MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Petition No. 48 of 2019

Sub: In the matter of petition under Section 86(1)(f) of the Electricity Act, 2003 read with Regulation 10 of MPERC (Cogeneration and Generation of Electricity from Renewable Energy Sources) (Revision-I) Regulations, 2010 for directions to Respondents to discontinue billing the petitioner under HV 3.1 category of tariff.

ORDER
(Date of Order: 18th December' 2020)

M/s. Sterling Agro Industries Limited
Aggarwal Cyber Plaza 2, 11th Floor,
Netaji Subhash Place, Pitampura, New Delhi – 110 034 - **Petitioner**

Vs.

(1) M.P. Power Management Company Ltd.,
Block No. 15, Shakti Bhawan, Rampur, Jabalpur – 482008

- **Respondents**

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

Shri Parinay Deep Shah, Advocate appeared on behalf of the petitioner.

Shri S K Okhade GM appeared on behalf of the Respondent No.1

Shri Sanjay Malviya SE and Shri Shailendra Jain Dy. Director appeared on behalf of the Respondent no.2

The petitioner, M/s. Sterling Agro Industries Ltd. filed the subject petition under Section 86(1)(f) of the Electricity Act, 2003 read with Regulation 10 of MPERC (Cogeneration and Generation of Electricity from Renewable Energy Sources) (Revision-I) Regulations, 2010 seeking directions to the Respondents to discontinue billing the petitioner under HV 3.1 category of retail supply tariff order.

2. While mentioning Regulation 10 of MPERC (Cogeneration and Generation of Electricity from Renewable Energy Sources) (Revision-I) Regulations, 2010 and Tariff Schedules HV-7 and HV 3.1 of retail supply tariff order of this Commission, the petitioner broadly submitted the following in the subject petition:

(i) M/s. Sterling Agro Industries Ltd. is an independent power producer and has two wind

*power projects of 6(1.5*4) MW capacity in Mahuriya and 10.5 MW(1.5*7) at Behpur in MP. The petitioners wind power project located at Mahuriya is connected to the common feeder maintained by M/s. Suzlon Infra Mahuriya Ist Susner KRBL Pvt. Ltd. Similarly, the petitioner's wind power project, located at Behpur is connected to two separate common feeders, both maintained by M/s. Suzlon Global Services Ltd.*

(ii) The petitioner, through its wind power projects, is supplying and selling power to MPPMCL under PPA dated 23.07.2011 and 08.08.2014. Since commissioning of the projects, the petitioner has been raising invoices for the power delivered to it, in terms of the PPAs.

(iii) The petitioner being a wind energy generator has to draw power for synchronization of its plants with the grid. The same is also recognized in Regulation 10 of RE Regulations, as amended by 7th Amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 dated 15.11.2017. Regulation 10 clearly states that renewable energy generator will be entitled to draw power for its own use for synchronization of plant with the grid or during shutdown or such other emergencies. The regulation further states that the power availed for synchronization shall be billed as per the Retail Supply Tariff Order.

(iv) The Hon'ble Commission in accordance with Regulation 10, created a separate tariff category, being HV-7, in its Retail Supply Tariff Orders for generators, already connected to the grid, availing power for synchronization with the grid. Respondent No. 2, in accordance with Regulation 10 of RE Regulations read with the Tariff Schedule HV-7, has been raising monthly bills for the power imported at the common feeder, by wind energy generators (including the petitioner)

(v) It is important to note that under HV-7 only energy charges are levied on the generators while fixed charges were not applicable.

(vi) Further, under Regulation 10 of RE Regulation, generators can also draw power during shutdown or such other emergencies and such drawl is billed at the rate applicable to temporary connection under HT Industrial category. Thus, currently drawl of such power is being billed at temporary supply tariff under HV 3.1 industrial category.

(vii) It is pertinent to mention that prior to amendment of Regulation 10 of RE Regulation there was no distinction made between tariff applicable on energy drawn for synchronization and energy drawn during shutdown or other emergencies. All such drawl of power, by renewable energy generators, was billed at rate applicable to temporary connection under HT industrial category. Thus, renewable energy generators were billed under HV 3.1 Category for Industrial Consumers and had to pay both energy and fixed charges. However, the Hon'ble Commission vide its order dated 05.07.2016, passed in petition No. 20 of 2016, held that power required by wind energy generators for startup of its plant frequently cannot be considered as drawl of power during shutdown or emergency periods. Accordingly, the distribution companies, including Respondent No. 2, started billing such drawl of power under HV-7 tariff category.

(viii) However, now suddenly Respondent No. 2 in its bill for September, 2019 has started billing the petitioner under HV-3.1 Industrial Category, levying both energy charges and fixed charges, where the drawl of power for synchronization is more than two hours. It is pertinent to mention that the petitioner is also being billed under HV-7 tariff category for the two hours it draws energy for synchronization and thereafter billed under HV-3.1 industrial consumer category. Thus, while the petitioner is paying high energy charges of INR 9.35/unit under HV-7 it is also paying both energy charges and fixed charges under HV-3.1 category. It is pertinent to mention that the petitioner is selling power from its two projects at INR 4.35/unit and INR 5.92/unit.

(ix) In view of the facts and circumstances stated above, it is submitted that Respondents have acted in contravention of MPERC Supply Code and orders of this Hon'ble Commission. The Respondent are incorrectly levying temporary supply tariff for industrial consumers on the petitioner causing it great financial difficulty.

3. With the above submissions, the petitioner prayed as under:

(i) Direct the Respondents to not apply HV-3.1 industrial consumer tariff on the petitioner.

(ii) Set aside and quash the invoices which have already been raised by Respondent No. 2 on the petitioner; and

(iii) Pass any other order this Commission may deem fit.

4. The petitioner also filed two applications for the following:

(i) seeking urgent listing of the subject petition

(ii) seeking ad-interim ex-parte stay and interim directions to the Respondents to not disconnect the petitioner's project till disposal of the subject petition

5. The petition was admitted on 06.12.2019 and the petitioner was directed to serve a copy of the subject petition on all Respondents in the subject matter. Ld. Counsel of the petitioner had sought ad-interim ex-parte stay and interim directions to the Respondents to not disconnect the petitioner's project till disposal of the petition however, the same was not considered without hearing the Respondents. The Respondents were directed to file their replies by 10.12.2019 on the aforesaid application for stay.

6. Vide letter dated 10.12.2019, M.P. Power Management Co. Ltd. (Respondent No. 1) and M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd. (Respondent No. 2) submitted that the copy of subject petition was not served to them. However, at the hearing held on 11.12.2019, Ld. Counsel of the petitioner placed a copy of acknowledgement serving the copy of subject petition to the Respondents. After hearing the parties on 11.12.2019 and looking into the nature of billing dispute, the parties were suggested by the Commission to sit together at once to amicably resolve the issue of billing under dispute but no agreement reached on this matter. The parties were further directed to maintain the status-quo with regard to the electrical connection to the petitioner project till next date of hearing. The Respondents were directed to file their reply to the subject petition by 23rd December'2019 and the petitioner was directed to file rejoinder within 10 days thereafter.

7. By affidavit dated 23.12.2019, the Respondent No.2 filed its reply to the subject petition. The petitioner, by affidavit dated 01.01.2020, filed rejoinder on the aforesaid reply filed by Respondent No.2.

8. At the hearing held on 3rd January' 2020, the representative appeared for Respondent No.1 (MPPMCL) stated that Respondent No.1 supports the reply filed by Respondent No. 2. Ld. Counsel of the petitioner stated that despite clear directives of the Commission in para 7 of its order dated

16.12.2019 in petition No. 29 of 2019, the copy of Petition No. 29 of 2019 has not been served to the petitioner being the intervener in said petition. He requested to direct the Respondent No.2 to serve copy of Petition No. 29 of 2019 to him being one of the intervenors in that petition and sought time to file comprehensive submissions after studying Petition No. 29 of 2019. The Commission directed the petitioner to make payments of disputed bills under protest however, the difference of billing amount if any arises on account of the outcome/decision of the subject petition, the same shall be refunded along with the interest at prevailing bank rate by Respondent No.2 to the petitioner. The Respondents were directed to ensure service of the copy of Petition No. 29 of 2019 to the petitioner at the earliest in terms of para 7 of Commission's order dated 16.12.2019 in petition No. 29 of 2019.

9. At the hearing held on 23rd June' 2020, Ld. Counsel who appeared for the petitioner stated that the petitioner had approached the Hon'ble Appellate Tribunal for Electricity against the interim order passed by this Commission, primarily seeking interim protection against disconnection and the Hon'ble Tribunal has granted ad-interim protection against the disconnection of petitioner's power plant supply by the Respondent No. 2. He further stated that the issues involved in the subject petition are entirely same which are involved in Petition No. 14 of 2020 for which he has already placed his detailed arguments on the same date of hearing i.e. 23.06.2020. He requested to consider the same arguments in this matter also.

10. The petitioner and the respondents were asked to file their respective written notes on arguments by 3rd July' 2020. The case was reserved for order thereafter.

Respondent's Submission:

11. The Respondent No. 2 submitted the following in its reply to the subject petition filed on 23.12.2019:

"(i) 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 under temporary Industrial category on the drawl of power over and above the ceiling of 2 hours.

(ii) 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: Non submission petition as per direction of the Hon'ble Commission

(iii) That, the instant petition listed for motion hearing before Hon'ble Commission on dated 06/12/2019. Hon'ble Commission vide order dated 07/12/2019 admitted the petition and directed to the petitioner to serve a copy of the petitioner to the respondents. Further respondents were directed to file reply at the earliest but not later than 10.12.2019. The next date for hearing was fixed on 11.12.2019.

(iv) That, the aforesaid order Communicated to the respondents vide letter No. MPERC/D(L&R)/1767 Bhopal dated 11.12.2019 and said order received in the office of the answering respondent on dated 12/12/2019.

(v) That, name and address of the answering respondent in the instant petition as well as in the order of the Hon'ble Commission mentioned as "Madhya Pradesh Paschim Khetra Vidyut Vitaran Co. Ltd , ***GPH Compound, Polo ground Indore*** *whereas petitioner has submitted the copy of petition at the office of Superintending Engineer* ***at Mandsaur*** *that too only on dated 10.12.2019. Further petition is served on the office SE (O&M) without referring any order of the Hon'ble Commission. It is stated that submission of petition at the address other than mentioned in the petition cannot be treated as due compliance of the daily order of the Hon'ble Commission.*

(vi) That, daily order dated 07.12.2019 came into knowledge of the answering respondent at GPH Compound pologround Indore only on dated 10.12.2019 from the website of the Hon'ble Commission. Further answering respondent was not aware about the service of the petition at the office of the SE Mandsaur and said fact was communicated by the answering respondents to the Hon'ble Commission vide its letter No. MD/WZ/05/Com/TRAC/ 22865 Indore dated 10.12.2019.

(vii) That, at the time of hearing on dated 11.12.2019 answering respondent reiterated its position that it is not in receipt of the copy of the petition hence unable to respond the content of the petition. On the other hand petitioner submitted (without disclosing the fact the petition is submitted to office of SE Mandsaur only on dated 10.12.2019) before Hon'ble Commission that petition is already been served. Subsequently petitioner vide letter No. SAIL/MPPKVVCL/19-20/Petition Copy/01 dated 16/12/2019 served the copy of the petition in the office of answering respondent at GPH Compound Polo ground Indore.

(viii) That, in the aforesaid circumstances of the case Hon'ble Commission has passed the daily order dated 17.12.2019 directing the respondents to maintain the status-quo with regard to the electrical connection of the petitioner's project. Further Hon'ble Commission has not granted any stay on the payment of the energy bill but petitioner is not making payment of the same in the garb of the order of the Hon'ble Commission regarding status-quo of electric connection.

*(ix) That, there are some established principles of equity upon which injunction are founded. The principle that an injunction cannot be granted when the conduct of the applicant or his agent has been such as to disentitle him to the assistance of the Courts. This is based upon two well known principles "**he who seeks equity must do equity**" and "**he who comes into equity must come with clean hands**". Equitable remedy should not be granted unless the conduct of applicant is fare and honest and free from any taint or fraud or illegality. A party suppressing material fact does not deserve the grant of any discretionary relief.*

(x) That, in view of above, it is expedient in the interest of justice that petitioner be directed to make payment of the dues of the answering respondents.

RE: Billing of power drawn continuously above Two Hours

(xi) That, this Hon'ble Commission vide Notification No. 3042/MPERC-2010, Dated: 09.11.2010, has issued the "Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 (Revision-I) {RG- 33(I) of 2010}" here in after referred as 'Regulation'. Subsequently, 7 amendments have been made in the Regulations from time to time. The last and 7th amendment in the Regulation has been made on 17/11/2017.

(xii) Clause 10 of the regulation provides as under:
10. Drawing Power by Generator/ Cogeneration from renewable Sources

The Generator/ Co-generation from Renewable Sources would be entitled to draw power exclusively for its own use from the Transmission/ Distribution Licensees' network for synchronization of plant with the grid or during shutdown period of its plant or during such other emergencies. The power availed during synchronization of plant with the grid shall be billed for the period and at the rate as per retail supply tariff order under tariff schedule for synchronization. In other cases, it would be billed at the rate applicable to temporary connection under HT Industrial Category.

(xiii) Hon'ble Commission vide its tariff order has made provisions for drawl of power by RE Generators for synchronization purpose under HV-7 tariff schedule and restricted the drawl from Grid for synchronization purpose only for a maximum period of 2 hours on each occasion. The relevant conditions of HV-7 tariff are reproduced as under:-

> *"This Tariff shall apply to those generators who are already connected to the grid and seek to avail power for synchronization with the grid.*
>
> *(a) The supply for synchronization with the grid shall not exceed 15% of the capacity of unit of highest rating in the Power Plant.*
>
> *(b) The condition for minimum consumption shall not be applicable to the generators including CPP. Billing shall be done for energy recorded on each occasion of availing supply during the billing month.*
>
> *(c) _____*
>
> *(d) _____*
>
> ***(e) For the synchronization with the grid, power shall be provided for a maximum period of 2 hours on each occasion."***

(xiv) That, in compliance of aforesaid provisions of Regulation and Tariff order, respondent Discom is required to apply 2 different sets of billing methodology for each occasion of drawl by RE Generators.

(xv) That, it is submitted that under the HV 7 tariff category any generator can draw power for the purpose of synchronization and such power can be drawn up to maximum of 2 hours only. Energy drawn over and above two hours has to be billed as per rate prescribed for HT Temporary tariff under Schedule HV 3.1 (HT Industrial). It is stated that HT industrial tariff (Tariff Schedule HV 3.1) has provisions for billing of Monthly Fixed Charges (based on billing demand), Energy Charges (as per units consumption).

(xvi) That, considering the aforesaid provision of regulation as well as tariff order billing of power drawn for 'synchronization' purpose (up to two hours) is to be done under HV-7 tariff schedule only. Such drawl can be computed for entire billing month considering that on each occasion of drawl, initial 2 hours allowed for synchronization purpose. Remaining period of each occasion above 2 hours is to be considered for "non-synchronization purpose" as HV-7 tariff category doesn't permit use of power more than 2 hours.

(xvii) That, contention of the petitioner that even the power drawn continuously over and above the 2 hour should also be billed under HV-7 is without any substance as HV-7 tariff category doesn't permit use of power more than 2 hours. As per provision of the regulation read with the tariff order said power need to be billed at the rate applicable to temporary connection under HT Industrial Category.

(xviii) That, petitioner vide instant petition has disputed the billing of the month of September 2019 with respect to the following connections of Wind Generators:

S.No.	*Name of consumer*	*Consumer Code*	*Circle*
1	*Suzlon Infra Mahuriya Ist Susner KRBL P LTD. Mahuriya Shajapur*	*5380332105*	*Agar*
2	*Suzlon Global Services Limited, 03, Tirupati Nagar, Sailana Road, Ratlam (M.P) (Behpur Point-1) 457001*	*7479114643*	*Mandsaur*
3	*Suzlon Global Services Limited, 03, Tirupati Nagar, Sailana Road, Ratlam (M.P) (Behpur Point-2) 457001*	*2591426021*	*Mandsaur*

(xix) That, at present following procedure is being adopted in the billing of power drawn over & above 2 hour at the rate applicable to temporary connection under HT Industrial Category:

21.1 ***Energy charges:*** *Energy drawn continuously over and above 2 hour is being billed at the rate of 1.25 times of energy charges prescribed for temporary connection under HT Industrial Category.*

21.2 ***Fixed charges*** *: Maximum recorded MD among all the occasion of above 2 hours is being considered as Billing Demand for the entire billing month. Further billing is being done on prorate basis considering only those number of days in which power is drawn over and above 2 hours in any occasion.*

21.3 Power factor incentive/Surcharge and ToD rebate is being provided on the energy charges billed under temporary HT Industrial Category.

Detailed calculation sheet showing billing under temporary industrial category, day wise consumption summary and statement duly segregating the day wise number of occasion between upto 2 hour & above 2 hour enclosed as ***Annexure-R1 (Colly).***

(xx) That, it is noteworthy to mention that aforesaid billing is being done by the Discom is subject to upwards revision depending upon the clarification received from the Hon'ble Commission in the petition No. 29/2019. In the said petition clarification has sought from this Hon'ble Commission on the following issues:

"a. Billing Demand for calculation of Monthly Fixed Charges: In case of consumers, Billing Demand is considered as Recorded maximum demand (MD) or 90 % of Contract Demand (CD), whichever is higher. Since in case of Generators, there is no defined CD, the only parameter available is Recorded MD in each occasion. Whether the maximum recorded MD among all the occasion of non-synchronization period is to be considered as Billing MD for the entire billing month is not clear. The same needs to be clarified. Further, whether the Highest recorded MD during a period of drawl of power beyond 2 hours, is to be treated as the Billing Demand for all successive periods of drawl of power beyond two hours during whole year (as mentioned in clause 'c' of para 1.18 of General Terms and Conditions for HT Tariff above) is also not clear.

b. Calculation of Monthly Fixed Charges : As mentioned in clause 'a' of para 1.18 of' General Terms and Conditions for HT Tariff above, the Monthly Fixed Charged are to be billed on pro-rata basis for the number of days the Temporary Connection has been availed during the month. However, in case of Grid Connected Generators, there is no specified period for which the Temporary Connection can be said to be availed. Neither there is any application of consumer, nor any subsisting agreement for availing Temporary Supply. As such, how the proportionality rule is to be applied for calculation of monthly fixed charges in case of grid connected generators is not clear.

c. Calculation of Guaranteed Annual Minimum Consumption: The guaranteed annual minimum consumption depends upon contract demand. In case of grid connected generators, there is no subsisting contract demand. Hence how Guaranteed Annual Minimum Consumption is to be calculated is not clear. Further, as mentioned in clause 'b' of para 1.18 of 'General Terms and Conditions for HT Tariff above, the guaranteed annual minimum consumption is also required to be calculated on pro-rata basis for

the number of days the connection has been availed during the year. Since there is no specified period during which the Temporary Connection has been availed in case of Grid Connected Generators, how the proportionality rule is to be applied for calculation of Guaranteed Annual Minimum Units in case of grid connected generators is not clear.

d. Applicability of other terms and condition of tariff order: As mentioned in clause 'i' of para 1.18 of 'General Terms and Conditions for HT Tariff above, Power factor incentives/penalties and the condition for Time of Day Surcharge/rebate shall be applicable in case of Grid connected generators or not.

e. Advance payment : As mentioned in clause 'd' of para 1.18 of 'General Terms and Conditions for HT Tariff above, condition of advance payment shall be applicable in case of Grid connected generators or not.

f. Applicable Energy Charges: In the Tariff Schedule HV 3.1differential energy charges provided depending upon the load factor upto 50% and above 50%. In the case of grid connected generator there is no contract demand, therefore how the load factor shall be calculated and which rate of energy charges shall be applicable is not clear..

g. Power drawn under HV-7 Exceeds 15% limit: In case grid connected generator drawing power under HV-7 tariff schedule, exceeds drawl limit of 15% what shall be the manner of billing in such circumstances. Whether any action is required to be taken in terms of penal billing or otherwise, if recorded MD of such generators exceeds the 15 % limit prescribed in tariff."

12. The Respondent No. 2 prayed the following:

(i) Direct the petitioner for making the payment of energy bills in respect of electric connection of the petitioner's wind power plant.

(ii) Dismiss the instant petition with exemplary cost.

13. The Respondent No. 2 in its additional submission on 06.02.2020 submitted that at present, billing is being done by answering respondent for the power drawn up to 2 hours under HV-7 Tariff Schedule, without any penal billing or change of tariff category, even if condition of 15% is not being fulfilled. The Respondent No. 2 also requested the Commission to clarify, whether any action is required to be taken in terms of penal billing or otherwise (i.e change in tariff category etc.), in the cases where recorded Maximum Demand of petitioner's drawl from the grid, exceeds the 15 % limit prescribed in tariff order.

14. The petitioner filed rejoinder on the reply filed by the Respondent No. 2 on 02.03.2020 stating that MPPKVVNL is now trying to re-agitate the issue which has already been adjudicated upon by the Hon'ble Commission in Petition No. 29 of 2019 filed by the Respondent. The petitioner submitted that this approach of MPPKVVNL is contrary to the principle of res judicata. Hence the additional submissions made by MPPKVVNL are liable to be dismissed.

15. The petitioner in its written submission filed on 14.07.2020 broadly submitted the following:

"1. The Petitioner has filed the instant petition under Section 86(1)(f) read with Regulation 10 of MPERC (Cogeneration and Generation of Electricity from Renewable Energy Sources) (Revision-I) Regulations, 2010 (hereinafter referred to as the "RE Regulations") The Petitioner is praying for directions to the Respondents to not bill the power drawn for synchronization, by the Petitioner, at the tariff applicable to temporary industrial consumers under HV 3.1 tariff category. The Petitioner is further praying to this Hon'ble Commission that such drawl of power, by the Petitioner, for the purposes of synchronization may be billed only under HV-7 tariff category, in terms of the Retail Supply Tariff Order dated 08.08.2019 for FY 2019-20, as was being done prior to September 2019.

2. The Petitioner was billed for the first time, for drawl of power in September, 2014 when only energy charges were applied to the Petitioner. Pursuant to this Hon'ble Commission's Orders dated 05.07.2016 and 08.07.2016, passed in Petitions Nos. 20/2016 and 22/2016, respectively the Respondent billed the RE generators under HV-7 tariff category. From then onwards until September 2019 the Respondent billed the power drawn by the Petitioner under HV-7 tariff category, which fixes the rate at which power drawn for synchronization, by RE generators will be billed. The relevant extracts of HV-7 tariff category are as under:

"Tariff Schedule - HV - 7

SYNCHRONIZATION OF POWER FOR GENERATORS CONNECTED TO THE GRID

Applicability:

This Tariff shall apply to those generators who are already connected to the grid and seek to avail power for synchronization with the grid.

Tariff for all voltages:

Category	***Energy Charge (Paise/unit)***

Generators synchronization with Grid	*935*

Terms and Conditions:

(a) The supply for synchronization with the grid shall not exceed 15% of the capacity of unit of highest rating in the Power Plant.

(b) The condition for minimum consumption shall not be applicable to the generators including CPP. Billing shall be done for energy recorded on each occasion of availing supply during the billing month.

(c) The supply shall not be allowed to the CPP for production purpose for which they may avail stand-by support under the relevant Regulations.

(d) The synchronization with the grid shall only be made available after commissioning of plant.

(e) The synchronization with the grid, power shall be provided for a maximum period of 2 hours on each occasion.

(f) The generator including CPP shall execute an agreement with the Licensee for meeting the requirement of synchronization with the grid incorporating the above terms and conditions."

3. *Suddenly for the first time in September, 2019, the Respondent began billing the power drawn by the Petitioner beyond a period of 2 hours in a day, at the rate applicable to temporary connection under HT industrial category, i.e. under HV-3.1 tariff category multiplied by 1.25 times. The Respondent in its reply before this Hon'ble Commission has submitted that it is doing so under Regulation 10 of RE Regulations read with HV-7 tariff category of the Tariff Order which prescribes a 2 hours limit on drawl of power for synchronization. (Please see paras 9-10 of the Respondent's Reply dated 12.05.2020 at Pages 5-6). The relevant extracts of HV-3.1 tariff category are as under:*

*"**Tariff Schedule - HV - 3***

INDUSTRIAL, NON-INDUSTRIAL AND SHOPPING MALLS

Applicability:

***The tariff HV-3.1(Industrial)** shall apply to all HT industrial consumers including mines (other than coal mines) for power, light and fan etc. which shall mean and include all energy consumed for factory and lighting in the offices, main factory building, stores, canteen, residential colonies of industries, compound lighting, common and ancillary facilities such as Banks, General purpose shops, Water supply, Sewage pumps, Police Stations etc. in the premises of the industrial units and Dairy units where milk is processed (other than chilling, pasteurization etc.) to produce other end products of milk. This tariff shall also apply to cold storages.*

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Tariff:

S.No.	***Sub-Category of consumer***	***Monthly Fixed Charge (Rs./kVA of billing demand per month)***	***Energy Charge for consumption upto 50% load factor (paise/unit)***	***Energy Charge for consumption in excess of 50% load factor (paise/unit***
3.1	***Industrial***			
	11 kV supply	*340*	*700*	*600*
	33 kV supply	*560*	*690*	*590*
	132 kV supply	*650*	*650*	*550*
	220/400 kV supply	*650*	*610*	*510*

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Specific Terms and Conditions:

(a) Guaranteed Minimum Consumption for all the above categories shall be on following basis:

Supply Voltage	***Sub-Category***	***Guaranteed annual minimum consumption in units (kWh)/ kVA of contract demand***
*****		
For supply at 33/11 kV	*Educational Institutions*	*600*
	Contract demand upto 100 kVA	*600*
	Others	*1200*

4. *Provision 1.19 of the General Terms and Conditions of HT Tariff in the tariff order states that if a consumer requires temporary supply then it shall be treated as separate service and charged 1.25 times the normal fixed and energy charges. The same is extracted below:*

*"**1.19 Temporary supply at HT:** The character of temporary supply shall be as defined in the M.P. Electricity Supply Code, 2013. If any consumer requires temporary supply then it shall be treated as separate service and charged subject to the following conditions.*

(a) Fixed Charges and Energy Charges shall be charged at 1.25 times the normal tariff. The fixed charges shall be recovered for the number of days for which the connection is availed during the month by prorating the monthly fixed charges. Month shall be considered as the number of total days in that calendar month."

5. *Regulation 10 of RE Regulations, is an exhaustive provision, which provides that a RE generator can draw power from the Distribution Licensee's Network for three purposes only i.e., firstly, drawl for synchronization of the plant; secondly, drawl during shutdown and thirdly, drawl for other emergencies. The Regulation further states that power availed, during synchronization of plant with the grid, shall be billed at the rate under tariff schedule for synchronization. In other cases i.e. shut down and emergencies, the drawl of power, will be billed at the rate applicable to temporary connection under HT industrial category. Since there is no other regulation which permits drawl of power by a RE generator from a distribution licensee, a RE generator cannot draw power for any purpose other than the three purposes mentioned in Regulation 10 of RE Regulations. Regulation 10 does not contemplate any other purpose for which power can be drawn, other than those already specified. It is submitted that this is the only interpretation that can be given to Regulation 10 in terms of the Latin principle of interpretation of Statute, which is Expressio unius est exclusion alterius i.e. express mention of one thing excludes all others. This legal maxim has been affirmed to be valid principle of legal interpretation by the Supreme Court in several judgments including in the matter of Babu Verghese and Ors. v. Bar Council of Kerala and Ors, (1999) 3 SCC 422 wherein the Supreme Court held that when a statute prescribes to do a particular thing in a particular manner, the same shall not be done in any other manner than prescribed under the law. This principle of law has also been upheld by the Learned Appellate Tribunal for Electricity ("APTEL"), in Appeal No. 33 of 2012as under:*

> *"24. The settled legal position is when it is prescribed in a statute that a particular act is to be done in a particular manner, then requirement to the Act in that manner is mandatory and the specified Section of non -compliance have necessary to follow."*

Copies of aforesaid Judgments of the Hon'ble Supreme Court and Hon'ble APTEL are annexed herewith as ***Annexure P-1 and P-2*** *respectively.*

6. *Therefore, express mention of the three purposes for which power can be drawn, excludes any other purposes. A natural corollary of this principle is that if any kind of drawl of power cannot be categorised in any of the three prescribed categories then such drawl of power is neither permissible nor billable in terms of Regulation 10of RE Regulations. Since drawl of power for the purposes of synchronisation, whether under two hours or over two hours, cannot be classified as power drawn for either of the other two stipulated purposes i.e. shutdown or emergency, such power has to be billed as*

power drawn for synchronisation only, as provided for under in Regulation 10of RE Regulations.

7. *As mentioned, Regulation 10 also specifies how the power procured by the RE generator should be billed. The phrase "The power availed during synchronization of plant with the grid shall be billed for the period and at the rate as per the retail supply tariff order under tariff schedule for synchronization" in Regulation 10 of RE Regulations makes it clear that the power drawn for the purposes of synchronization will be billed under tariff schedule for synchronization i.e. HV-7 tariff category. The phrase "In other case, it would be billed at the rate applicable to temporary connection under HT Industrial category" in Regulation 10 refers to other cases of shut-down and/or emergency and no other case. Further, if the phrase "other case" in Regulation 10 included any other case other than the other two specified cases i.e. shut-down and emergency, then it would lead to absurdity since then why would Regulation 10 even make a mention of shutdown and emergency and not just mention two categories for drawl of power, i.e. synchronization and other cases. But instead it clearly specifies that there are three categories for drawl of power and no other category. Therefore, the phrase "other case" means only shutdown and emergency and no other case.*

8. *The Respondent seeks to make a case that the power drawn after a period of two hours by virtue of clause (e) in HV-7 tariff category of the tariff order, which states that "The synchronization with the grid, power shall be provided for a maximum period of 2 hours on each occasion", shall be assumed to be power drawn for shutdown or emergency and accordingly may be billed under Regulation 10 of RE Regulations. It is respectfully submitted that such a submission of the Respondent besides being an erroneous interpretation of the provision is also absurd in so far it would be ludicrous to assume that there is a shutdown or emergency every day at the plant. Further the legal position that the power drawn for synchronization cannot be considered as power drawn for shutdown or emergency has been concretized by this very Hon'ble Commission in several precedents, wherein the Hon'ble Commission has held that the power drawn by Wind energy generator for synchronization of WTGs frequently cannot be considered as drawl of power for shut down or emergency periods and the same shall be billed as per HV-7 tariff category. The Respondent cannot now assert a position of law which is contrary to these orders, which have attained finality. Relevant paras of aforementioned orders are extracted below:*

Petition No. 20 of 2016

"7……..During the shut down or emergency periods, the plant shall not generate power and requires power for repairs and maintenance purposes, for which the petitioner shall have to avail power and would be billed at temporary supply tariff as specified in the aforesaid Regulations. However, the power is required by the petitioner for start up of WEGs frequently, which cannot be considered under drawl of power during shut down or emergency periods. The Commission has noted that the provisions of the aforesaid Regulations have been misinterpreted by the respondents. As such, this petition cannot be considered under Section 86(1)(f) of the Electricity Act, 2003. The Commission, therefore, directs the respondents to take action accordingly as mentioned above and revise the impugned bills from November, 2015 if found necessary."

Petition No. 22 of 2016

"6……. During the shut down or emergency periods, the plant shall not generate power and requires power for repairs and maintenance purposes, for which the petitioner shall have to avail power and would be billed at temporary supply tariff as specified in the aforesaid Regulations. However, the power is required by the petitioner for start up of WEGs frequently, which cannot be considered under drawl of power during shut down or emergency periods. The Commission has noted that the provisions of the aforesaid Regulations have been misinterpreted by the respondent no.1 and 2."

Petition No 42 of 2016

"7……. During the shut down or emergency periods, the plant requires power for repairs and maintenance purposes, for which the petitioner shall have to avail power and would be billed at temporary supply tariff as specified in the aforesaid Regulations. If the power is required by the petitioner for synchronisation of WEGs frequently, the same cannot be considered under drawl of power during shut down or emergency periods and the provisions of the aforesaid Regulations shall not apply and, therefore, shall be billed as per the provisions of tariff schedule HV-7……"

Petition No. 50 of 2016

"6…. During the shut down or emergency periods, the plant requires power for repairs and maintenance purposes, for which the petitioner shall have to avail power and would be billed at temporary supply tariff as specified in the aforesaid Regulations. If the power is required by the petitioner for synchronisation of WEGs

frequently, the same cannot be considered under drawl of power during shut down or emergency periods and the provisions of the aforesaid Regulations shall not apply and, therefore, shall be billed as per the provisions of tariff schedule HV-7. The Commission, therefore, directs the respondents to take action accordingly as mentioned above and revise the impugned bills from November, 2015 if found necessary…." (Emphasis supplied)

From a bare perusal of the above extracts it is obvious that power drawn for synchronization cannot be considered as power drawn for shutdown and/or emergency. Further, the Hon'ble Commission having passed these orders is now bound by the same as per the rules of precedent.

9. *It is pertinent to mention that the 2 hour drawl limit, as mentioned in HV- 7 tariff category, has been present in all the tariff orders passed since Tariff Order dated 24.05.2014 for FY 2014-15. Despite the limit of 2 hours being present in the tariff orders, the Hon'ble Commission in orders passed in Petition Nos. 20, 22, 42 and 50/2016, held that RE generators have to be billed as per HV-7 tariff category. Since, then billing has happened under HV-7 tariff category. Therefore, power drawn for the purposes of synchronization, whether it be for a period of two hours or for more than two hours, in order to be allowed to be procured/billed at all, has to be considered to have been drawn for the purposes of synchronization and ought to be billed at the rate specified in HV-7 tariff category as per Regulation 10 of RE Regulations.*

10. *Without prejudice to the fact that there is no legal provision which would allow billing of the Petitioner as a temporary supply consumer, it is most respectfully submitted that a temporary supply consumer is defined in Madhya Pradesh Electricity Supply Code as follows:*

"4.43 Any person requiring power supply for the purpose that is temporary in nature, may apply for temporary power supply for a period of less than two years in the Form as required by the Licensee. The period of temporary connection can be extended up to five years for construction of buildings/power plants and for the purpose of setting up of industrial units. Requisition for temporary supply shall normally be given 7 days before the day when supply is required for loads up to 10kW and 30 days before for higher the said loads. Under no circumstances, permanent connection be allowed for construction purposes".

11. *The Petitioner is obviously not a temporary consumer and requires power to*

synchronize everyday for the whole life of its plant, as contra-distinct from a temporary consumer which requires power for a period of less than 2 years. While Regulation 10 provides that power drawn for the purposes of shut down and emergency can be billed as if drawn by a temporary consumer, the reasoning behind the same is obvious i.e. shut down and emergency are rare events and thus it is acceptable to bill the power drawn for such rare events as if being drawn by a temporary consumer. However, the interpretation sought to be given by the Respondent to bill power drawn for synchronization for more than 2 hours as if drawn by a temporary consumer is completely illogical since as distinct from shut down and emergency, power for synchronization, is drawn nearly every day for a period of more than 2 hours and thus cannot be considered to be for a temporary purpose. It would be grossly unfair if the power being drawn everyday by a renewable generator for the whole life of the project was to be billed as if it were being drawn by a temporary consumer. Therefore the Petitioner not only has a good case in law but also in equity.

12. *It is germane to mention that Electricity Act, 2003 specifically provides for promotion of renewable energy. The Preamble of the Act clearly states that it is for "promotion of efficient and environmentally benign policies". While, under Section 61(h), the Commissions while specifying the terms and conditions for determination of tariff have to be guided by principle of "promotion of co-generation and generation of electricity from renewable sources of energy". The Hon'ble Commission, under Section 86(1)(e), is obligated to, "promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee." Thus, promotion of renewable energy is a basic principle of the Electricity Act, 2003.*

13. *The Respondent is seeking to give a perverse interpretation to Clause (e) of the HV-7 tariff category. While Clause (e) states that the synchronization with the grid, power shall be provided for a maximum period of 2 hours on each occasion, the Respondent seeks to not implement the phrase "each occasion". Assuming though not admitting that the Clause (e) limits drawl of power for synchronization to 2 hours, it is respectfully submitted that such a limitation is only on "each occasion" of synchronization. Therefore, the Respondent cannot bill the Petitioner for power drawn for shut down/ emergency beyond 12 seconds. This is because after every 2 hours the*

Respondent will assume that power is being drawn for shut down/emergencies, however as soon as 1 second is completed, again the 2-hour limit will start for drawl of power for synchronization. Since the Respondent, admittedly, cannot identify the purpose for which power is being drawn it ought to assume that the same is being drawn for synchronization. This is the only harmonious interpretation that can be given to Clause (e) without ignoring either part of the provision. It would be wholly unfair towards the Petitioner, if the Respondent chooses to implement only the two hours limitation, without reading the phrase "each occasion" alongside. The Hon'ble Commission ought not to permit such selective reading of the provisions of the Tariff Order particularly when such a selective reading will also be in the teeth of Regulation 10 of RE Regulations.

14. *It is further pertinent to mention that WTGs need to draw power from the grid all the time to stay synchronized with the grid except when they're generating. Further Wind Generators do not control wind speed and cannot generate at will and depend on wind speed to begin generation. Thus, the Wind Power Project, comprising of Wind Generators, internal transmission lines, transformers, substations etc. have to draw from the grid, in order to remain synchronized with the grid, so that they can begin generating when the wind speed becomes adequate. The WTG needs to draw power so that during the cut-in time it will be able to push turbine RPM beyond synchronous RPM. Once the WTG reaches beyond synchronous RPM it begins generating and it stops importing from the grid and begins to export to the grid. If a WTG does not remain connected with the grid during the low Wind speed then the WTGs will have to begin the process of synchronization with the Grid afresh each time the wind speed becomes adequate to generate and such multiple fresh synchronizations are not only operationally impossible but are also detrimental to grid as it would result in sudden inrush of current and lower voltage due to sudden start. Further frequent connection and disconnection of the WTGs from the Grid can cause other technical and operational problems as well. It is submitted that wind generators are distinct from thermal generators as they cannot control their fuel source like thermal generators. The Wind Power Project may be forced to draw power beyond 2 hours, due to inadequate wind speed, to remain synchronized with the grid. Therefore, the billing for all power drawn during synchronization ought to occur as per the rate prescribed in HV-7 tariff category for power availed for synchronization.*

15. *Further, while HV-7 tariff category prescribes a limit of 2 hours for power drawn for*

synchronization, it does not state the consequence of a generator exceeding the said limit. It nowhere mentions that drawl beyond 2 hours would be treated as drawl for shut-down/emergencies and billed at the rate applicable to temporary connection under HT industrial category. Regulation 10 of RE Regulations states that only power drawn for shut down or other such emergencies can be billed at the rate applicable to temporary connection under HT industrial category. The said regulation makes no difference between power drawn under 2 hours and power drawn beyond 2 hours when such drawl is for synchronization. As per Regulation 10 drawl of power for synchronization has to be billed as per the tariff schedule for synchronization i.e. HV-7 tariff category. Thus, there is no legal provision on the basis of which power availed during synchronization beyond two hours can be considered as power availed for shut down and/or emergencies and billed under HV-3.1 industrial category. Neither the tariff order nor the Regulation creates such a legal fiction for treating power drawn for synchronization to be treated as power drawn for shutdown or emergency. Besides the fact that the law does not provide for such a legal fiction, it is further submitted that this Hon'ble Commission has also prohibited the Distribution licensee to bill power drawn for synchronization as power drawn for shut down or emergency in its previous orders as quoted above and thus barred any such legal fiction as well.

16. *Finally, the Respondent has itself admitted, in Petition No. 29 of 2019, that it is impossible for distribution licensees to segregate energy drawn by RE generators from the grid on each occasion and to identify the purpose for which such energy is being drawn. The Respondent has also submitted that distribution companies are finding it difficult to apply the provisions of Regulations related to billing of energy drawn by RE generators for purposes other than synchronization as the energy drawn has to be clubbed over a period of billing month. (Please see paras 14 to 16 and 21 at pages 6 and 8 of Petition No. 29 of 2019). In such a scenario where the Respondent is unable to identify why the power is being drawn by the Petitioner it cannot assume that power is being drawn for shut down/emergency. Thus, the new billing methodology adopted by the Respondent is clearly incorrect and merits to be discontinued.*

17. *The Hon'ble Commission must take note of the malafide conduct of the Respondent. The Respondent filed the Petition No. 29/2019 in the year 2019 and prayed for amendment to Regulation 10. After the filing of the Petition, wherein the Respondent admitted that it was impossible for the Respondent to implement the 2 hours limitation on synchronization of power since it could not even tell the purpose for which the power*

was being drawn, and there procedural difficulties in implementation of such limitation, the Respondent without any direction or order from the Hon'ble Commission, on its own, changed the billing methodology in September 2019, despite having billed under a different methodology since 2016 onwards. Therefore, it is clear that the Respondent knew that in terms of the established law it wasn't permitted to bill power availed by RE generators as temporary consumer for HT tariff category. Despite having known that the law did not permit billing power drawn by the renewable generators under the HV-3.1 tariff category, the Respondent after filing Petition No. 29/2019 and without getting any order or permission from this Hon'ble Commission in the aforesaid petition, began to bill the power drawn by RE generators under HV-3.1 tariff category as a temporary consumer. Subsequently despite Order dated 16.12.2019, wherein the Hon'ble Commission recognized that the billing had already occurred for the past period in terms of the tariff order, and thus whatever amendments or changes are sought by the licensees of the State will be considered in the next tariff order, the Respondent showed complete disregard towards the Order of this Hon'ble Commission and revised all bills retrospectively from 2017 onwards. Therefore, despite the Hon'ble Commission directing the Respondent to pursue whatever changes it sought in the next tariff order, the Respondent decided to implement the changes nonetheless by itself without any order from the Hon'ble Commission. If the Respondent was allowed to bill RE generators as temporary consumers under the HV-3.1 tariff category, then there would no reason for the Respondent to approach the Hon'ble Commission seeking amendment to the tariff order and Regulation 10. The very fact that the Respondent approached the Hon'ble Commission by Petition No. 29/2019 praying for amendment to Regulation 10 i.e. doing away with the distinction between three categories of drawl, is an admission and conclusive proof that even the Respondent agreed that the RE generators ought to be billed under HV-7 tariff category only. The Hon'ble Commission took the view that the billing had already happened in terms of the tariff order and the regulation and that settled position ought not to be changed until the next tariff order. The Hon'ble Commission's whole reasoning of disposing the Petition No. 29/2019 was that whatever billing has occurred since 2017 had already occurred and was not to be tinkered with by retrospective amendments in the regulations or the tariff order. It is submitted once the Hon'ble Commission had taken this position there was no occasion for the Respondent to bill under any new methodology or to brazenly revise bills retrospectively.

18. *It is submitted that under Section 56(2) of Electricity Act, 2003, no sum can be*

recovered from a consumer two year after the due date unless such sum was shown as recoverable as arrear. The Respondent through Letter, dated 16.01.2020, has raised additional charges for the time period of April, 2017 to August, 2019 when recovery of bills for April, 2017 to January, 2018 is already time barred by law. Section 56(2) reads as under:

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

19. *The Respondent has erroneously contended that Section 56 (2) is not applicable in the instant case by giving an erroneous interpretation to the term 'first due' with respect to charges levied upon the Petitioner and by erroneously relying on the judgment of the Hon'ble Supreme Court in the case of SLP (C) No. 765 of 1997, Swastic Industries v. Maharashtra State Electricity Board ("Swastic case") and the judgment of the Hon'ble APTEL in Appeal Nos. 202 & 203 of 2006, Ajmer Vidyut Vitran Nigam Ltd. v. M/s Sisodia Marble & Granite Pvt. Ltd. &Ors. ("Ajmer case"). The aforementioned judgments deal with cases of incorrect reading of meter and supplementary bills raised pursuant to the same. The judgments relied upon by the Respondents are not applicable in the instant matter as the case of the Petitioner is not one of defective meter but is a case involving the Respondent raising supplementary bills on account of its arbitrary and illegal decision of billing, the Petitioner, under a different Tariff Schedule. Thus, Hon'ble Commission may not place any reliance on the aforementioned judgments.*

20. *Similarly, the Hon'ble Supreme Court's remarks in the Swastic case makes it evident that the issue of escaped billing therein pertained to improper meter recording. The relevant para is quoted for reference:*

> *"5…Moreover, there is no deficiency of service in making supplementary demand for escaped billing. There may be negligence or collusion by subordinate staff in not properly recording the reading or allowing pilferage to the consumers. That would be deficiency of service under the Consumer Protection Act."*

Thus, the instant case, wherein the issue pertains to revised bills on account of changed methodology, attracts the bar under Section 56 (2).

21. *Contrary to the submissions of the Respondent that the supplementary invoices may be issued on any day and the date on which the invoices are issued shall be considered as the date on which the amount becomes 'first due' for the purposes of the restrictions under Section 56(2), the phrase 'first due' is to be read with respect to 'first billing' of the energy, which in the instant case was done in 2017. It is submitted that the only exception provided under Section 56(2) is if the licensee has been continuously showing such unpaid sum as recoverable as arrear of charges for electricity supplied. The interpretation given by the Respondent that it can raise the supplementary bill at any point of time and that day ought to be considered as the date the charges became 'first due' renders the provisions pertaining to "shown continuously as recoverable as arrear of charges' as redundant. If the Respondent's contention is accepted then by treating the words "first due" to mean the date of detection of mistake, the mandate of the two-year limitation period provided by Section 56(2) would be diluted, since a mistake may be detected at any point of time. Furthermore, the words "recoverable as arrears of charges" would be rendered completely otiose and nugatory. The period of limitation Under Section 56(2) cannot be extended by raising a supplementary bill. The "sum due" raised in the original bill, and not paid by the consumer, must be continuously shown as arrears of charges in subsequent bills, for it to become recoverable by taking recourse to the coercive mode of disconnection of electricity supply.*

22. *The Respondent has erroneously contended that bar of Section 56(2) is applicable only after two years from the date when the amount becomes first due and that there is no bar on raising supplementary demand of escaped billing. Thus, the Respondent erroneously contends that it has merely raised supplementary demand for April, 2017 to May, 2019 vide its Letter dated 16.01.2020. It is submitted that the Respondent is twisting the facts to get out of application of Section 56(2). The Respondent has not raised supplementary demand for "escaped billing" but has raised fresh invoices by completely changing the billing methodology. In such a scenario the Respondent cannot claim that the bill raised for the past period first became due on 16.01.2020 when the letter was sent to the Petitioner. Further, while bills for the period of April, 2017 to May, 2019 have been raised by Respondent and paid by the Petitioner, fresh supplementary bills have been now raised by changing the methodology of billing retrospectively. Further the sum billed in these supplementary bills has not been continuously shown as recoverable as arrear of charges for electricity supplied during the period of April, 2017 to May 2019 and therefore these supplementary bills are barred by Section 56(2).*

23. *The Hon'ble High Court of Bombay in judgment, dated 12.03.2019, has also held that even in cases of supplementary bills no recovery beyond two years is permissible unless that sum has been shown continuously as recoverable as arrears of charges for the electricity supplied from the date when such sum became first due and payable. The relevant paragraph from the Judgment of Bombay High Court in the matter of MSEDCL v. The Electricity Ombudsman, W.P. No. 10764 of 2011 is extracted below:*

> *"78…. Even if supplementary bills are raised to correct the amounts by applying accurate multiplying factor, still no recovery beyond two years is permissible unless that sum has been shown continuously as recoverable as arrears of charges for the electricity supplied from the date when such sum became first due and payable."*

Copy of W.P. No. 10764 of 2011 is annexed herein as ***Annexure P-7.***

24. *It is also relevant to mention that Hon'ble APTEL has deprecated the practice of Discoms raising belated bills on account of its own negligent behavior and has held that such practice is against the public interest and commercial interest of the Discoms. In the Ajmer case, which has been relied upon by the Respondent itself, the Hon'ble APTEL says that, "18….Notwithstanding the fact that the demand is not barred by limitations, the fact of considerable delay in raising the demand was against the commercial principles. The licensee ought to have realized that when such large sums of money are allowed to remain unrecovered from the consumers for long periods of time, it not only affects the investment opportunities but also erodes the value of the principal on account of inflation. The action of the licensee is not in public interest. It woefully demonstrates the lack of commercial sense." Also, in the Chhattisgarh Case, the Hon'ble APTEL held that the Chhattisgarh Discom had acted negligently and its actions were neither in its own commercial interest not in public interest. The Hon'ble APTEL notes that "16…. The learned State Commission while passing the Impugned Orders had already granted a concession to the appellant, a distribution licensee by holding not to initiate any penal action under section 142 and 146 of the Electricity Act, 2003 in spite of giving clear finding that the said action of the appellant cannot be held to be in commercial interest of the appellant as well as in the public interest. Consequently, these appeals merit dismissal."*

25. *Without prejudice to the assertions above, in the event this Hon'ble Commission were to accept the Respondent's assertion that it had been wrongly billing the RE generators since 2017, then in that event the Hon'ble Commission ought to initiate an inquiry to*

determine by whose negligence was the alleged wrong billing being done since 2017. If any such negligence has occurred, the same cannot be taken casually. The Respondent has not given a single reason as to why it was applying the alleged wrong methodology since 2017 and this Hon'ble Commission must ask it to explain as to which employee was negligent and responsible for the application of wrong methodology and what action has been taken against the errant employee. It is a settled position of law that a public sector utility cannot simply make a submission before a Court of law that its actions had led to a loss to the State Exchequer without detailing how such negligence occurred and what actions it had taken against the negligent officers. In the present case the Respondent has casually submitted that this is a case of escaped billing without even identifying the employee by whose fault such escaped billing occurred. This Hon'ble Commission ought not to allow such casual and negligent conduct to continue brazenly and must hold the negligent officers responsible in the event it were to hold that the billing since 2017 has been done under the wrong methodology. The Hon'ble Commission may also pass similar directions against the negligent and casual approach of the Respondent in arbitrarily revising the methodology of billing and creating unnecessary disputes between itself and the power generators. Such negligent and casual approach is against the interest of the entire industry and acts to demotivate investments by creating uncertainty."

16. Vide letter No. MD/WZ/05/Com/TRAC/7772 dated 04.07.2020, the Respondent No.2 broadly submitted the following for consideration in this matter:

"RE: Billing of power drawn continuously above Two Hours

(i) Billing of power drawn by generator from the grid is to be billed in the following manner:

(1) Synchronization power drawn ***for the period*** *prescribed in the* ***tariff schedule for synchronization*** *(i.e HV-7 Category) is to be billed as per rate prescribed in that schedule. In other words, if power drawn for synchronization two things is to be taken from the HV-7 Tariff category* ***'period of billing'*** *and* ***'rate of billing'.***

(2) In all other cases excluding the cases covered in (1) above, power drawn shall be billed at the rate applicable to temporary connection under HT Industrial Category i.e HV 3.1 Tariff category. This may be treated as residuary billing mechanism and shall be applicable for all circumstances not covered under (1).

(ii) The Commission vide Tariff Order has made provision for drawl of power by RE Generators for synchronization purpose under HV-7 tariff schedule. The relevant conditions of HV-7 Schedule of tariff order 2019-20 are reproduced as under:-

"This Tariff shall apply to those generators who are already connected to the grid and seek to avail power for synchronization with the grid.

(a) The supply for synchronization with the grid shall not exceed 15% of the capacity of unit of highest rating in the Power Plant.

(b) The condition for minimum consumption shall not be applicable to the generators including CPP. Billing shall be done for energy recorded on each occasion of availing supply during the billing month.

(c) _____

(d) _____

(e) For the synchronization with the grid, power shall be provided for a maximum period of 2 hours on each occasion."

*It may be seen that as per aforesaid clause (e) of the HV-7 Tariff Category generator can draw power for the purpose of synchronization for maximum **period** of 2 hours. Thus, it is clear that while framing the regulation Hon'ble Commission was conscious about the ceiling on the **period** of drawl, hence in the regulation it is specifically provided that **period and rate** shall be considered as per HV-7 tariff category.*

(iii) That, in compliance of the aforesaid provisions of the Regulation and Tariff order, respondent Discom is required to apply 2 different sets of billing methodology for drawl of power by Generators.

(iv) That, it is submitted that under the HV 7 tariff category any generator can draw power for the purpose of synchronization maximum up to 2 hours only. Thus, any energy drawn over and above two hours in any occasion would fall under the residuary billing mechanism provided under Regulation 10 and accordingly required to be billed as per rate prescribed for HT Temporary tariff under Schedule HV 3.1 (HT Industrial). It is stated that HT industrial tariff (Tariff Schedule HV 3.1) has provision for billing of Monthly Fixed Charges (based on billing demand), Energy Charges (as per units consumption).

*(v) That, contention of the petitioner that the power drawn over and above the 2 hour should also be billed under HV-7 category is without any substance. On any such interpretation **use of power above two hours** under HV-7 Tariff category would become **unauthorized use of power** because HV-7 tariff category doesn't permit use of power more than 2 hours in any occasion. Further if we consider the period of drawl as irrelevant for the purpose of billing, the provisions regarding **period** of drawl in the tariff order as well as in the regulation would become infructuous. Such course of interpretation is not permitted at all. Accordingly as per provision of the regulation read with the tariff order drawl of above 2 two hours need to be billed at the rate applicable to temporary connection under HT Industrial Category.*

*(vi) That, it is submitted that unless tariff order and regulation are amended after following the due procedure prescribed in the Act, respondent Discom is bound to charge as per terms and condition approved by the Hon'ble Commission under HV-7 Tariff Category of Tariff order. A question of permissibility of charging of tariff other than approved by the Regulatory Commission came under consideration of the Hon'ble Supreme Court in case of Shree Sidhbali Steels Limited v. State Uttar Pradesh (2011) 3 SCC 193 (**Annexure-1**). Rejecting the request of the petitioner in this regard, Hon'ble Apex Court held as under:*

> *62.This Court in Assn. Of Industrial Electricity Users v. State of A.P. as well as in W.B. Electricity Regulatory Commission v. CESC Ltd., and in BSES Ltd. V. Tata Power Co. Ltd., has held **that the licensee has no power to amend and/or modify the tariff determined by the Regulatory Commission.** Grant of reliefs claimed by the petitioners would amount to compelling them to act against the statute. Such a course is not permissible while exercising powers under Article 32 of the Constitution. **Thus Respondent 2 Corporation cannot be directed to amend or modify the tariffs determined by the Commission nor the petitioners would be entitled to seek any direction against the licensee to amend or modify the tariff determined by the Commission."***

In view of above it may be seen that Hon'ble Supreme Court has declined to grant relief of charging of tariff other than the approved tariff. The similar relief claimed by the petitioner in the instant case cannot be granted by this Hon'ble Commission exercising the adjudicatory jurisdiction under section 86(1) (f) of the Act.

RE: Bar of Limitation on recovery of legitimate dues of the licensee :

*A. **Sum become 'first due' only when supplementary bill raised for escaped billing not earlier:***

(vii) That, petitioner has raised the plea of bar under section 56(2) of the Electricity Act 2003. Section 56 of the Act is reproduced as under:

> *Section 56. **(Disconnection of supply in default of payment)**: -- (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off*

and reconnecting the supply, are paid, but no longer:

Provided that the supply of electricity shall not be cut off if such person deposits, under protest, -

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him and the licensee.

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

(viii) *It may be seen that section 56 provides an additional right of recovery of dues through disconnection of supply of electricity apart from other rights available to the licensee i.e. suit e.t.c. In other words Section 56(2) only bars recovery of dues through disconnection. Further this bar is applicable only after two year from the date when the amount becomes* ***'first due'****. Section 56(2) has no applicability on supplementary billing of escaped billing as the said demand become first due only when demand notice/supplementary bill in this regard issued by the licensee. Unless any demand is raised specifying the time limit for payment no such demand can be said as* ***'due'*** *and person consuming electricity cannot be termed as neglectful of their responsibilities of payment. Thus, aforesaid section has no application in making supplementary demand for escaped billing. It is now a settled legal position through various judicial pronouncements that there is no limitation for making the demand by way of supplementary bill.*

(ix) *That, the issue of limitation on demand of earlier escaped billing came for consideration before Hon'ble Supreme Court in the case of M/S. Swastic Industries vs Maharashtra State Electricity (1997) 9 SCC 465* ***(Annexure-2)****. The relevant part of the said judgment is reproduced as under:*

"The admitted position is that the respondent- Electricity Board had issued a supplementary bill to the petitioner on February 5, 1993 demanding payment of Rs. 3,17,659/-. The petitioner objected to the bill by his letter dated February 16, 1993, However, when letter was issued for payment of the said amount, the petitioner paid it under protest and filed the complaint paid it under protest and filed the complaint before the State Consumers Disputes Redressal Commission. The Commission by order dated May 24, 1995 allowed the complaint and held that the claim was barred by limitation of 3 years. Feeling aggrieved, the Electricity Board

filed an appeal. ***The National Commission relying upon the judgment of a Division Bench of the Bombay High Court in M/s. Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd. Vs. The Municipal Corporation of Greater Bombay & Anr. (Air 1978 Bom. 369) has held that there is no limitation for making the demand by way of supplementary bill.*** *Section 24 of the Indian Electricity Act, 1910 gives power to the Board to issue such demand and to discontinue the supply to a consumer who neglects to pay the charges. It is contended by the learned counsel for the petitioner that Section 60-A of the Electricity (supply) Act, 1948 prescribes a limitation of 3 years for the Board to institute any suit, after its constitution , for recovery of the arrears. Thereby the limitation of 3 years is required to be observed. The Board in negation of Section 60A of Supply Act cannot be permitted to exercise the power under Section 24 of the Electricity Act, 1910. We find no force in the contention.*

……

This is an enabling provision by way of suit. Despite the fact that Section 24 of the Indian Electricity Act clearly empowers the Board to demand and collect any charge from the Consumer and collect the same towards the electrical energy supplied by the Board in the following terms:

"Where any person neglect to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy, to him, the licensee may, after, giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge of other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but longer."

It would, thus, be clear that the right to recover the charges is one part of it and right to discontinue supply of electrical energy to the consumer who neglects to pay charges is another part of its. The right to file a suit is a matter of option given to the licensee, the Electricity Board. Therefore, the mere fact that there is a right given to the Board to file the suit and the limitation has been prescribed to file the suit, it does not take away the right conferred on the Board under Section 24 to make demand for payment of the charges and on neglecting to pay the same. They have the power to discontinue the supply or cut-off the supply, as the case may be, when the consumer neglects to pay the charges. The intendment appears to be that the obligation are actual. The board would supply electrical energy and the consumer is under corresponding duty to pay the sum due toward the electricity consumed. Thus the Electricity Board, having exercised that power,

since admittedly the petitioner had neglect to pay the bill for additional sum, was right in disconnecting the supply without recourse to filling of the suit to recover the same. The National Commission, therefore, was right in following the judgment of the Bombay High Court and allowing the appeal setting aside the order of the State Commission. Moreover, there is no deficiency of service in making supplementary demand for escaped billing. Therefore may be negligence or collusion by subordinate staff in not properly recording the reading or allowing pilferage to the consumers. That would be deficiency of service under the Consumer Protection Act. We do not find any illegality warranting interference.

The Special Leave Petition is accordingly dismissed.

(x) From the bare perusal of the aforesaid judgment of the Hon'ble Supreme Court it is clear that :

x.1. There is no limitation for making the demand by way of supplementary bill.

x.2. Right of disconnection is an additional right provided to licensees apart from other option available for recovery i.e. filing of suit e.t.c.

(xi) That, issue of applicability of section 56(2) in case of escaped billing came under consideration of Hon'ble Appellate Tribunal of Electricity in Appeal Nos. 202 & 203 of 2006 in the case of Ajmer Vidyut Vitran Nigam Limited Vs M/s Sisodia Marble & Granites Pvt. Ltd. & Ors. Vide order dated 14/11/2006 ***(Annexure-3****) Hon'ble APTEL held as under:*

"14. We have heard the learned counsel for the parties. The basic question for determination is what is the meaning of the words 'first due' occurring in Section 56(2) of the Electricity Act 2003; Regulation 39(1) of the Regulations, 2004 and condition No. 49 of the Terms and Conditions for supply of Electricity, 2004. In case the words 'first due' is construed as meaning consumption, it would imply that the electricity charges would become due and payable, the moment electricity is consumed. In that case failure to pay charges will entail consequences leading to disconnection of electricity to consumers even though the consumer will only know the units consumed by him and will not know the exact amount payable by him as per the approved tariff as the actual computation depends upon different parameters such as peaking/non-peaking rates; HT/LT rates etc. The responsibility to determine the amount payable by the consumer is that of the licensee. The consumer cannot be expected to discharge the duties of the distributor or the supplier of electricity. Moreover, it will create an anomalous situation as it would be difficult to determine the last date by which the payment is to be made by the consumer and in case last date is not known, it will be difficult to levy surcharge for delayed payment. Besides there will be problem in issuing notice for disconnection

for failure to pay the charges on consumption. It appears to us that it could never be the intention of the legislature to equate the words 'first due' with consumption. The consumption of electricity will certainly create a liability to pay but the amount will become due and payable only after a bill or demand is raised by the licensee for consumption of electricity by the consumer in accordance with the Tariff Order. Such a bill/ demand will notify a date by which the dues are to be paid without surcharge.

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

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

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

The judgement further holds that,

"The amount of charges would become due and payable only with the submission of the bill and not earlier. It is the bill which stipulates the period within which the charges are to be paid. The period which is provided is not less than 15 days after the receipt of the bill. If the word "due" in S. 24 is to mean consumption of electricity, it would mean that electricity charges would become due and payable the moment electricity is consumed and if charges in respect thereof are not paid then even without a bill being issued a notice of disconnection would be liable to be issued under S. 24. This certainly could not have been the intention of the Legislature. Section 24 gives a right to the licensee to issue not less than 7 days' notice if charges due to it are not paid. The word "due" in this context must mean due and payable after a valid bill has been sent to the consumer. It cannot mean 7 days notice after consumption of the electricity and without submission of the bill. Even though the liability to pay may arise when the electricity is consumed by the

consumer, nevertheless it becomes due and payable only when the liability is quantified and a bill is raised. Till after the issue and receipt of the bill the authority has no power or jurisdiction to threaten disconnection of the electricity which has already been consumed but for which no bill has been sent".

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

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

17. Thus, in our opinion, the liability to pay electricity charges is created on the date electricity is consumed or the date the meter reading is recorded or the date meter is found defective or the date theft of electricity is detected but the charges would become first due for payment only after a bill or demand notice for payment is sent by the licensee to the consumer. The date of the first bill/ demand notice for payment, therefore, shall be the date when the amount shall become due and it is from that date the period of limitation of two years as provided in Section 56(2) of the Electricity Act, 2003 shall start running. ***In the instant case, the meter was tested on 03.03.2003*** *and it was allegedly found that the meter was recording energy consumption less than the actual by 27.63%. Joint inspection report was signed by the consumer and licensee and thereafter, the defective meter was replaced on 05.03.2003.* ***The revised notice of demand was raised for a sum of Rs. 4, 28,034/- on 19.03.2005****. Though the liability may have been created on 03.03.2003, when the error in recording of consumption was detected,* ***the amount become payable only on 19.03.2005, the day when the notice of demand was raised.*** *Time period of two years, prescribed by Section 56(2), for recovery of the amount started running only on 19.03.2005. Thus, the first respondent cannot plead that the period of limitation for recovery of the amount has expired."*

*(xii) That, the aforesaid order of the Hon'ble APTEL has been challenged by the consumers before Hon'ble Supreme Court in Civil Appeal no. (D.No.13164/2007). Vide order dated 17/05/2007 (**Annexure-4**), Hon'ble Supreme Court has dismissed the civil appeal*

confirming the order of Hon'ble APTEL.

(xiii) *Issue of applicability of section 56(2) of the Act in case of supplementary billing also came under consideration of Hon'ble High Court of Madhya Pradesh Bench at Gwalior in the case of Kapoor Saw Manufacturing Co. MPSEB and others (2006 SCC Online MP 612). Vide judgment dated 13/07/2006* ***(Annexure-5)*** *Hon'ble High Court have upheld the supplementary bill raised on account of error in the matter of calculating tariff. The relevant para is reproduced as under:*

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

(xiv) *That, in view of aforesaid judicial pronouncement, amount becomes first due only when the notice of demand/supplementary bill is raised. In the instant case supplementary bill is raised on dated 16.01.2020 hence amount become* ***first due only on 16.01.2020.*** *Thus, petitioner cannot plead that recovery is time-bar under section 56(2) of the Act.*

B. Bar under Section 56(2) is applicable only in cases where dues are recoverable from consumers and not from any other person:

(xv) *That, it may be seen that Sub Section (1) of Section 56 is talks about the dues recoverable from* ***any 'person'*** *whereas Sub-Section (2) of Section 56, which provides the bar of two years, talks about dues recoverable from* ***'consumer'*** *only. Accordingly protection under Section 56(2) is not available to any person other than the* ***'consumer'****.*

(xvi) *In the instant case petition has been filed by the petitioner in the capacity of generators invoking provisions of section 86(1) (f) of the Act. Therefore petitioner cannot raise plea of bar under Section 56(2). Further respondent distribution company is entitled to disconnect supply as per provision of sub-Section (1) of Section 56.*

C. Statute of limitation only bars the remedy but does not extinguish the debt:

*(xvii) That, it is now a settled legal position that the statute of limitation only bars the remedy but does not extinguish the debt. In this regard kind attention is drawn towards the judgment of the Hon'ble Supreme Court in the case of Khadi Gram Udyog Trust vs Shri Ram Chandraji Virajman 1978 AIR 287, 1978 SCR (2) 249 (**Annexure-6**):*

"……..The question that arises for consideration in this appeal is whether the entire amount of rent due would include even rent which cannot be recovered as having been time-barred. There is ample authority for the proposition that though a debt is time-barred, it will be a debt due though not recoverable, the relief being barred by limitation. In Halsbury's Laws of England (3rd Ed.) Vol. 24 at p. 205, Article 369, it is stated "except in the cases previously mentioned, the Limitation Act, 1939 only takes away the remedies by action or by set off; it leaves the right otherwise untouched and if a creditor whose debt is statute-barred has any means of enforcing his claim other than by-action or set-off, the Act does not prevent him from recovering by those means. The Court of Appeal in Curwen v. Milburn (1889) 42 Ch. D. 424 Cotton, L. J. said :

"Statute-barred debts are dues, though payment of them cannot be, enforced by action."

*The same view was expressed by the Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. v. The State of Bombay & Others(1) where it '**held that the statute of limitation only bars the remedy but does not extinguish the debt**, except in cases provided for by section 28 of the Limitation Act, which does not apply to a debt. Under section 25(3) of the Contract Act a barred debt is good consideration for a fresh promise to pay the amount. **Section 60 of the Contract Act provides that when a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt.** In a full Bench decision of the Patna High Court Ram Nandan Sharma and Anr. v. Mi. Maya Devi and Others(2), Untwalia, C. J. as he then was, has stated "There is a catena of decisions in support of what has been said by Tek Chand, p.330 paragraph 12) **that the Limitation Act with regard to personal actions, bars the remedy without extinguishing the right." The law is well-settled that though the remedy is barred the debt is not extinguished.** On consideration of the scheme of the Act, it is clear that the statute has conferred a benefit on the tenant to 'avoid a decree for eviction by complying with the requirement of section 20(4). If he fails to avail himself of the opportunity and has not paid the rent for not less than four months and within one month from the date of service upon him of a notice of demand, the landlord under section 20(2) would be entitled to an order of eviction. Still the tenant can avail himself of the protection by complying with the requirements of section 20(4). As he has not deposited the entire amount due the protection is no more available. **We agree with the view taken by the trial court and the High Court of Allahabad that the words "entire amount of rent due" would include rent which has become time-barred** In the result the appeal is dismissed. There will be no order as to costs."*

(xviii) In the present case although dues are not barred by limitation, as per aforesaid dictum of the Hon'ble Supreme Court there is no prohibition on the realization of time bar debt

by available modes. These other modes may include adjustment from Security (if any), adjustment from any amount refundable/payable to user of electricity by distribution licensee on any account, appropriation of unearmarked amount paid by user of electricity to distribution licensee against time bar dues e.t.c. As per record amount of Rs. 14,26,458.00 payable by petitioner on account of supplementary bill dated 16.01.2020, has already been paid on dated 31.01.2020, hence after payment of dues any plea of limitation doesn't survive.

RE: Summary disposal of petition No. 29/2019 has no bearing on the instant petition:

(xix) That, petitioner is trying to establish that Hon'ble Commission in the Petition No. 29/2019 adjudicated the issue finally against the respondents. Hence, there cannot be any revision of billing in accordance with the tariff order/regulation.

(xx) That, proceeding before Hon'ble Commission in the petition No. 29/2019 was not the adjudicatory in nature. Petition No. 29/2019 had been filed by the distribution licensees invoking the regulatory power of the Hon'ble Commission under Regulation 16 & 17 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010. Regulation 16 & 17 conferred discretionary power to this Hon'ble Commission to remove difficulties in appropriate cases. Res-judicata has no applicability on exercise or refusal to exercise the regulatory power by this Hon'ble Commission.

(xxi) That, Section 11 of the Code of civil procedure provides for the res-judicata as under:

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

……

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(xxii) That, from bare perusal of the aforesaid provision it is clear that for applicability of the res-judicata parties in the former and subsequent suit must be same. Further, case must be heard on merit and should be decided finally. Explanation III clearly provides that there must be an allegation by one party and denial/admission by other party. In the instant case present petitioner was not the party to the petition No. 29/2019. Some generators were joined as intervener but no hearing granted to them on the merit of the case so as to construe any denial/admission of any matter on the part of them. Even

the copy of the petition not served on them till the decision pronounced on dated 16/12/2019. It is a settled legal position that intervener cannot be considered as party to the suit. Hon'ble Bombay High Court in the case of Maria Emilia Barreto Mascarenhas vs Sushma Ruzar Fernandes and Ors. 2006 (5) BomCR 761 ***(Annexure-7)*** *explained the difference between intervener and party to the suit in the following manner:*

> *"4……There is certainly a difference between a person being joined as party defendant and a mere intervener. Once a person is joined as party defendant to the suit, he would be entitled to file his pleadings and contest the proceedings according to the defence sought to be raised by such person. However, in case of intervenor, he is not entitled to file any pleadings nor to lead any evidence as such. He can appear in the matter merely to assist the Court to arrive at the truth on the basis of whatever materials are placed on record by the parties to the proceedings."*

Similarly, Hon'ble Supreme Court in case of Saraswati Industrial Syndicate Ltd v. Commissioner of Income tax Haryana Rohtak [1999] 103 Taxman 395 (SC) ***(Annexure-8)*** *held that interveners are not entitled for similar relief as provided to the parties of the litigation:*

> *"12. Learned Counsel for the intervener submits that he is entitled for same order as we have just passed. We cannot pass such an order in an intervention application.* ***The only purpose of granting an intervention application is to entitle the intervener to address arguments in support of one or the other side.*** *Having heard the arguments, we have decided in assessee's favour. The interveners may take advantage of that order".*

(xxiii) *Hon'ble High Court of Madhya Pradesh in case Jagdamba Prasad Soni V. State of MP and Others* ***(Annexure-9)*** *held that if the matter has not adjudicated on merit in earlier litigation than res-judicata shall not be applicable. The relevant observations are reproduced as under:*

> *(11) For the applicability of the doctrine of res-judicata, the matter must have been adjudicated in "stricto sensu" in earlier litigation. The former order of the labour court was passed, dismissing the case of the petitioner in default. Admittedly, the matter was not adjudicated on merits. If the former case is dismissed for want of jurisdiction or for default or on the ground of technical mistake, the decision being not on merits would not be res-judicata in the subsequent proceeding. (see sheodan singh vs. Daryao kunwar, air 1966 sc 1332.)*

In view of above, it is clear that present petitioner was not the party of the petition no. 29/2019. Further that decision was not on merit of the case. Thus question of applicability of res judicata doesn't arise.

RE: There can be no estoppel against the statute:

(xxiv) That, contention of the petitioner that till the Sep-19 respondent is doing billing as per HV-7 Tariff Category hence thereafter billing methodology cannot be changed. Though specifically not mentioned petitioner is trying to invoke doctrine of promissory estoppel. The reliance on this doctrine is without any substance as there can be no estoppel against the statute. In the instant case, the bill(s) have been raised in terms of the tariff order. Any demand, which is raised under legal provisions, cannot be said to be inequitable.

*(xxv) That, in the case of M/s. Mathra Prashad and Sons Vs State of Punjab 1962 AIR 745 (**Annexure-10**) five judge bench of Hon'ble Supreme Court held that there can be no estoppels against the statute. The relevant para of the said judgment is reproduced as under:*

> *"…….. The second argument is also without force. **There can be no estoppel against a statute.** If the law requires that a certain tax be collected, it cannot be given up, and any assurance that it would not be collected, would not bind the State Government, whenever it choose to collect it.*

*Further Hon'ble Supreme Court in the case of **Shree Sidhbali Steels Limited** supra held as under:*

> *"33…….**However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law.** There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the government or public authority cannot be compelled to make a provision which contrary to law."*

***RE: Any hardship resulting from operation of Regulation/Tariff order cannot alter its meaning**:*

*(xxvi) That, petitioner has submitted that the revised billing is creating hardship due to additional financial burden. In this regard kind attention is drawn towards the judgment of the Hon'ble Supreme Court in case of Commissioner of Agricultural Income Tax, West Bengal v. Keshab Chandra Mandal AIR 1950 SC 265(**Annexure-11**). The relevant part is reproduced as under:*

> *"……There is an argument based on hardship or inconvenience. Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute or the rules….."*

In view of above since HV-7 Tariff category clearly prohibits the drawl of power more than two hours. Therefore any plea of hardship or inconvenience cannot be raised.

RE: Power drawn under HV-7 exceeds 15% limit:

(xxvii) It is submitted that HV-7 Tariff category provides one more restriction upon drawl of power by generators. Clause (a) of HV-7 Tariff Category provides that the supply for synchronization with the grid shall not exceed 15% of the capacity of unit of highest rating in the Power Plant. However, it is noticed that Regulation 10 doesn't have any such stipulation. Regulation 10 only refers two factors which are to be taken from HV-7 tariff category i.e period and rate. Hence as per regulation there is no restriction regarding drawl of power upto 15% of capacity. Further Tariff order is also silent about the consequences if generator exceeds drawl limit of 15% . There is no mention about any action required to be taken in terms of penal billing or otherwise, if recorded MD of such generators exceeds the 15 % limit prescribed in tariff order.

(xxviii) That, clause 1.15 of the General Terms and Conditions for High Tension tariff provides for the penal billing in case drawl of power exceeds the contracted power. The said clause is reproduced as under:

"1.15 Additional Charges for Excess Demand

i. The consumer shall at all times restrict their actual maximum demand within the contract demand. In case the actual maximum demand in any month exceeds 120% of the contract demand, the tariffs given in various schedules shall apply to the extent of the 120% of the contract demand only. The consumer shall be charged for excess demand computed as difference of recorded maximum demand and 120% of contract demand on fixed charges and while doing so, the other terms and conditions of tariff, if any, shall also be applicable on the said excess demand. The excess demand so computed, if any, in any month shall be charged at the following rates from all consumers except Railway Traction.

ii. Energy charges for excess demand: No extra charges are applicable on the energy charges due to the excess demand or excess connected load.

iii. Fixed charges for Excess Demand: - These charges shall be billed as per following:

1. Fixed charges for Excess Demand when the recorded maximum demand is up to 130% of the contract demand: Fixed charges for Excess Demand over and above the 120 % of contract demand shall be charged at 1.3 times the normal fixed charges.

2. Fixed charges for Excess Demand when the recorded maximum demand exceeds 130% of contract demand: In addition to fixed charges in 1 above, recorded demand over and above 130 % of the contract demand shall be charged at 2 times the normal fixed charges.

Example for fixed charges billing for excess demand: If the contract demand of a

consumer is 100 kVA and the maximum demand recorded in the billing month is 140 kVA, the consumer shall be billed towards fixed charges as under:-
a) Up to 120 kVA at normal tariff.
b) Above 120 kVA up to 130 kVA i.e. for 10 kVA at 1.3 times the normal tariff.
c) Above 130 kVA up to 140 kVA i.e. for 10 kVA at 2 times the normal tariff.

iv. The excess demand computed in any month will be charged along with the monthly bill and shall be payable by the consumer."

(xxix) That, the aforesaid clause 1.15 provides the penal billing of fixed charges only and no penal billing provided in respect of energy charges. Thus penal billing in case of Recorded MD exceeding permissible limit of 15% cannot be applied with respect to power consumed under HV -7 tariff schedule due to following reason:

xxix.1. HV-7 tariff Schedule doesn't provide for any billing of fixed charges. Only energy charges are being billed under HV-7 tariff Schedule. Since aforesaid clause 1.15 doesn't provide for any penal billing on energy charges, thus no penal billing can be done even if drawl of power exceeds prescribed limit of 15%.

xxix.2. HV -7 tariff schedule is applicable to generators, and generator do not have any specified contract demand with the Discom. Therefore comparison of contract demand with maximum demand cannot be done.

(xxx) In view of above, at present, considering the provision of the regulation 10 along with clause 1.15 of general terms and condition, billing is being done by the respondent Discom for the power drawn up to 2 hours under HV-7 Tariff Schedule without considering the condition of 15%. To avoid any future dispute in the matter Hon'ble Commission is requested to provided clarification whether any action is required to be taken in terms of penal billing or otherwise if drawl of power exceeds 15% of capacity.

(xxxi) In view of above submission, it is requested to the Hon'ble Commission to dismiss the petition."

17. Observations and Findings:

The Commission's observations on the petition and submissions made by the Petitioner & Respondents in this matter are as under: -

(i) The petitioner has mainly raised the following issues in the subject petition: -

a) Billing methodology for power drawn for synchronization of the generator with the grid upto a period of 2 hours and after 2 hours in each instance/occasion.

b) Billing methodology for power availed by the generator from the grid for the purpose other than synchronization.

c) Supplementary demand raised by the Respondent No.2 (M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd. Indore) for the past period.

(ii) Generation of power through Solar and Wind projects is possible only when natural resource i.e. sunlight/wind is available. If the sunlight/wind is not available though the project is operational, it cannot generate power. During such time, it draws power from the grid for auxiliary consumption and for synchronization with the grid when generation starts again. Sometimes, power is also required during the shutdown or other emergencies in the plant. The Commission has observed that for billing the generators, who avail power from the Distribution Licensees under such circumstances, appropriate provisions have been made in the Regulations and the Retail Supply Tariff Order. The Commission vide Notification No. 3042/MPERC-2010, dated 09.11.2010, had issued the "Madhya Pradesh Electricity Regulatory Commission (MPERC) (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 (Revision-I) (RG-33 (I) of 2010)". Subsequently, several amendments have been made in the Regulations from time to time. The 7th amendment in the Regulations was made on 17.11.2017, wherein Clause 10 of the said Regulations provides as under:

> **10.** ***Drawing power during shut down by Generator/Co-generation from Renewable Sources***
>
> *The Generator/Co-generator would be entitled to draw power exclusively for its own use from the Transmission/Distribution Licensees' network for synchronization of plant with the grid or during shutdown period of its plant or during such other emergencies. The power availed during synchronization of plant with the grid shall be billed for the period and at the rate as per the retail supply tariff order under tariff schedule for synchronization. In other cases, it would be billed at the rate applicable to temporary connection under HT Industry category.*

(iii) The annual Retail Supply Tariff orders provide a Tariff Schedule HV-7, which is applicable for synchronization of power for generators connected to the Grid. The Retail Supply Tariff order for FY 2019-20, is having a special tariff schedule HV-7 for the generators connected to the grid and availing power for synchronization with the grid from time to time. As per the terms and conditions under schedule HV-7, synchronization with the grid shall only be made available after commissioning of such generating plants. For synchronization with the grid, power shall be provided for a maximum period of 2 hours on each occasion. It has also been provided that the supply for synchronization with the grid shall not exceed 15% of the capacity of unit of highest rating in power plant. This tariff is a single part tariff provides for billing only on per unit energy charge basis and the condition of minimum consumption shall not be applicable to the generators. Billing has to be done for energy recorded on each occasion of availing supply for synchronization purpose during the billing month.

(iv) Earlier vide petition No.29/2019, MPPMCL and all the three state Discoms approached the Commission submitting that because of two types of billing methodology for power drawn for synchronization purpose and "other-than –synchronization" purposes, they were facing difficulty to implement the same. They stated that it becomes difficult to ascertain the purpose of drawl of power by a Generator in each occasion. During the initial period of two hours also the power being drawn by a generator may or may not be utilized for synchronization purposes. They further stated that only way to implement the provisions of the Regulations and the Retail Supply Tariff Order is to assume that in first two hours power drawn is for synchronization purpose. They further stated that while carrying out billing at the rate applicable to temporary connection under HT Industrial category, it is not clear whether all terms and conditions prescribed in the Tariff Order for temporary consumer shall be applicable or tariff order shall be referred only to ascertain the rate of billing. Citing the difficulties being faced, they had prayed for amendment in the Regulations as well as in the Tariff Schedule HV-7.

(v) The Commission disposed of the aforesaid petition No. 29/2019 vide order dated 16th December 2019 with the observation that the petitioners were seeking revision/ clarification in retail supply tariff order for FY 2018-19 issued on the 3rd May 2018. The

Commission observed that the petition was filed after a period of more than a year. It was mentioned in the aforesaid order that the process for determination of ARR and retail tariff order for FY 2020-21 have already been started. In view of the background mentioned in the subject petition and developments, the Commission directed the petitioners that with regard to their contention for HV-tariff, they may approach by way of appropriate proposal in their tariff petition for FY 2020-21. With regard to their other prayer seeking amendment in MPERC (Co-generation and Generation of Electricity for Renewable Source of Energy) (Revision-I) Regulations 2010, it was mentioned in the aforesaid order that the Commission shall examine the prayer of the petitioners and may come up with an appropriate draft amendment, if required, providing opportunity to all stakeholders to offer their comments/objections on the draft Regulations through the process of public hearing. The above-mentioned process for amendment in MPERC (Co-generation and Generation of Electricity for Renewable Source of Energy) (Revision-I) Regulations 2010 was taken up and has already been completed and further course of action is under consideration of the Commission. However, revision if any, in the Regulations shall be applicable prospectively only.

(vi) With regard to the present and past period billing dispute about applicability of schedule HV-7 and HV-3.1, the Commission has examined the views and submissions made by the Petitioner and Respondents in light of the provisions under existing Retail Supply Tariff order and the applicable Regulations.

(vii) Regulation 10 of Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Source of Energy) Regulations 2010 (Revision-I) (RG-33(I) of 2010) has specific provision for drawing power by Generator /Cogeneration from Renewable Sources. It entitles the Generator/Co-generation from Renewable Sources to draw power exclusively for its own use from the Transmission/Distribution Licensees' network for synchronization of plant with the grid or during shutdown period of its plant or during such other emergencies. Regarding billing for that period, it has clearly been specified that the power availed during synchronization of plant with the grid shall be billed for the period and at the rate as per Retail Supply Tariff order under tariff schedule for

synchronization. Accordingly, for the previous years' Retail Supply Tariff orders including the Retail Supply Tariff order for FY 2019-20, which is applicable presently also, a specific tariff schedule HV-7 is incorporated in these tariff orders.

(viii) The Regulations provide that the power availed during synchronization of plant with the grid shall be billed for the period and at the rate as per retail supply tariff order under tariff schedule for synchronization. Accordingly, the Commission has fixed the maximum time period for billing the generator for synchronization purpose alongwith the applicable unit rate. Hence, the Respondent Distribution Companies are required to bill the generators for power drawl for synchronization purposes accordingly. The drawl of power by the generators during shutdown period of its plant or during such other emergencies, would be billed at the rate applicable to temporary connection under HT Industrial Category.

(ix) In the matter of M/s Malwa Solar Power Generation Private Limited in Appeal no. 112/2017 against MPERC order dated 1/2/2017, Hon'ble APTEL upheld the order of the Commission. It has been held that the billing of the solar generator for power drawl from the Distribution Companies exclusively for its own use, at the rate applicable to temporary connection under HT Industrial Category under Regulation 10, is in order. Based on the prevailing Regulations and the order dated 12/2/2020 passed by the Hon'ble Appellate Tribunal for Electricity in aforesaid Appeal, the Commission reiterates that the maximum two hours' time limit for synchronization of power specified in HV-7 Schedule of Retail Supply Tariff order is much more than normally the actual time required for synchronization of power by the generators. On conjoint reading of the provisions under aforesaid MPERC Regulations and HV-7 Schedule, the continuous drawl of power in every instance for over and above two hours shall be considered for the purposes other than synchronization. Therefore, the billing for such continuous drawl of power for over and above two hours in every instance has to be done at the rate applicable for temporary connection under HT Industrial Category which is HV 3.1 schedule in the existing Retail Supply Tariff order. Therefore, for every instance of power drawl for synchronization, upto two hours, tariff as per HV-7 schedule is applicable but thereafter for the period of continuous power drawl over and above two hours, temporary tariff at the rate of HV-3.1 (H.T. Industrial Category) would be applicable.

(x) However, billing under tariff category HV-3.1 requires computation of Fixed as well as Energy charges. Fixed charges are billed based on billing demand during the month. As per clause 1.5 under "General Terms and Conditions of High-Tension Tariff" of the Retail Supply Tariff Order for FY- 2019-20, the billing demand for the month shall be the actual maximum KVA demand recorded during the month or 90% of the contract demand, whichever is higher. In the present case, the generator does not have any specified contract demand with the Respondents. Therefore, the actual Maximum Demand recorded during the month, when power was drawn (excluding for synchronization), shall be considered on billing demand for computation of fixed charges for the purpose of billing under HV-3.1 Tariff Schedule applying temporary supply basis. It is also provided in the aforesaid Retail supply tariff order under clause 1.19(a) of "General Terms and Conditions of High-Tension Tariff" that the fixed charges in the case of temporary connection shall be recovered for the number of days for which the connection is availed during the month by prorating the monthly fixed charges. Accordingly, in the subject matter, the fixed charges on temporary supply basis, under HV 3.1 Tariff Schedule shall be pro-rated on the number of days during the month when the power is drawn for other than synchronization as mentioned above.

(xi) For Computation of Energy Charges, rates for consumption up to 50% load factor under Tariff Schedule HV 3.1 would be applicable, as the power drawn by the generator from the grid is for a limited period as per its requirement. Further, the specific terms and conditions defined under the Tariff Schedule HV 3.1 and other terms and conditions for temporary supply in Retail Supply Tariff orders would not be applicable.

(xii) Regarding the billing for previous years, the Commission has observed that the Respondent Distribution Company had wrongly billed at the rate applicable under HV-7 schedule for the power continuously drawn over and above two hours in contravention with the provisions under MPERC (Cogeneration and Generation of Electricity from Renewable Source of Energy) Regulations 2010 (Revision-I) (RG-33(I) of 2010) as amended and the applicable Retail Supply Tariff orders. This is a serious lapse committed by the Respondent Discom and later on, it has issued supplementary bills for difference of HV-3.1 (Temporary Supply) and

HV-7 billing with regard to the usage by the generator. The Commission in the Retail Supply Tariff Orders has categorically directed the Respondent Discoms that they can't change tariff or the tariff structure. Clause 1.26 of the General Terms and Conditions of High-Tension Tariff is reproduced below:

"No charges in the tariff or the tariff structure including minimum charges for any category of consumer are permitted except with prior written permission of the Commission. Any order without such written permission of the Commission will be treated as null and void and also shall be liable for action under relevant provisions of the Electricity Act, 2003".

(xiii) Ld. Counsel for the petitioner in his arguments and subsequent written submission stated that the Respondent No.2 vide letter dated 16.01.2020 raised additional charges for the period of April'2017 to August' 2019 wherein the recovery of bills for April'2017 to January'2018 is time barred in terms of Section 56(2) of the Electricity Act'2003. The Respondent No. 2 in its written note placed counter arguments along with several citations on this issue. The submissions of both the parties on this issue are mentioned in para 15 and 16 of this order. Section 56 (2) of the Electricity Act'2003 provides as under:

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

In terms of the above provision under Section 56 (2), the sum due from any consumer is not recoverable after a period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrears of charges for electricity supplied by the licensee. The Hon'ble Appellate Tribunal for Electricity in Judgment dated 14th November'2006 in Appeal Nos. 202 and 203 of 2006 held in para 14 that *"the consumption of electricity will certainly create a liability to pay but the amount will become due and payable only after a bill or demand is raised by the licensee in accordance with the Tariff Order. Such a bill/demand will notify a date by which the dues are to be paid without surcharge".* In para 17 of aforesaid Judgment, Hon'ble Tribunal mentioned that " *In*

our opinion, the liability to pay electricity charges is created on the date electricity is consumed or the date the meter reading is recorded or the date meter is found defective or the date theft of electricity is detected but the charges would become first due for payment only after a bill or demand notice for payment is sent by the licensee to the consumer. The date of the first bill/ demand notice for payment, therefore, shall be the date when the amount shall become due and it is from that date the period of limitation of two years as provided in Section 56(2) of the Electricity Act, 2003 shall start running."

Similarly, in another case, Hon'ble High Court of Madhya Pradesh, Bench at Gwalior in the matter of Kapoor Saw Manufacturing Co. V/s MPSEB and Others- (2006 SCC online MP 612), vide Judgment dated 13.07.2006 have upheld that the provisions of Section 56 of the Electricity Act 2003 will not be applicable when error in the matter of calculating tariff is being corrected when the error came to the notice. The relevant para of the aforesaid Judgment is mentioned by the Respondent No. 2 (Para 16 (xiii) of this order)

From the above, the disputed amount in the subject matter was first due on 16.01.2020 when billing for additional charges was raised by the Respondent No.2. Hence, the contention of petitioner that the recovery of bills from April'2017 to January'2018 is time barred, has no merit.

18. In view of the observations and findings in the foregoing paragraphs, the Respondent Discom is directed to bill the generators in the subject matter, in accordance with the provisions under MPERC (Cogeneration and Generation of Electricity from Renewable Source of Energy) Regulations 2010 (Revision-I) (RG-33(I) of 2010) as amended and the applicable Retail Supply Tariff orders issued by this Commission from time to time as clarified above. The Respondent Discom shall not be entitled to recover any carrying cost prior to the period when the supplementary demand was issued for the first time.

With the above directions, the subject petition is disposed of.

Shashi Bhushan Pathak) **(Mukul Dhariwal)**

Member **Member**