captive Project is operational from 10.07.2019.

It is submitted that Section 42(4) of the Act speaks about the very same 'supply' which is being taken place in the instant cases as per aforesaid submission of the petitioner.

24. *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.

25. *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 mean sale and term 'supply' cannot be used as synonym for 'sale' as sought to be established by the petitioners.

26. 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:

<u>Provisions</u>	<u>Meaning of term 'supply'</u>
24. Suspension of distribution licence and sale of utility.-(1) If at any time the	Here supply means make available electricity and not

<p><i>Appropriate Commission is of the opinion that a distribution licensee–</i> <i>(a) has persistently failed to maintain uninterrupted <u>supply of electricity</u> conforming to standards regarding quality of electricity to the consumers; or</i> <i>.....</i></p>	<p><i>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.</i></p>
<p>56. <u>Disconnection of supply in default of payment</u>–<i>(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, <u>cut off the supply of electricity</u> 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:</i></p>	<p><i>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. If meaning of term supply taken as sale then in such case M/s Amplus cannot disconnect supply from captive generating plant to M/s UltraTech.</i></p>
<p>53. <u>Provision relating to safety and electricity supply</u>–<i>The Authority may, in consultation with the State Government, specify suitable measures for–</i> <i>.....;</i> <i>(c) <u>prohibiting the supply</u> or transmission of electricity except by means of a system which conforms to the specification as may be specified;</i></p>	<p><i>Here supply means making available electricity. Safety provisions are applicable notwithstanding the sale is being done or not.</i></p>
<p>Section 139. (Negligently breaking or</p>	<p><i>Here expression supply would</i></p>

<p>damaging works): Whoever, negligently breaks, injures, throws down or damages any material connected with the <u>supply</u> of electricity, shall be punishable with fine which may extend to ten thousand rupees.</p>	<p>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.</p>
<p>Section 140. (Penalty for intentionally injuring works): Whoever, with intent to cut off the <u>supply</u> 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.</p>	

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 petitioners are liable to pay additional surcharge to the answering respondent.

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 following 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 even on the consumption of electricity through captive route.

38. Petitioners are 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:

"67..... Therefore, we are of the opinion that captive consumers are not liable to pay additional surcharge. If it is understood as contended by the Respondent Commission, the entire policy which formulated into law to promote captive generation and its users (captive users) would be a futile exercise and the purpose of the entire law will be defeated as argued by the Appellants."

39. 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.

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

40. 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 **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 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.**

41. 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 taken note of *Hindalco supra*, which was delivered at earlier point of time, the decision in *Jindal Steel* is not a binding precedent.

42. During the course of argument petitioners have submitted that in the matter of *Hindalco supra* issue has not been pressed by the M/s *Hindalco* hence said judgment is not relevant in the instant matter. Petitioners have submitted that judgment in *Hindalco supra* has passed *sub silentio*. This submission of the petitioners is contrary to record and against the settled legal principles.

43. At first it is incorrect that issue was not argued before Hon'ble APTEL by the petitioner M/s Hindalco. Ld Counsel of the petitioner definitely argued the case based on the national tariff policy. After recording the stand of the counsel appearing for M/s Hindalco when the Hon'ble APTEL observed "**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**", the same is unequivocal determination of the issue, particularly when the specific question regarding applicability of additional surcharge was before the Court. It may be further observed that at para 43 Hon'ble APTEL recorded the finding '**(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.**' Therefore, in the para 43 Hon'ble APTEL specifically decided the issue upholding the liability of additional surcharge.

44. In this regard kind attention of the Hon'ble Commission is drawn towards the judgment of Hon'ble Supreme Court in the matter of **Ambika Prasad Mishra v. State of U.P. and others (AIR 1980 SC1762)**. Hon'ble Supreme Court clearly held that a decision does not lose its authority merely because it was badly argued. The relevant part of the said judgment is reproduced as under :

6. It is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death **because a decision does not lose its authority "merely because it was badly argued, inadequately considered and fallaciously reasoned"** (Salmond 'Jurisprudence' p. 215 (11th edition)).

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 distress that the said course was not followed. **It is well settled that if a Bench of coordinate jurisdiction disagree 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."

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** we can not disagree with the

judgment of Hindalco based on 'different argument' or otherwise on a question of law.

46. With regard to issue of sub silentio kind attention is drawn towards the judgment of Hon'ble Calcutta High Court in the **Sibnath Koley and Ors v. State (AIR 2007 CALCUTTA 223)** . The relevant para 17 is reproduced as under:

17. Since the issues relating to the circulars were duly considered and decided by the earlier Division Bench we are of the opinion that non-mentioning of a particular circular in the earlier judgment of the Division Bench cannot render the said judgment per incuriam. **When the issue has been specifically decided by the learned single Judge as well as the Division Bench of this Hon'ble Court in the case of Biswajit Das (supra) the question of sub silentio cannot and does not arise.**

Thereafter Hon'ble High Court at para 18 refereed the judgment of Hon'ble Supreme Court in the case of State of Bihar Vs Kalika Kuer. The said para is reproduced as under:

18. Mr. Gupta referred to and relied on the decisions of the Supreme Court in the case of State of Bihar v. Kalika Kuer alias Kalika Singh, reported in (2003) 5 SCC 448 : (AIR 2003 SC 2443). In the aforesaid decision, Hon'ble Supreme Court has specifically held :

"10. Looking at the matter, in view of what has been held to mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that the decision in the case of Ramkrit Singh was rendered per incuriam. On the other hand, it was observed that in the case of Ramkrit Singh the Court did not consider the question as to whether the Consolidation Authorities are Courts of limited jurisdiction or not. **In connection with this observation,**

we would like to say that an earlier decision may seem to be incorrect to a Bench of 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. 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. Though hardly necessary, we may however, refer to a few decisions on the above proposition."

In view of above in the instant case since issue of additional surcharge is specifically decided the question of sub silentio cannot and does not arise. Further Hindalco judgment cannot be ignored on the ground that a possible aspect of the matter was not considered or not raised before the Hon'ble APTEL or more aspects should have been gone into by the Hon'ble APTEL deciding the Hindalco earlier.

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 unless overruled by Hon'ble Apex Court or larger bench of Hon'ble APTEL.*

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:

48. *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.

49. Hon'ble Supreme Court in **Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Others (Civil Appeal No. 5479 of 2013)** 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. The relevant part of the said judgment is reproduced as under:

25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their 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 for both these aspects.

26. 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 so as to ensure that the consumers do not go out of their fold to get supply from some other source.

27. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes 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.**

28. Therefore, in the aforesaid circumstances though CSS is payable by the

Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. **In 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.

50. 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.

51. 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 consume power from other source of supply comes within that '**class of consumers**', additional surcharge shall be payable by such consumer. In other words, the fact that any particular consumer has not availed open access for consumption of power from other source of supply shall also liable to pay additional surcharge if that consumer belongs to such class of consumers to whom open access is available.

52. Without prejudice to the submission that use of distribution system is not necessary to levy of additional surcharge, it is submitted that, MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 (Revision-I) {RG- 33(I) of 2010}, provides as under with regard to ownership of the power evacuation facilities developed by any developer of power plant:

7.2. 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).

53. As per aforesaid provision of the Regulations 2010 it can be said that the network through which M/s Amplus is supplying power to M/s Ultratech shall be treated as part & parcel of the distribution system. Therefore, it cannot be said that there is no use of the distribution system and petitioner is liable pay additional surcharge to respondent.

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

54. That, contention of the petitioner that since wheeling charges are not applicable (as no distribution system being used) additional surcharge would also not be applicable is without any merit.

55. **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."**

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 nature of both levies are different and both are being levied for different purposes. Therefore, even if wheeling charges are not being levied, additional surcharge is payable.

56. That, the fact that premises of petitioners are connected at 132 KV voltage level is also not makes any difference with regard to liability of additional surcharge as the answering distribution licensee has universal supply obligation towards all its consumer irrespective of the quantum and voltage of the supply. Further 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.

57. Petitioners are relying upon the judgment of Hon'ble APTEL in the matter of **Gujarat Urja Vikas Nigam Limited Vs. Gujarat Electricity Regulatory Commission (Appeal No. 84/2015 order dated 20/11/2015)**. Relevant extract of said judgement is reproduced as under:

28.....In the present case, no part of distribution system and associated facilities of the Appellants is sought to be used by the Respondent No.2 for transmission of power through CTU, from injecting point to the Respondent No. 2's plant. Therefore, as per definition under Section 2(76) of the Electricity Act, 2003, Respondent No.2 is not liable to pay wheeling charges on Additional Surcharge for the open access. **In terms of Section 42 of the Electricity Act, 2003, the payment of Additional Surcharge on the charges of wheeling would not arise at all.**

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

58. It is submitted the aforesaid judgments are not applicable in the present circumstances of the case due to following reasons:

58.1. **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.**

58.2. **In that those case consumer was connected directly to CTU and not the intra state transmission system/distribution system :**

*Hon'ble Maharashtra 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.

58.3. *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.**"*

59. In this regard kind attention is drawn towards the tariff order 2020-21:

*"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.

60. It may be seen that three judge bench of Hon'ble Supreme Court overruled the findings of division bench of Hon'ble Apex Court in the matter of **M/s. SRD Nutrients Private Limited v. Commissioner of Central Excise, Guwahati AIR 2017 SC 5299**. The following were the findings of the Hon'ble Apex Court in the said judgement which are now overruled:

21. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education Cess is on excise duty. It means that those assesseees who are required to pay excise duty have to shell out Education Cess as well. This Education Cess is introduced by Sections 91 to 93 of the Finance (No.2) Act, 2004. As per Section 91 thereof, Education Cess is the surcharge which the assessee is to pay. Section 93

*makes it clear that this Education Cess is payable on 'excisable goods' i.e. in respect of goods specified in the first Schedule to the Central Excise Tariff Act, 1985. Further, this Education Cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of Central Excise Act, 1944 or under any other law for the time being in force. Sub-section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those related to refunds and duties etc. shall as far as may be applied in relation to levy and collection of Education Cess on excisable goods. A conjoint reading of these provisions would amply demonstrate that Education Cess as a surcharge, is levied @ 2% on the duties of excise which are payable under the Act. **It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any Education Cess as well, inasmuch as Education Cess @ 2% is to be calculated on the aggregate of duties of excise. There cannot be any surcharge when basic duty itself is Nil.***

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

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

62. The similar contention 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 foregoing 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 de hors 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.”

63. 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”.

64. 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) held 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.

65. 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.**

66. 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

67. The issue of levy of additional surcharge has been considered by this Hon'ble Commission in *M/s. Narmada Sugar Private Limited Vs M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd* (Judgement dated 27/03/2019 in review petition No. 02 of 2019). Relevant part of the said judgment is reproduced as under:

7. During the hearing held on 05.03.2019, the petitioner argued at length in favor of its submission in the petition justifying the review of the Commission's order in the petition No. 38/2018 dated 29.11.2018. The petitioner also filed a written submission. The petitioner in the petition and the written submission broadly stated as below:

.....

vii. Conjoint reading of Section 42 and Judgment cited in the instant petition clearly reflect that the additional surcharge can only be imposed on the charges on wheeling. Therefore, it is humbly submitted that if there is no wheeling there is no question of additional surcharge. As in the case in hand no part of the distribution system is used and no wheeling charges **billed to the petitioner hence following the rulings of Hon'ble Appellate Tribunal for Electricity in Appeal No. 84 of 2015 in the matter of GUVNL Vs. GERC and Anr. and in case of Kalyani Steels Limited Appeal No. 28 of 2005, no additional surcharge is applicable in the**

present case.

viii. In the instant case, the Petitioner is using its own system to supply electricity from its own generating station and not using distribution system of the Respondent No. 1.

Considering the aforesaid submission Hon'ble Commission held as under:

"11. The Commission had issued an Order on dated 22.5.2007 in respect of Petition No.02/2007. In this order, the Commission clarified that the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard. The Commission also clarified that this additional surcharge would be levied even when dedicated transmission line is used. In the Open Access Regulations, 2005, the Commission specified the charges applicable for the Open Access which includes the levy of additional surcharge as determined by the Commission on yearly basis.

17.Accordingly, the Commission has already determined the additional surcharge under Chapter "A3: Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge"of the Retail Supply Tariff Order for FY 2017-18 issued on 31stMarch, 2017and under Chapter "A4: Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge"of the Retail Supply Tariff Order for FY 2018-19 issued on 03rd May,2018.

18.Under the above circumstances, the Commission is of the view that the additional surcharge has already been determined in the retail supply tariff orders from time to time. As such, the aforesaid issue may be raised either through review of the retail supply tariff order of the Commission or while the process of determination of retail supply tariff for FY 2019-20 is initiated.

19.In view of the above, the Petition No. 02/2019 stands disposed of.

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

68. The petitioner is contending that judgments relied upon by the answering respondent are not binding precedent as same are sub silentio and observations are not the ratio decidendi with regard to levy of additional surcharge.

69. 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.**"

70. Hon'ble Supreme Court in **Ballabhadras 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"**.

71. In view of above judgments of Hon'ble APTEL it is clear that judgment of Hon'ble Supreme Court is binding on the all courts of the country and same cannot be ignored on the ground that Hon'ble Supreme Court laid down the legal position without considering any other point or "relevant provisions were not brought to the notice of the Court".

72. 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.

73. In view of above, various pronouncements of supreme Court relied upon by the answering respondent including the *Sesa Stelight supra*, *Hindustan Zinc supra*, *Karnataka Power Transmission Corpn supra*, *Unicorn Industries supra* e.t.c are binding on this Hon’ble Commission and these judgments cannot be ignore on the ground of

obiter dicta or subsilentio.

RE : Necessary support of grid is being provided continuously:

74. Here, it is also noteworthy to mention that although grid has not used for conveyance of electricity from other source of supply, a continuous support from the grid is being provided for reference voltage synchronization to operate inverters of generator. In this regard kind attention is drawn towards the findings of **M/s Amplus Solar Power Pvt. Ltd. & another V.s Uttarakhand Power Corporation Ltd. & another (petition No. 04 of 2018):**

“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.”

75. Further all the petitioners are drawing power parallelly from both the sources i.e own generating plant and answering distribution licensee. 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.

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

76. Petitioners are contending that it is paying demand charges /stand by charges which take care of its share of fixed cost of liability of the distribution licensee towards its generators. This claim of petitioner is wholly erroneous and misconceived on the following grounds:

76.1. Fixed Cost towards generator not being recovered through Fixed charges and being recovered through energy charges:

76.1.1. 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;

Emphasis supplied

76.1.2. 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) 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.

76.2. Fixed charges (demand charges) are being recovered for the supply being availed from distribution licensee and not for the consumption from other source of supply:

76.2.1. 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 **excluding the demand availed through open access for the period for which open access is availed** or 90% of the contract demand, whichever is higher, subject to clause 3.4 of the M.P. Electricity Supply Code, 2013.

76.2.2. 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.

76.3. Fixed charges are not sufficient to recover the fixed cost of the Distribution Licensees:

76.3.1. *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
	Total ARR for FY 2019-20	36671.06	100.00 %
	Variable cost (Variable cost of power purchase net of sale of surplus power)	11317.91	30.86%
	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%

76.3.2. *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%.*

76.3.3. *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.*

76.4. Levy of additional surcharge cannot be challenged in the present proceedings:

76.4.1. That, Tariff orders (FY 2017-18 w.e.f 10/04/2017, FY 2018-19 w.e.f 11/05/2018, FY 2019-20 w.e.f 17/08/2019 FY 2019-20 w.e.f 26/12/2020) approving additional surcharge on all the consumers (including captive consumers) have never been challenged by any captive consumer including petitioner. Further, the additional surcharge so determined made applicable to all consumer notwithstanding the fact that consumer may have contract demand with the distribution licensee. Accordingly, these orders have attained finality in this regard. The Tariff order cannot be challenged in the present proceedings initiated under Section 86(1)(f) of the Act for resolution of dispute.

76.4.2. That, while approving the additional surcharge, Hon'ble Commission duly considered the availability of power and stranded capacity thereof. If the petitioner has any grievance regarding stranded capacity of power or petitioner is of the view that while determining the additional surcharge consideration to the contract demand with the distribution licensee is also required to be given, it should have raised these grievances before this Hon'ble Commission in the proceedings of the determination of the additional surcharge and such issues cannot be raised in the present proceedings.

76.4.3. In view of above, particularly regulation and Tariff Orders of this Hon'ble Commission prevailing in the state of Madhya Pradesh, petitioner is liable to pay additional surcharge to the respondent.

RE: Effect of Section 9 of the Act on the liability of Open Access charges:

77. 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 such as cross subsidy surcharge and additional surcharge. Petitioner further contended that State Commission's power to regulate que a captive power plant wheeling power on the network of a licensee can at best be limited to the determination of paying wheeling charges (ref para 7 additional submission on behalf of petitioners petition No. 12/2020).

78. 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.

79. *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;

80. *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. The submission of the petitioner is also contradictory, on the one hand petitioner is submitting that it is not governed by provision of section 42 on the other hand petitioner is admitting that state commission can determine only the wheeling charges with respect to the open access of captive generating plant. As can be seen from the Open Access Regulation (ref para 48 above) 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. Captive consumers on their own cannot decide to pay only wheeling charges and not other open access charges.*

81. *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).

82. In view of above, it can be safely concluded that Section 9 of the Act do not provide 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.

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

83.1. 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.	(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 is overruled by Hon'ble Apex court and no more a good law.

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 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.

(2) In case of Kalyani Steel, petitioner was connected directly to central Transmission

<p>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.</p>	<p>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.</p>
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83.2. Judgment of Hon'ble APTEL in case of Gujarat Urja Vikas Nigam Limited Vs. Gujarat Electricity Regulatory Commission (Appeal No. 84/2015 order dated 20/11/2015):

S.No	Extract of Gujarat Urja	Remark
1	<p>19. It has also been argued by Respondent No.2 that they are not consumer of Appellant No.2 and Appellant No.2 has no universal service obligation as per Section 43(1) of the Electricity Act, 2003 to supply electricity to the premises of Respondent No.2 though the same may be located in the Distribution Licensee area of Appellant No.2 and Respondent No.2 has made</p>	<p>In the case of Gujarat Urja end user of power M/s Essar Steel India Ltd was self-reliant with regard to its whole requirement of power and was not the consumer of the distribution licensee whereas in present case Distribution licensee is under obligation to supply power to the petitioner and even supplying the same against the contract demand/standby support.</p>

	<p><i>arrangement for 1381.50 MW which is adequate for its requirement and is not dependent on Appellant No.2 to supply electricity....."</i></p>	
2	<p><i>28.....In the present case, no part of distribution system and associated facilities of the Appellants is sought to be used by the Respondent No.2 for transmission of power through CTU, from injecting point to the Respondent No. 2's plant. Therefore, as per definition under Section 2(76) of the Electricity Act, 2003, Respondent No.2 is not liable to pay wheeling charges on Additional Surcharge for the open access. In terms of Section 42 of the Electricity Act, 2003, the payment of Additional Surcharge on the charges of wheeling would not arise at all.</i></p>	<p><i>(2) In that case Gujrat Urja, end user of electricity M/s Essar Steel 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.</i></p>
2	<p><i>29. After transfer to control area from Gujarat State Load Dispatch Centre to Western Region Load Dispatch Centre, the Respondent No.2 cannot be called as embedded</i></p>	<p><i>In the case of Gujarat Urja control area was transferred from Gujarat SLDC to WRLDC. In the light of this fact Hon'ble Tribunal concluded that Essar Steel is no more consumer of the distribution licensee. In the present case petitioners are the consumer of the Distribution</i></p>

	customer of the Distribution Licensee of the State of Gujarat.	licensee.
3.	26. The Appellants stated that connectivity to the Intra-State Network is not a pre requisite for levy of Additional Surcharge. In this regard reliance has been placed by Appellants on the decision of the Hon'ble Supreme Court in the case of Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission (2014) 8 SCC 444. <u>In the said judgment, we observed that the decision of the Hon'ble Supreme court had referred to cross-subsidy surcharge and its rational and there is no reference of Additional Surcharge.</u>	In the Gujarat Urja case Hon'ble Tribunal observed that in the Sesa Sterlite there is no reference of additional surcharge. However attention of the Hon'ble APTEL not drawn to the para 25 and 28 of Sesa Sterlight in which Hon'ble Apex Court explicitly considered the levy of additional surcharge and declared the same is compensatory in nature.

83.3. 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 <u>upon supply of electricity as defined in the Act.</u> In the case of	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

	<i>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.</i>	<i>held that supply does not mean sale.</i>
2	<p>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.</p>	<p><i>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:</i></p> <p><i>"38. Central Transmission Utility and functions.-(1) The Central Government may notify any Government company as the Central Transmission Utility:</i></p> <p><i>Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity</i></p> <p><i>....."</i></p>

		<p><i>“39. State Transmission Utility and functions.–(1) The State Government may notify the Board or a Government company as the State Transmission Utility:</i></p> <p><i>Provided that the State transmission Utility shall not engage in the business of trading in electricity:</i></p> <p><i>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:</i></p> <p><i>Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity.</i></p>
3	<p><i>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.</i></p>	<p><i>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:</i></p> <p><i>a.</i> <i>Cross subsidy surcharge to take care of the requirements of current levels of cross-subsidy,</i></p> <p><i>b.</i> <i>Additional surcharge to meet</i></p>

		<p><i>the fixed cost of the distribution licensee arising out of his obligation to supply.</i></p> <p><i>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.</i></p>
4	<p><i>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.</i></p>	<p><i>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.</i></p>
		<p><i>(1) The judgment of Hon'ble APTEL in JSW Steel case is contrary to its own co-</i></p>

		<p><i>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.</i></p>
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In view of above submission, it is requested to the Hon'ble Commission that instant petitions sans merit hence same may please be dismissed.

11. The petitioner submitted the following in its written submission:

1. *"At the outset, the present Petitioner adopts the submissions made by Mr. Amit Kapoor, Advocate, appearing on behalf of Ultratech Cement Ltd. The present written submission is limited to certain additional points that may be considered by the Hon'ble Commission. In the present written submissions, the Petitioner herein also addresses the submissions, including the relied upon by Madhya Pradesh Paschim Kshetra Vidyut Vitran Co. Ltd.*

2. *The present dispute relates to demand of additional surcharge on the Petitioner for power consumed by the Petitioner from its captive power plant during the period FY 2017-18 to FY 2019-20. By a letter dated 14.09.2020, the Madhya Pradesh Paschim Kshetra Vidyut Vitran Co. Ltd. (herein the "Discom") demanded Rs. 36.89 crores as additional surcharge from the Petitioner. The said additional surcharge was computed on the basis of the tariff orders issued by the Commission for the year 2017-18, 2018-19, and 2019-20, where additional surcharge was determined to be 0.646 per unit, 0.723 per unit and 0.46 per unit, respectively for the said three years. It is true that during this period the Petitioner consumed electricity from its two co-located captive generating plants having capacity of 25 MWs and 40 MWs. It is also an admitted position that these plants are islanded and that power is carried to the destination of use without using either the transmission or distribution system of the transmission licensee and / or the Discom. There is no element of transmission or wheeling in the present case.*

3. *While the principal issue that arises for consideration is the applicability of section 42(4) Electricity Act, 2003, it is necessary to fully appreciate the scheme of*

Section 42 – which deals with the "Duties of Distribution Licensees and Open Access". Section 42(1), inter alia, provides as follows:

"Section 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."

(Underline Supplied)

4. From the aforesaid it is quite clear that the distribution licensee in the protocol envisaged under Section 42 has:

(a) duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system;

(b) to supply electricity

In the present case, it is important to appreciate that neither of the aforesaid two factors / aspects are involved – (a) there is no wheeling of electricity and (b) there is no supply of electricity. Both the concept of wheeling and supply are defined in Section 2(76) and 2 (47) of the Electricity Act, 2003.

5. Section 42(2) deals with introduction of open access and the conditions thereto. The said section provides as follows:

"(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 that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced

in the manner as may be specified by the State Commission:

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:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt."

6. *Section 42 (2) has to be read along with the definition of "open access" contained in Section 2(47). The concept of open access, as envisaged in the statute, intrinsically involves use of transmission lines or the distribution system. Open access allows use of the facilities owned by the transmission licensee and the Discom. To avail open access one has to make an application to the concerned owner of the facility. Once the statutory conditions are met, such owner of the facility "grants" open access to his facility i.e. the transmission lines or the distribution system as the case may be. Further, to avail open access one has to pay transmission charges or wheeling charges, which again establishes a use of facility for which there is a pre-determined charged based primarily on the capital cost of the same.*

7. *Since open access may lead to imbalance in the existing cross subsidy regime, a compensation principle by way of surcharge is provided in the 1st proviso to Section 42(2). The purpose and application of the surcharge is clarified in the second proviso. But in the third proviso, a specific carve out in the form of an exemption is made for "a person who has established a captive generating plant for carrying the electricity to the destination of his own use". For such a person, the levy of surcharge is specifically exempted. The use of language when it comes to utilization of electricity by a captive generating plant is quite telling. The word "supply" and "consumer", which terms are otherwise defined, in the statute have not been used in the said proviso. When it comes to self use of electricity by the owner of the captive generating plant, the operative words is "a person" who "carries" electricity to the "destination of use". Even the word "premises", which is found in the definition of consumers has been dropped when dealing with captive use of electricity.*

8. *Section 42(3) vests rights on persons whose premises are situated within the area of supply to require supply of electricity from a generating company or a licensee other than the distribution licensee operating in such area. The principle of a "common carrier" providing non-discriminatory open access in relation to duties of a distribution licensee is captured in the said section. This section, when read with Section 42 (1), makes it clear that the distribution licensee has dual function (a) to*

maintain an efficient and coordinated distribution system and (b) to supply electricity. For purposes of Section 42(3), the distribution licensee has an obligation to make available his system to enable supply of power by a person other than the said distribution licensee. He is merely a “common carrier”.Section 42(3) provides as follows:

“(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.”

9. *The provisions contained in section 42(4), which is as follows:*

“(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.”

10. *Before analysing section 42(4), it is necessary to appreciate that the scheme of section 42 relates to duties/ obligations of a distribution licensee on matters of open access. For this the following are relevant and needs to be appreciated:*

a. The distribution licensee has a duty/ obligation to develop and maintain an efficient and coordinated distribution system in its area. Such system should be capable to enable supply of electricity in accordance with the provisions contained in the Act. (Please see 42(1))

In this context, reference may be made to the definition of the word “supply” contained in section 2(70) of the EA, 2003, which provides as follows:

“Section 2

Definitions:

In this Act, unless the context otherwise requires:

... ..

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

b. Open access in terms of section 42(2) had to be introduced by the Commission in phases. Such open access was subject to certain conditions. Under the provisions of the statute while introducing open access the Commission is vested with the jurisdiction to determine charges for wheeling and determine surcharge to offset the current level of cross subsidy. Therefore, open access could be granted on payment of wheeling charges and surcharge (to meet the current level of cross subsidy within the area of supply of the distribution licensee).

The Appellate Tribunal in RVK Energy while interpreting the provisions of section 42(2) held as follows:

"24. Sub-Section (2) of Section 42 of the Act authorizes the State Regulatory Commissions to introduce open access in the area of distribution of electricity. It requires the State Commission to introduce open access in such phases and subject to such conditions including the cross subsidies and other operational constraints that may be specified within one year of the appointed date by it. While determining the charges for wheeling, the Commission is required to have due regard to all relevant factors including surcharge and other operational constraints. According to the first proviso to Section 42(2), open access can be allowed by the Commission on payment of surcharge in addition to wheeling charges. The State Commission under first proviso is also required to determine the surcharge. In terms of second proviso to Section 42(2), the surcharge determined by the Commission is required to be utilized to meet the requirements of current level of cross-subsidies within the area of supply of distribution licensee. It needs to be noted that neither the first proviso nor the second proviso provides that the cross subsidy must be so computed that it is equal to or more than the current level of cross subsidy. All that the second proviso requires is that after the surcharge is determined by the Commission under the first proviso, the surcharge collected for providing open access must be towards meeting the current level of cross subsidy. The dictionary meaning of the word 'utilised' is "to put to use". The appearance of the word 'utilised' in the second proviso to Sub-Section (2) of Section 42 before the words 'to meet the requirements of current level of cross subsidy' is not without significance. It is a pointer as to how the surcharge will be used. In case the surcharge was always required to be equal to or more than the current level of cross subsidy, the second proviso would have stated as follows:

Provided further that such surcharge shall be equal to or may be more than the requirements of current level of cross subsidy within the area of supply of the

distribution licensee.”

While cross subsidy could be levied at the time of grant of open access, a specific exemption was carved out in relation to captive generating plants who were carrying electricity to the destination of its own use.

A review of the provisions contained in 42(2) particularly the provisos contained therein will confirm that captive generating plants when carrying electricity for self-use and when carrying electricity to a destination of its own use, the obligation to pay surcharge was expressly exempted.

c. While conferring a right on any person to obtain electricity supply from a source of its choice such as a generating company or a trading licensee, other than the distribution licensee of the area, the distribution licensee’s role under the statute was that of a common carrier providing non-discriminatory open access.

Open access is defined in section 2(47) to mean as follows:

“Section 2

Definitions:

In this Act, unless the context otherwise requires:

... ..

(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;”

Section 42(4) permits “a consumer or class of consumers” to receive supply of electricity from a person other than a distribution licensee of his area of supply. It further says that “such consumer” shall then be liable to pay “additional surcharge on charges of wheeling”.

The ingredients of the section are not met.

The question that has now arisen is whether Section 42(4) is applicable when a “person who owns a captive generating plant is carrying electricity to the destination of his own use”. The words and phrases used in the statute in relation to captive generating plant is different from the language employed in section 42(4).

At this stage, it is necessary to appreciate the definition of “captive generating plant” which is as follows:

“Section 2

Definitions:

In this Act, unless the context otherwise requires:

... ..

(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;”

A review of the aforesaid definition will confirm that while dealing with a captive generating plant, the legislature has carefully avoided the use of the word “supply”, “consumer” and “premises”. In the said definition a captive generating plant is that which generates electricity for his own use. The definition of “supply” in section 2(70) means sale of electricity to a licensee or a consumer. This aspect is not there when it comes to transfer or carriage of electricity from a captive generating plant to the place / destination of its own use. This aspect is also recognised in section 9(2) of the Electricity act, 2003, which, inter alia, provides as follows:

“Section 9

Captive generation:

... ..

(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."

While recognising that a captive generating plant shall have the right to open access, the same is for the purposes of carrying electricity from the captive generating plant to the destination of its use. The legislature has again used the word "carrying" instead of "supply". The reason is not hard to find because captive generation is for self-use and not for sale to a licensee or a consumer, which then constitutes a supply in terms defined under section 2(70).

Similarly, in the third proviso of section 42(2), which grants exemption from payment of surcharge required to meet the current level of cross subsidy, the legislature has again used the words "carrying the electricity to the destination of its own use".

Keeping the above legislative intent, the question that arises is whether section 42(4) which essentially deals with a "consumer or class of consumers" at all apply to carriage and use of electricity by a person who has established his own captive generating plant.

Apart from the aforesaid, section 42(4) also uses the word "supply" and expressly provides that such consumer shall be liable to pay additional surcharge on charges of wheeling. Does "self use" of power by a captive generating plant constitute "supply" of electricity in terms envisaged in the definition of supply in Section 2(70) of the Act.

Further, section 42(4) starts by saying "Where the State Commission permits a consumer or class of consumer to receive supply....." But in case of captive use, there is no need for any permission. Section 9 (2) is clear. Captive use including the right of open access for purposes of such use is granted under the statute and is not "subject to any permission by the State Commission." This also makes it clear that Section 42(4) is not applicable to captive use at all. Clearly, there is no grant of permission of the Commission that is necessary for a person who owns a captive generating plant when carrying electricity to the destination of his own use. Section 9(2) is an unqualified statutory right. The only condition is "availability of adequate transmission facility". Further, even such "availability", in terms of the proviso of Section 9, is to be determined by the Central Transmission Utility and State Transmission Utility and not by the Commission. So in case of captive, when the primary section confers a statutory grant, there is no question of any permission of State Commission that is required for such carrying of electricity to the destination of his own use. By the first sentence itself the statute becomes inapplicable in the present facts.

Again the word a consumer or class of consumer is distinguished from a captive user. A consumer or a class of consumer is the one who receives supply from the distribution licensee. In this context, the definition of "consumer" in section 2(15) becomes relevant, which is as follows:

"Section 2

Definitions:

In this Act, unless the context otherwise requires:

... ..

(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;"

To be a consumer, one has to necessarily be supplied with electricity by "(i) a licensee or (ii) the Government or (iii) 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". The first part of the definition of consumer does not apply to a user of electricity from his own captive generating plant. A captive user is not supplied electricity by any of the persons or class of persons referred to in Section 2(15) of the Act.

It is necessary to further appreciate that the word "and" used in section 2(15). Hence, under the section, for purposes of coming within the definition of consumer, not only one needs to fulfil the first part (which is not being fulfilled in the present case) but after fulfilling the first part one has to additionally fulfil the second part, which requires the premises of such person (whose electricity is being supplied by a licensee, by a government or any other person engaged in the business of supplying electricity to the public under the Act etc.) to be also connected with the works of the licensee, the government or such other person. Both conditions of the definition have to be met in order to qualify as a "consumer". While it can be argued that the user facility/ factory owned by the person who also owns the captive generating plant is connected to the grid, however the said person for the purposes of the present case is not supplied electricity by the licensee, government or other person as envisaged in the first part of the definition. Hence, the section cannot be applied unless it is applied as a whole, satisfying both the 1st and the 2nd part.

Also, it is important to appreciate that both consumer or class of consumers as envisaged in section 42(4) are those for whom tariff is determined by the Commission. In terms provided in section 62 and 86(1) of the Electricity Act, 2003. In case of the power used by a person from his own captive generating plant, there is no determination of tariff as is done in the case of consumer or a class of consumer.

Further, the use of the word "supply" in section 42 makes it abundantly clear that the present section has nothing to do with transfer of electricity by the captive generating plant to his destination of own use. In the context of captive, the legislature has always used the word "carry" and not "supply". It is not available to the Commission to replace an express provision of the statute in order to introduce a levy, which otherwise is not capable of introduction. In this context, the following principles of statutory interpretation are relevant:

Gurudev datta VKSSS Maryadit v. State of Maharashtra, reported in (2001) 4 SCC 534, wherein it was held as follows:

"26. Further we wish to clarify that it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute. Bearing in mind, the aforesaid principle of construction, if the expression "any new member society" occurring in the proviso to sub-section (3) of Section 27 is construed, it conveys the only meaning that it refers to the societies to be formed hereafter and not of those societies which have already become member societies of the federal society."

Apart from the aforesaid that disqualifies the applicability of the said sub-section to the present facts, what is also important is that the additional surcharge is "a charge on wheeling of electricity". Since the transfer of electricity is through a dedicated line and not using the distribution system for carrying electricity to the point of self-use, there is no element of wheeling. If there is no wheeling, there cannot be any surcharge. The language is clear that the additional surcharge is a charge on

wheeling. In the present case, when wheeling is zero, there is no question of levying additional surcharge.

d. The aforesaid analysis of the provisions of the statute will confirm that section 42(2) does not apply in case where a person who has established a captive generating plant carries electricity to the destination its own use. It is clarified that this is not the case of exemption, but a case of non-applicability of the charging section. The principles of interpreting a charging section, which levies a charge or a tax has been settled by the Hon'ble Supreme Court in several judgments, which are as follows:

Commr. of Customs v. Dilip Kumar & Co., reported in (2018) 9 SCC 1, wherein it was held as follows:

“23. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose. [*Commr. v. MathapathiBasavanneewa*, (1995) 6 SCC 355] Not only that, if the plain construction leads to anomaly and absurdity, the court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation.

24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution [“265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law.”] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/ certain objects in certain circumstances, it cannot be expanded/ interpreted to include those, which were not intended by the legislature.

25. At the outset, we must clarify the position of “plain meaning rule or clear and unambiguous rule” with respect to tax law. “The plain meaning rule” suggests that when the language in the statute is plain and unambiguous, the court has to read

and understand the plain language as such, and there is no scope for any interpretation. This salutary maxim flows from the phrase “cum inverbisnullaambiguitasest, non debetadmittivoluntatis quaestio”. Following such maxim, the courts sometimes have made strict interpretation subordinate to the plain meaning rule [Mangalore Chemicals and Fertilisers Ltd. v. CCT, 1992 Supp (1) SCC 21] , though strict interpretation is used in the precise sense. To say that strict interpretation involves plain reading of the statute and to say that one has to utilise strict interpretation in the event of ambiguity is self-contradictory.”

State of Jharkhand v. Ambay Cements, reported in (2005) 1 SCC 368, wherein it was held as follows:

“23. Mr Bharuka further submitted that in taxing statutes, provision of concessional rate of tax should be liberally construed and in respect of the above submission, he cited the judgment of this Court in CST v. Industrial Coal Enterprises [(1999) 2 SCC 607] and in the case of Bajaj Tempo Ltd. v. CIT [(1992) 3 SCC 78] . We are unable to countenance the above submission. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.”

11. Having said that, the Appellate Tribunal for Electricity in the JSW judgment has, inter alia, held as follows:

“53. For the purpose of carrying power to its own users / members and also to consumers and licensees, the captive generating plant has to pay charges of wheeling and open access charges. However, in terms of proviso 4 to Section 42(2), there is an exemption to pay cross subsidy charges if the open access is used for carrying electricity by captive generating plant to the destination of its own use. However, this does not apply in case of supply of electricity to a consumer in general. Though open access charges and wheeling charges are to be paid, there is no requirement to pay cross subsidy charge when the supply is meant for its own use. This is clear from Section 42(2) and its provisos.

54. Then coming to sub-section (4) of Section 42, one has to see whether levy of any charge is both on captive users as well as on general consumers. In terms of Section 9(2), the right to open access to the captive user of a captive generating plant for carrying electricity to the destination of its own use is provided. We have to see

whether the State Commission can control this right to open access, since Section 42(4) says that State Commission may permit a consumer or a class of consumers to receive electricity from a person other than the distribution licensees of its area. This is quite contrast to the right of the captive generating plant to carry electricity from captive generating plant to the destination of its own use in terms of Section 9(2). There is no such permission required by the State Commission, though such permission is required under Section 42(4) when a consumer or class of consumers want to receive electricity from a person other than the distribution licensee of its area of supply. In this context, i.e. Section 42 (4), one has to see whether the captive user can be equated with a normal consumer as referred in Section 42(4). A captive user gets electricity from its own plant in terms of Section 2 (8) read with Section 3 of Electricity Rules of 2005 and also in terms of scheme envisaged under Section 9 of the Electricity Act 2003. Could we equate words 'receive supply of electricity' with the words 'carrying the electricity to the destination of its own use'? One has to understand the word 'supply' being used under various provisions, referred to above. Section 9(2) and fourth proviso to Section 42(2) refer to transaction of a captive generating plant and its users. The word 'supply' has not been consciously used in the context of a transaction between a captive generating plant and its users. Therefore, one has to understand Section 42(4) with reference to context and language in the context of captive generating plant and the end user being its own members.

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.*

56. *So far as captive generating plant (including Group Captive Generating Plant), there could be two types of consumers; one is captive consumers who carry electricity to destination of their own use and others are consumers and licensees who get supply of electricity. Fourth proviso to Section 42(2) exempts captive consumers from paying cross subsidy surcharge while Section 42(4) itself is conditional upon supply. There is no question of supply in case of captive consumption as contrast to the word 'supply' used in Section 42(4). This again has to be seen with reference to what amounts to supply.*

57. *We opine that there is no question of 'supply' in case of captive user so far as Section 42(4) of the Act is concerned for the following reasons:*

Apparently, these two Appellants seem to be special purpose vehicle, which is clearly

defined under Explanation (d) to sub-rule (2) of Rule 3 of 2005 Rules. It is an entity which owns, operates and maintains a generating station. Its business is to run the generation station and it cannot have any other business or activity. In other words, if such special purpose vehicle does any other activity other than generating process, it cannot be a special purpose vehicle as defined under Rule 3. A captive generating plant could be owned by a company, which can be termed as special purpose vehicle. Sub-Rule (1) to Rule 3 of 2005 Rules refer to different facets of "self/own consumption". It also refers to circumstances where a special purpose vehicle is formed for the purpose of captive generation wherein the power generated by special purpose vehicle is consumed by its equity shareholders/members. They certainly fall within the ambit of captive user i.e., own use. Absolutely there is no reference to the word 'supply' or 'sale' of power in sub-rule (1) of Rule 3. Consciously it uses the word 'own use' and not 'supply' of electricity. But whereas sub-rule (2) deals with a situation when captive generating unit loses the status of captive nature. Sub-Rule (2) of Rule 3 reads as under:

"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."

12. While the aforesaid judgment has been challenged before the Hon'ble Supreme Court and that there is a stay of the operation of the said judgment, the submission is that the principle settled by the Appellate Tribunal will still operate. The stay is only in relation to the operation of the judgment and order qua the parties therein, and not in relation to the principle established by the Appellate Tribunal. Those principles are valid unless the same is set aside or modified by the Hon'ble Supreme Court in exercise of its second appellate jurisdiction. In this context, reference may be made to the *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI Cinod Secretariat, Madras* judgment, reported in (1992) 3 SCC 1, wherein it has been held as follows:

"10. In the instant case, the proceedings before the Board under Sections 15 and 16 of the Act had been terminated by order of the Board dated April 26, 1990 whereby the Board, upon consideration of the facts and material before it, found that the appellant-company had become economically and commercially non-viable due to its huge accumulated losses and liabilities and should be wound up. The appeal filed by the appellant-company under Section 25 of the Act against said order of the Board was dismissed by the Appellate Authority by order dated January 7, 1991. As a result of these orders, no proceedings under the Act were

pending either before the Board or before the Appellate Authority on February 21, 1991 when the Delhi High Court passed the interim order staying the operation of the order of the Appellate Authority dated January 7, 1991. The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending. We are, therefore, of the opinion that the passing of the interim order dated February 21, 1991 by the Delhi High Court staying the operation of the order of the Appellate Authority dated January 7, 1991 does not have the effect of reviving the appeal which had been dismissed by the Appellate Authority by its order dated January 7, 1991 and it cannot be said that after February 21, 1991, the said appeal stood revived and was pending before the Appellate Authority. In that view of the matter, it cannot be said that any proceedings under the Act were pending before the Board or the Appellate Authority on the date of the passing of the order dated August 14, 1991 by the learned Single Judge of the Karnataka High Court for winding up of the company or on November 6, 1991 when the Division Bench passed the order dismissing O.S.A. No. 16 of 1991 filed by the appellant-company against the order of the learned Single Judge dated August 14, 1991. Section 22(1) of the Act could not, therefore, be invoked and there was no impediment in the High Court dealing with the winding up petition filed by the respondents. This is the only question that has been canvassed in Civil Appeal No. 126 of 1992, directed against the order for winding up of the appellant-company. The said appeal, therefore, fails and is liable to be dismissed.”

13. *Keeping in view the aforesaid, one can now proceed to the submissions made by the MP Discom. At the outset, the reliance of MP Discom on the Sesa Sterlite judgment is completely misplaced for the said judgment does not deal with the issue of additional surcharge at all. In this context, the following paragraphs of Sesa Sterlite are relevant:*

“Our analysis

21.From the aforesaid narration of events as well as arguments of the counsel for the parties, it has become manifest that the primary dispute relates to CSS which the appellant is called upon to pay to Wesco. As per the appellant no such CSS is payable and the PPA which was submitted by the appellant to the State Commission for approval, should have been accorded due approval by the State Commission.

... ..

(3)Cross-Subsidy Surcharge (CSS)—Its rationale

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 for both these aspects.

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 so as to

ensure that the consumers do not go out of their fold to get supply from some other source.

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:

4. (vi)(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 a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for 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.

... ..

33. Notwithstanding the above, because of the reason that the area where the VAL-SEZ the unit of the appellant is situate is an SEZ area and the appellant is declared as developer for that area under the SEZ Act, it is the contention of the appellant that in such a scenario it is not liable to pay any CSS to Wesco.

This submission flows from the fact that there is a notification issued in this behalf under the proviso to Section 49 of the SEZ Act and the appellant itself is treated as a deemed distribution licensee as per the provisions of Section 14 of the Electricity Act. On that basis, detailed submissions are made by the appellant with an attempt to show that it cannot be treated as a “consumer” under the Electricity Act when the appellant itself is deemed to be a licensee. It is further argued that since the supply-line of VAL-SEZ is not connected to Wesco and it is getting the electricity directly from Sterlite under the PPA, there is no question of payment of CSS to Wesco at all. The argument of Wesco that the lines owned by the VAL-SEZ are only “transmission lines” under Section 2(72) of the Electricity Act and not “dedicated transmission lines” because of the reason that the duty of the generator to establish and maintain dedicated transmission lines, is sought to be refuted by arguing that even as per Section 2(72) of the Act, transmission lines are part of the distribution system of licensing. It is argued that it is not even the case of Wesco that the supply-line of SEL-VAL is a part of Wesco distribution system.

... ..

36. Though the appellant endeavoured to counter this position and has given its own diagram that does not lodge the aforesaid factual aspect. Therefore, prima facie we accept the position as explained by Wesco. Thus we feel that notwithstanding that supply-line of SEL-VAL is a transmission line, but not “dedicated transmission line”. The appellant cannot run away from the fact that under Section 2(10) of the Electricity Act, it is the duty of the generating company (i.e. Wesco) in this case to establish, operate and maintain dedicated transmission lines. Since it is duty-bound to establish, operate and maintain these dedicated lines by making huge investment, in order to get into the consumption in the area in question the very necessity of payment of CSS arises by the consumer of electricity covered by the definition of “consumer” under Section 2(15) of the Act but is not getting supply of that generator and someone else. We have also to keep in mind the provision of Regulation 27 of the OERC (Conditions of Supply) Code, 2004. As per this Regulation the “service line” shall be the property of the licensee unless otherwise specified in writing. This Regulation reads as under:

‘27. The entire service line, notwithstanding that whole or portion thereof has been paid for by the consumer, shall be the property of the licensee and shall be maintained by the licensee who shall always have the right to use it for the supply of energy to any other person unless the line has been provided for the exclusive use of the consumer through any arrangement agreed to in writing.’”

14. Therefore, to suggest that Sesa Sterlite holds the fort is wrong and misleading. In fact, the Appellate Tribunal in JSW's case has referred to Sesa Sterlite and has held as follows:

"68. The issue of cross subsidy surcharge and additional surcharge is concerned, the rationale behind these came up for consideration before the Hon'ble Supreme Court in the case of Sesa Sterlite Limited. The relevant paragraphs 27 to 33 reads as under:

... ..

69. Reading of the above paragraphs it would mean that cross subsidy surcharge and additional surcharge are leviable on those who source electricity from any other source other than the distribution licensee in the area who supplies electricity. Therefore, we accept the argument of Appellants that once the scheme of the Act was to liberalise generation of electricity and in the case of captive generation and captive use, the intention was to permit the person or association of persons to establish his or its own generating station i.e., for the purpose of self-consumption.

70. Once the electricity generated by captive power plant or a group captive plant is consumed by captive user/users in terms of Rule 3 of 2005 Rules (i.e., 51% of electricity) the same has to be treated as own use. From the scheme of the Act including the rules made thereunder one has to understand the intention of the legislation i.e., whether it was intended to extend any benefit to captive users and therefore no license was required if surplus power were to be sold. Once surplus power is permitted to be sold, such power has to be supplied either to the licensee or consumer (other than captive users) by complying with all terms and conditions of the Act and the Rules. In that situation, definitely surplus power beyond 51% of aggregate power on annual basis has to be sold and the provisions of Section 42 of the Act would definitely apply. In that event, cross subsidy surcharge is payable by such consumer and so also additional surcharge. The exemption of surcharge therefore applies to both cross subsidy surcharge as well as additional surcharge."

15. The Commission being a statutory body below the Tribunal in the hierarchy envisaged in the Electricity Act, 2003, it is bound by JSW judgment read with principles of the Shree Chamundi -Mopeds unless the same is set aside or modified by the Supreme Court.

16. While in Annexure 1 of the present note a chart distinguishing the judgments referred to, it is necessary to state certain principles relating to the law of precedence and the value thereof. The Supreme Court has held the following:

Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Others, reported in (2003) 2 SCC 111, wherein it was held as follows:

“59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See *Ram Rakhi v. Union of India* [AIR 2002 Del 458 (FB)] , *Delhi Admn. (NCT of Delhi) v. Manohar Lal* [(2002) 7 SCC 222 : 2002 SCC (Cri) 1670 : AIR 2002 SC 3088] , *Haryana Financial Corpn. v. Jagdamba Oil Mills* [(2002) 3 SCC 496 : JT (2002) 1 SC 482] and *Nalini Mahajan (Dr) v. Director of Income Tax (Investigation)* [(2002) 257 ITR 123 (Del)] .]”

Union of India v. Amrit Lal Manchanda and Another, reported in (2004) 3 SCC 75, wherein it was held as follows:

“17. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

18. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus: (*Abdul Kayoom v. CIT* [AIR 1962 SC 680] , AIR p. 688, para 19)

‘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 Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.’

‘Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.’

17. *When dealing with the precedential value of judgement, in the present note filed by MP Discom, judgments have been cited without analysis of the provisions of the statute. Simply on first principles one can argue that the section 42(4) does not apply to captive generating plant and that the judgment cited have no application in the present case. The list of Judgment distinguishing the judgments filed by the respondents being not applicable in the instant case is marked and enclosed herewith as Annexure 1."*

Commission's Observations and Findings:

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

- (i) The petitioner (Grasim Industries Limited) commissioned a chemical processing unit at Nagda (MP) in the year 1970. The petitioner has also set up an onsite 65 MW Captive Power Plant (CPP) in the year 1996 (25 MW in 1992 and 40 MW in 1996) and it owns 100% of the CPP and consumes 100% of the power generated from this CPP for its aforesaid manufacturing unit. In other words, the petitioner is the captive generator and the consumer/user also in the present case. As per submissions on record, the status of aforesaid on-site captive power plant as Captive Generating Plant and the petitioner as captive user in accordance with Rule 3 of Electricity Rules 2005 is not under dispute in the subject petition.
- (ii) The petitioner (M/s Grasim India Ltd) is a HT consumer of the Respondent (MPPKVVCL) since 14.06.2006 and it has Contract Demand of 65000 KVA, under an Agreement for High Tension Supply executed between the petitioner and MPPKVVCL. Earlier, the petitioner had contract demand of 2500 KVA in the year 2006 which has now been increased to 65000 KVA through supplementary agreements. The petitioner is drawing power at 132 kV from Grid and it is connected to 132 kV Sub-station.
- (iii) The Respondent vide notice dated 14.09.2020 started levying Additional Surcharge for FY 2017-18 to FY 2019-20 on the captive generation of the petitioner. The aforesaid levy of additional surcharge by the Respondent is the cause of dispute in the subject petition.
- (iv) The Captive power plant of the petitioner is on-site/co-located and the petitioner is drawing power through dedicated lines and no network/system of the Distribution or Transmission licensee is being used for aforesaid drawl of power. Further, the petitioner is not availing open access for drawing power from the aforesaid captive power plant.

(v) The petitioner in the subject petition placed arguments on the following legal framework and orders/Judgments against levy of additional surcharge by the Respondent:

- (a) Provisions under Section 42(4) of the Electricity Act 2003 for applicability of additional surcharge.
- (b) Provisions under Rule 3 of the Electricity Rules 2005 for interpretation of term "Supply of electricity" used in Section 42 (4) of the Electricity Act 2003.
- (c) Clause 8.5.4 of Tariff Policy notified by the Central Government.
- (d) Judgment passed by the Hon'ble Appellate Tribunal for Electricity on 27.03.2019 in Appeal No. 315 of 2017 in the matter of *M/s JSW Steel Ltd. & Ors. v. MERC & Anr.*
- (e) Judgment passed by the Hon'ble Appellate Tribunal for Electricity on 29.05.2006 in *Kalyani Steels Limited v. Karnataka Power Transmission Corporation Limited & Ors.*

13. As mentioned in para 11 of this order, the petitioner has adopted the submissions made by M/s Ultratech Cement Ltd in other similar nature of petitions namely petition Nos. 12/2020, 61/2020 and 62/2020. The petitioner further submitted that the written submission filed by it is limited to certain additional points that may be considered by the Commission. The petitioner broadly submitted the following against levy of additional surcharge by the Respondent:

- (i) 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 to the charges of wheeling. Additional Surcharge is levied to meet the fixed cost of the distribution licensee arising out of such licensees' obligation to supply electricity.
- (ii) Additional Surcharge is levied on consumers or a class or consumers who are availing **supply** of electricity from someone other than their area distribution licensee i.e., on Open Access. The term supply, inherently and in the context of Section 42 involves an element of sale.

- (iii) There is no element of Open Access and/ or sale involved in the facts of the present case and hence there cannot be any levy of Additional Surcharge from the power consumed by the Petitioner from its onsite Captive Project.
- (iv) Additional Surcharge is to be specified on wheeling which is determined by a State Commission from time to time. Therefore, if no wheeling charges are applicable then there cannot be any levy of additional surcharge.
- (v) Additional Surcharge is levied to meet the fixed cost of the area distribution licensee which is a result of the licensees' obligation to supply electricity.
- (vi) The petitioner is a captive consumer. A captive user/ consumer, 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. Captive use does not envisage **supply** of electricity by the captive user to himself.
- (vii) 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.
- (viii) 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 utilizes 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.
- (ix) 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 exempted 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.

- (x) 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, 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. In the facts of the present case, there is no wheeling agreement between the petitioner and MPPKVVCL for the consumption/ use of energy from the petitioner's onsite Captive Project.
- (xi) In fact, as stated, the petitioner is connected at 132 kV transmission network of the transmission licensee. Hence, no Wheeling Charges are paid by the petitioner.
- (xii) By various retail supply tariff orders (i.e. for FY 2017 to FY 2020), this Commission has, amongst others, determined Wheeling Charges, Cross Subsidy Surcharge and Additional Surcharge for various class of consumers. It is noteworthy that, while determining Wheeling Charges payable by consumers, this Commission has specifically not determined any Wheeling Charges for EHT consumers (i.e., consumers connected at 132 kV such as the petitioner). This Commission has held that generators and consumers connected at 132 kV or above are only required to pay transmission charges and no wheeling charges are determined for such consumers as there is no usage of the distribution network. The petitioner's Unit is the generator and the consumer connected at 132 kV and is not liable to pay wheeling charges.
- (xiii) As a precursor for levying Additional Surcharge, MPPKVVCL is required to demonstrate that there is stranded fixed cost on account of the petitioner not receiving supply of electricity from MPPKVVCL.
- (xiv) MPPKVVCL has failed to demonstrate any stranding of capacity on account of the petitioner consuming power generated by its onsite CPP. MPPKVVCL's justification for levying Additional Surcharge [no exemption akin to 4th Proviso to Section 42(2) available under Section 42(4)] is misconceived. MPPKVVCL 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.

- (xv) Any interpretation of the Electricity Act which leads to the conclusion that Additional Surcharge is leviable on captive consumers 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 consumers are completely exempted from levy of Additional Surcharge. The Additional Surcharge can only be levied on non-captive Open Access users who are liable to pay Cross Subsidy Surcharge under the Electricity Act.
- (xvi) Hon'ble Appellate Tribunal for Electricity passed its Judgment on 27.03.2019 in Appeal No. 315 of 2017 titled as *M/s JSW Steel Ltd. & Ors. v. MERC & Anr.*. By the said Judgment, the Hon'ble Appellate Tribunal held that Additional Surcharge is not leviable on Captive Users. While the aforesaid judgment has been challenged before the Hon'ble Supreme Court and that there is a stay of the operation of the said judgment, the submission is that the principle settled by the Appellate Tribunal will still operate. The stay is only in relation to the operation of the judgment and order qua the parties therein, and not in relation to the principle established by the Appellate Tribunal.

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

- (a) 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
- (b) Hon'ble Supreme Court's Judgment in the matter of Sesa Sterlite v. OERC [(2014) 8 SCC 444]
- (c) Hon'ble Supreme Court's Judgment in the matter of Hindustan Zinc Ltd. v. RERC [(2015) 12 SCC 611]
- (d) 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
- (e) Judgment dated 09.02.2010 in Appeal No. 119 & 125 of 2009 - Chhattisgarh State Power Distribution Company Limited v. Aryan Coal Benefications Pvt. Ltd.

- (f) MPERC's Order dated 27.03.2019 in Review Petition No. 02/2019 in the matter of *M/s. Narmada Sugar Private Limited v. M.P. Poorva Kshetra Vidyut Vitaran Co. Ltd.*

15. The Respondent in its submissions placed the following arguments while citing various Orders / Judgments:

- (i) The petitioner is contending that in the transaction of availing power from captive generating plant there is no element of 'supply' hence additional surcharge is not applicable. The petitioner is solely relying on the definition of term 'supply' given in the Act. The same 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;"*

- (ii) The petitioner is trying to establish that since 'supply' means sale and in case of consumption of power from captive generating plant there is no element of sale involved hence they are not liable to pay additional surcharge.
- (iii) It is submitted that aforesaid Section 2 of the Electricity Act, 2003, which contains the definition of supply, opens with the phrase *"unless the context otherwise require"*. Therefore, depending upon the context meaning of any term defined in the definition clause may be varied.
- (iv) In the issue under consideration, the context is of the consumption of power from the source other than the distribution licensee's area and additional surcharge is being levied to compensate the distribution licensee. In the scenario of open access, 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 and distribution licensee has nothing to do with the commercial arrangement (if any) between sender and receiver of the electricity. Therefore, in the present context meaning of supply cannot be same as given in the definition clause.
- (v) That, in this regard following definitions provided in the Act are relevant:

*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 aforesaid definitions, it clearly emerges that a power plant set up to **generate** electricity primarily for own use become a captive generating plant. Further, when a power plant generates, it shall always be for giving **supply** to any premises not otherwise. In other words, there cannot be any generation except for the purpose of supply.

- (vi) In view of above submissions, it is stated that expression 'supply' not always means sale of electricity. Further in the present fact and circumstance of the case there is 'supply' of power by generating plant to the premises of the petitioner.
- (vii) The issue of open access and rational behind levy of surcharges came under consideration of the Hon'ble Supreme Court in case of **Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Others (2014) 8 SCC 444**. The relevant part of the said judgment is reproduced as under:

24. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt.

25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their 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 for both these aspects.

26. 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 so as to ensure that the consumers do not go out of their fold to get supply from some other source.

27. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes 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.**

28. Therefore, in the aforesaid circumstances though CSS is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In 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.

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

- (viii) In the above Sesa Sterlite Judgment (supra), it is made clear that a consumer who consumes the power from any source other than the area of distribution licensee either through a "dedicated transmission line" or through "open access" would be liable to pay Cross Subsidy Surcharge and Additional Surcharge under the Electricity Act. The rationale is that the consumer's exit from the ambit of distribution licensee adversely affects 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 incurred by such licensee as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the distribution licensee for both these aspects.
- (ix) In Hon'ble Supreme Court's Judgment in the matter of **Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission (2015) 12 SCC 611**, it was contended by appellant captive generating plant that the Act of 2003 has totally liberalized the establishment of captive power plants and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, the Regulatory Commission had no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source. In regard to the same, the Hon'ble Supreme Court held as under:

"34. The above contention is rightly repelled by the learned counsel for the respondents that such an interpretation would render the words "percentage of total consumption of energy in the area of supply" redundant

and nugatory is wholly untenable in law. In case, the legislature intended such power of the Regulatory Commission to be confined to the Distribution Licensee, the said words and phrases of Section 86(1)(e) would have read "total electricity purchased and supplied by distribution licensee". The mere fact that no licence is required for Establishment, Operation and Maintenance of a Captive Power Plant does not imply that the industries engaged in various commercial activities putting up such Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission and required to purchase certain quantum of energy from Renewable Sources.

....

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 be imposed upon the 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."

- (x) In view of above dictum of Hon'ble Apex Court, it is clear that captive consumers are also the consumer of the distribution licensee and they do not enjoy any immunity from compliance of any provision of the statute except specifically provided.
- (xi) 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 before the Hon'ble 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.

- (xii) This Commission in 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. 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.

- (xiii) In view of above, the petitioner’s contention that in the case of Malanpur (supra), MPERC has not considered the scenario where power consumed through dedicated transmission line without availing the open access is not correct.
- (xiv) Sub-section 42(2) of the Act deals with the ‘cross-subsidy surcharge’ and sub-section 42(4) of the Act deals with ‘additional surcharge’. The Electricity Act provides clear 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).
- (xv) For levy of ‘additional surcharge’ under the Act, it is sufficient that power is being procured from any source other than the Distribution Licensee of area and there is no restriction regarding status of such other source captive or otherwise. It is also not necessary to avail such power by using distribution system though open access. Surcharge shall be applicable even if power is consumed directly from generator through dedicated transmission line.

- (xvi) The petitioner has submitted that it is not an open access consumer and there is no wheeling (as there is no use of distribution system) hence no wheeling charges are being billed to the petitioners. The petitioner is contending that since wheeling charges are not being billed, additional surcharge shall also not be applicable. The proposition put forth that simply because one kind of charge (wheeling charge in the present case) is not being billed, other kind of charges automatically fall, cannot be accepted as there is no difficulty in making the computation of additional surcharge which is payable as per the rate determined by the Hon'ble Commission in the Retail Supply Tariff Orders issued from time to time. The relevant part of the tariff order of FY 2019-20 is reproduced as under:

*"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."*

- (xvii) It may be seen that calculation of additional surcharge is to be done based on the units (kWh) consumed by any consumer from source other than the distribution licensee and there is no dependency on the wheeling charges in this regard. Thus, the petitioner is liable to pay the additional surcharge even if no wheeling charges is being billed separately.
- (xviii) The fact that premises of the petitioner is connected at 132 KV voltage level does not make any difference with regard to liability of additional surcharge as the answering distribution licensee has universal supply obligation towards all its consumer irrespective of the quantum and voltage of the supply. Further 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.

16. Let us look into the provisions under Section 42 of the Electricity Act, which provide as under

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated 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-subsidy and the operational constraints) as may be specified within the one year from the appointed

date and in specifying the extent of open access in successive phases and in determining the charges of wheeling, it shall have due regard to all relevant facts including such cross-subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of surcharge, in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of the current level of cross-subsidy within the area of supply of distribution licensee

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

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 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.

17. In the subject matter, the petitioner being a consumer of the Respondent is receiving supply of electricity from its Captive Power Plant i.e., from a person other than the distribution licensee of the petitioner's area of supply. However, the petitioner has placed arguments to establish that the captive generation and consumption of electricity by captive user would not be treated as "Supply" of electricity, based on the following grounds:

- (i) that the "captive use" does not envisage **supply** of electricity by the captive user to himself.
- (ii) Insofar as Section 42(4) of the Electricity Act is concerned, there is no reference to the term "supply" vis-à-vis a captive user. There is no reference to the term "supply" in Rule 3(1) of the Electricity Rules. Rule 3(2), does mention the term "supply".
- (iii) The term "Supply" is only in the context of a captive power plant failing to meet the qualifications under Rule 3(1) of the Electricity Rules. Hence, the

legislature intended that 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.

18. **“Supply”** is defined in Section 2(70) of the Electricity Act 2003 as given below:

“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;”

Further, the “Captive generating plant” and “generate” is defined in the Electricity Act 2003 as given below:

*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.*

(Emphasis Supplied)

19. On reading of the above two definitions, it is clearly conveyed that the term “generate” which is used in the definition of “Captive generating plant” also means to produce electricity for the purpose of giving “Supply” to any premises.

20. In view of the above provisions under the Electricity Act 2003 and the facts in this matter, the contention of the petitioner that captive generation and consumption of electricity by the captive user would not be treated as “supply” of electricity has no merit hence not considered by the Commission.

21. In the present case, the petitioner without availing open access is receiving supply of electricity from a person (captive power plant) other than the distribution licensee of his area of supply. The petitioner is receiving supply of electricity from its captive power plant to its manufacturing unit through dedicated line. As provided in Section 42(4) of the Electricity Act 2003, the petitioner having Contract Demand of 65,000 KVA is

permitted by the Commission to avail open access as per provisions under MPERC (Terms and Conditions for intra-state Open Access in Madhya Pradesh) Regulations, 2005. Further, as provided in Section 42(4), such a consumer or class of consumers who is/are permitted to avail open access by the State Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply, 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.

22. In the matter of *Sesa Sterlite v. OERC [(2014) 8 SCC 444]* as mentioned in **preceding part of this order**, Hon'ble Supreme Court observed that open access in distribution means freedom to the consumer to get supply from any source of his choice other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Further, open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensees' obligation to supply.

23. Hon'ble Apex Court further observed that 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 and the mechanism of this surcharge is meant to compensate the licensee for both these aspects.

24. Hon'ble Apex Court, while summarizing the issue, concluded that CSS is compensation to the distribution licensee irrespective of the fact whether its line is used or not. The consumer situated in an area is bound to contribute to subsidizing a low end consumer, if it 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. Even a licensee who 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.

25. The person who has established a captive generating plant is categorically exempted from payment of only cross-subsidy surcharge under Section 42(2) of the Electricity Act 2003 and there is no exemption for payment of additional surcharge for such person under the Electricity Act 2003. In this regard, the petitioner has submitted 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 is further stated by the petitioner that the aforesaid Judgment dated 27.03.2019 of Hon'ble Appellate Tribunal has been 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 has 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.

26. It is pertinent to mention that, in Para 61 of the aforesaid Judgment, Hon'ble Tribunal has observed the following in reference to the Judgment of **Kadodara Power, Private Limited**:

"This Judgment of the Tribunal is under challenge before the Hon'ble Supreme Court, however, there is no stay of the judgment. Therefore, the law laid down by the Tribunal in the above judgment holds good as on today.

However, the Judgment in the matter of *M/s JSW Steel Ltd. & Ors. v. MERC & Anr* passed by Hon'ble Appellate Tribunal for Electricity in Appeal No. 311 & 315 of 2018, which is relied upon by the petitioner in the subject matter, has been challenged before the Hon'ble Supreme Court (Civil Appeal No. 5074-5075/ 2019) and the Hon'ble Apex Court has passed an interim order on 01.07.2019 staying the operation and implementation of the aforesaid Judgment passed by Hon'ble Appellate Tribunal for Electricity.

27. Moreover, the facts and circumstances in the aforesaid Appeal Nos. 311 and 315 of 2018 were different because the Respondent Commission (in aforesaid appeals) in its MYT order held that additional surcharge was not applicable to captive users of captive generating plant under the provisions of Regulations. However, in its Mid Term Review, the Respondent Commission (in aforesaid appeals) opined that additional surcharge is leviable to captive users of captive generating plants. In para 78 and 79 of aforesaid Judgment dated 27.03.2019, Hon'ble Tribunal observed the following:

"78. Apparently, in the MYT order dated 3-11-2016, the Respondent Commission held that additional surcharge was not applicable to captive users of captive generating plant. This was while exercising jurisdiction under Regulation 8.1 and 8.2 of Multi-Year Tariff Regulations 2015.

79. During MTR proceedings, the Respondent Commission has opined that additional surcharge is leviable against captive users of captive generating plant."

In para 83 of the aforesaid Judgment dated 27.03.2019, the Hon'ble Tribunal has held the following:

"83. The scope of Mid Term Review proceedings is understood from the above regulations. As seen from the above Regulations, the Commission cannot deviate from the principles adopted in the Multi Year Tariff order.

Fundamental principles adopted in the MYT proceedings cannot be reopened and challenged at the stage of MTR proceeding, the scope of which is very limited.”

28. Section 43 of the Electricity Act’2003 provides as under:

“Section 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:
....”

29. As per above provision under sub section (1) of Section 43 of the Act, the Distribution Licensee is required to supply power as and when required by the any owner /occupier of any premises in its area of supply. This means that the distribution licensee is having an obligation under Section 43 of the Electricity Act’2003 to provide supply of electricity to owner or occupier of any premises without any discrimination whether it is a new consumer or an existing open access consumer or a captive user seeking additional/enhancement of demand in place of electricity which was otherwise being drawn through open access or from captive generation. In view of the aforesaid provision, the distribution licensee is required to fulfill its obligation to supply electricity to a consumer, being petitioner in this case. Besides the licensee is also required to pay fixed cost for procurement of power through long term PPAs which have to be signed to meet such obligations. Further, in the matter of Hindustan Zinc Ltd Vs. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015), Hon’ble Supreme Court has held that captive consumers are also consumers of the distribution licensee.

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.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman