

## MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION BHOPAL

**Sub: In the matter of petition filed under Section 86(1)(a), Section 86(1)(e) and in the matter of levy of additional surcharge on wheeling on the Solar Captive Plant of the petitioner under Section 42 of the Electricity Act and under 7<sup>th</sup> Amendment dated 15<sup>th</sup> November' 2017 to MPERC Regulations 2010 Revision-I (cogeneration and generation of electricity from renewable source of energy).**

**Petition No. 50 of 2019**

### **ORDER**

**(Date of Order: 3<sup>rd</sup> May' 2021)**

**M/s. Porwal Auto Components Ltd.**

Plot No. 2019, Sector 1, Pithampur, District Dhar

- **Petitioner**

**Vs.**

**(1) M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.**

GPH Compound, Pologround, Indore – 452001

**(2) M.P. Power Management Company Ltd.,**

Block No. 15, Shakti Bhawan, Rampur, Jabalpur – 482008

- **Respondents**

Shri Ajay Porwal appeared on behalf of petitioner.

Shri Shailendra Jain, Deputy Director appeared on behalf of the Respondent No.1

Shri Manoj Dubey, Advocate and Shri Rajneesh Reja, DGM appeared on behalf of the Respondent No.2

The petitioner (M/s. Porwal Auto Components Ltd). filed the subject petition under Section 86(1)(a), Section 86(1)(e) of the Electricity Act' 2003 in the matter of levy of Additional Surcharge on wheeling on the Solar Captive Plant of the petitioner under Section 42 of the Electricity Act and 7<sup>th</sup> Amendment to MPERC (Cogeneration and generation of electricity from renewable source of energy) Regulations 2010 Revision-I dated 15<sup>th</sup> November' 2017.

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

*"1. That Petitioner has established two solar PV power captive power plants for use of 100% power as captive use under GOMP Solar policy 2012 and under section 9 of The Electricity Act 2003 and have also availed open access under section 9 (2) of The Act for transmitting of power generated at Point A (at Village Kadodia, Tehsil Tarana, Dist Ujjain to point B to its industrial unit at plot no. 209, sector-1 Pitahmpur District Dhar. The plants were commissioned on dated 27/12/2013 and dated 08/11/2017.*

*2. That the Petitioner humbly submits that levy of additional surcharge under Section 42 of the Electricity Act 2003 (for short "**the Act**") is in contravention of the provisions of the Act as well as National Electricity Policy.*

3. *That the Respondent had not imposed any additional surcharge prior to notification of 7<sup>th</sup> amendment dated 15<sup>th</sup> November 2017 to MPERC Regulation (Co generation and generation of electricity from renewable sources of energy) (Revision 1) dated 19/11/2010. It was only after this notification the Respondent 1 started imposing additional surcharge on wheeling of solar captive plants by misinterpretation of said notification and section 42 (4) of The Act.*
4. *That Petitioner had preferred a representation before the Respondent no.1 clarifying that the additional surcharge on wheeling cannot be imposed on Renewable captive power plants and same is not provided for in the Act nor in MPERC. Copies of representation are enclosed as **Annexure P-2**.*
5. *That Respondent disagreed with the Petitioner's contentions and turned down the representation filed by the petitioner and continued with the imposition of additional surcharge on wheeling and till date an amount of Rs. 89,77,796/- has been recovered from the Petitioner forcefully. Copy of Respondent reply and calculation for same is enclosed as **Annexure P-3** and **P-4** respectively. Till date Rs. 89,77,796/- has been recovered from the Petitioner under the garb of Section 42 of the Act and the 7<sup>th</sup> amendment.*
6. *That the Respondent have acted in complete violation of the order passed by the Hon'ble Aptel in Appeal No. 315 of 2018 filed by Sai Wardha Power Generation Limited and also Appeal No. 311 of 2018 filed by JSW Steel Limited holding that levy of additional surcharge comes into play only in cases where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply. Whereas in the present case the Respondent has failed to appreciate that the question of permit and supply does not arise to the extent of self consumption by captive users of CPPs. Copy of the order passed in Appeal no 311 and 315/2018 by the hon'ble Aptel is annexed as **Annexure P-5***
7. *The Petitioner further submits that the respondent has failed to appreciate the provisions of Section 9 of the Act wherein the power plants have been given the right to carry electricity from generating plant to the destination of their own use. Therefore, the question of permit and supply does not arise to the extent of self consumption by captive users of CPPs.*
8. *The Petitioner humbly submits that the order of Hon'ble Aptel is under challenge before the Hon'ble Supreme Court, however, there is no stay granted by the Hon'ble Supreme Court. Therefore, the law laid down by the Hon'ble Aptel in the above referred Appeals holds good as on today.*
9. *That Hon'ble Commission in Petition No. 38/2018 Order dated 29<sup>th</sup> November, 2018 has held in para 15 as under*

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

10. *That as per said order of Hon'ble Commission the charges under Section 42 (2) and 42(4) are not applicable if the plant qualifies as Captive power plant as per the Act and the provisions under the Act. Copy of the order of the Commission is annexed and marked as **Annexure P-6***
11. *That Maharashtra Electricity Regulatory Commission in its tariff MYT Order of MSEDCL for the period from FY 2016-17 to FY 2019-20 dated 3 November, 2016 has held that Additional Surcharge is not applicable to Captive Users of CPPs to the extent of their self- consumption from such Plants.*
12. *That Open access report of December 2017 by forum of regulators has held that Additional surcharge shall not be levied in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.*
13. *That as per clause 2.1 of MPERC Regulation 2010 on (Co generation and generation of electricity from renewable sources of energy) (Revision 1) dated 19/11/2010 "Open Access Customer" means a person permitted under these regulations to receive supply of electricity from another person other than the distribution licensee of his area of supply, or a generating company (including captive generating plant) or a licensee, who has availed of or intends to avail of open access. However in present case power is not supplied by any person or generating company. There is no buyers and seller relationship.*
14. *In order to understand the issue it is relevant to refer the important provisions under the Act and the policy governing the issue involved. The relevant definitions of Electricity Act 2003, to be considered for the purpose of this Petition, are as under:*

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

**Section 2 (15)** *"consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being*

*connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”*

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

**Section 2 (76)** *“wheeling” means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;”*

**Section 9:** *“Captive Generation - (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines: Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.*

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

*(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use: Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be: Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”*

**Section 39:** *“State Transmission Utility and functions - (1) The State Government may notify the Board or a Government company as the State Transmission Utility: Provided that the State Transmission Utility shall not engage in the business of trading in electricity:*

*Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act. (2) The functions of the State Transmission Utility shall be – (a) to undertake transmission of electricity through intra-State*

transmission system; (b) to discharge all functions of planning and coordination relating to intra-state transmission system with –  
 (i) Central Transmission Utility; (ii) State Government; (iii) generating companies; (iv) Regional Power Committees; (v) Authority; (vi) licensees; (vii) any other person notified by the State Government in this behalf; (c) to ensure development of an efficient, coordinated and economical system of intra State transmission lines for smooth flow of electricity from a generating station to the load centres; (d) to provide non-discriminatory open access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission: Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross subsidy: Provided further that such surcharge and cross subsidies shall be progressively reduced 1[\*\*\*] in the manner as may be specified by the State Commission:

Provided also that the manner of payment and utilization of the surcharge shall be specified by the State Commission. Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.”

**Section 42:** “Duties of distribution Licensee and open access -

- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act
- (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints: Provided that such open access may be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission :

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

Provided also that such surcharge and cross subsidies shall be progressively reduced 1[\*\*\*] in the manner as may be specified by the State Commission:

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



2[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.] (3) ..... (4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

**Rule 3 of the Electricity Rules 2005:**(1) No power plant shall qualify as a 'Captive Generating Plant' under section 9 read with clause (8) of section 2 of the Act unless—

**(a)** in case of a power plant—

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

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

Provided that in case of power plant set up by registered co- operative society, the conditions mentioned under paragraphs (i) and (ii) above shall be satisfied collectively by the members of the co-operative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six per cent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one per cent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten per cent; (b) incase of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including—

*Explanation.*—(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and (2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant. Illustration In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen per cent of the equity shares in the company (being the twenty six per cent proportionate to Unit A of 50 MW) and not

less than fifty one per cent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users. (2) It shall be the obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in sub-clauses (a) and (b) of sub rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Explanation.—(1) For the purpose of this rule,— (a) “annual basis” shall be determined based on a financial year; (b) “captive user” shall mean the end user of the electricity generated in a Captive Generating Plant and the term “captive use” shall be construed accordingly; (c) “ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant; (d) “Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.”

**Statement of Objects and Reasons for the enactment of Electricity Act of 2003, i.e. Para 4, which reads as under:**

4(i) Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.”

National Electricity Policy :-This was in line with the National Electricity Policy of 2005 which intended to remove all control over captive generators as well as to enable the captive generators to supply available surplus capacity to licensees and consumers (noncaptive users). Clauses 5.2.24, 5.2.25, 5.2.26, 5.7, 5.7.1 of National Electricity Policy 2005 are relevant which read as under:

**“Captive Generation**

5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.

15. It is further submitted that Section 9 of the Act starts with a non- obstante clause, as indicated above. Reading of Section 42 in its entirety and in particular Section 42(2), 42(4) and Section 9 (2) of the Act, it is crystal clear that sub-section (4) of Section 42 does not override or control the applicability of Section 9 (2), except to the extent provided under Section 9 itself. Sub-Section (2) of Section 9 deals with conveyance of electricity by open access to the destination of use. It does not refer to supply of electricity at all since the consumption is for own use by captive consumers. The second proviso to Section 9(1) by way of amendment in the year 2007 came to be inserted to enable the captive generator not to waste the surplus power/electricity

*but to sell the same to others.*

16. *From the above Policy, it is clear that National Electricity Policy 2005 and the Tariff Policy of 2016 were directed to encourage captive generators, i.e. after meeting self-consumption (own use), surplus power available with captive generator could be sold. Therefore, it is submitted that Electricity Rules 2005 which came into force much prior to the amendment of 2007 inserting second proviso to Section 9(1) intended liberal interpretation of right of captive generators / captive generating plant.*
17. *Then on bearing reading of Section 42(2) and Section 42(4), it clearly indicates that open access has to be introduced in a phased manner in terms of first proviso to Section 42(2) which states that open access shall be allowed on payment of surcharge in addition to charges for wheeling as may be determined by the State Commission. Apparently, captive generating plant needs a mechanism to carry power from generating plant to its users which includes captive users, members as well as to supply power to licensees and also consumers in general. This mechanism is nothing but open access.*
18. *The Petitioner submits that for the purpose of carrying power to its own users / members and also to consumers and licensees, the captive generating plant has to pay charges of wheeling and open access charges. However, in terms of 4<sup>th</sup> proviso to Section 42(2), there is an exemption to pay cross subsidy charges if the open access is used for carrying electricity by captive generating plant to the destination of its own use. However, this does not apply in case of supply of electricity to a consumer in general.*
19. *That being aggrieved by the action on the part of the Respondent and due to levy of additional surcharge despite there being various orders holding that additional charges are not leviable on renewable energy captive power plants*

**GROUND:-**

*That the present Petition is filed on following amongst other grounds:*

20. *That the levying of additional surcharge under section 42(4) by the respondent is in violation of the provisions of the Electricity Act 2003 and therefore the Bills raised and the money recovered from the Petitioner should be refunded forthwith. The Section 42(4) is for levying of additional surcharge only when the State Commission has permitted the consumer to receive supply of electricity from a person other than distribution licensee. In the present case the Petitioner is carrying the electricity to the destination for its own use which is clearly governed by Section 42(2) 4<sup>th</sup> proviso and Section 9 (2).*
21. *That the Respondents have erred in law levying the additional surcharge on the Petitioner who owns a Solar Captive Power Plant and being a captive Generating Plant for carrying electricity for its self consumption.*



22. *That the action on the part of the Respondent is completely arbitrary and in violation of the provisions of the Act and orders of Hon'ble Aptel*
23. *That the impugned bill raised by the Respondent is bad in law and should be quashed.*
24. *That the alleged bill is nothing but an arm twisting technique used by the Respondent to harass the Petitioner.*
25. *That the Hon'ble Aptel and the Hon'ble Commission has time again held that no additional surcharge can be levied on renewable energy captive power plants*
26. *That the Respondent has erred in law despite there being clear provision under the Act under the provision 4<sup>th</sup> to Section 42 (2) which clearly exempts the imposition of additional surcharge on the Petitioner.*
27. *That the respondents have failed to appreciate the provisions of Section 9(2) of the Act wherein the power plants have been given the right to carry electricity from generating plant to the destination of their own use. Therefore, the question of permit and supply does not arise to the extent of self consumption by captive users of CPPs.*
28. *That the Respondent has misinterpreted the 7<sup>th</sup> amendment wherein it is mentioned that clause 12.2 shall be substituted with the charges etc shall be applicable as per provisions envisaged under Section 42. The Proviso to Section 42 (2) itself exempts the levying of surcharge to a person who has established a captive generating plant for carrying the electricity to the destination for its own use. In the present case also the Petitioner has developed captive generating plant and is carrying electricity to the destination for its own use.*
29. *That the Respondent has misinterpreted the entire provision and is reading the amendment and the act in isolation which cannot be permitted and therefore the bills raised for additional surcharge deserves to be set aside.*
30. *That the Petitioner craves leave to refer to other grounds at the time of the argument."*

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

- i. *To admit the Present Petition;*
- ii. *For order/directions to the Respondent No. 1 not to impose additional surcharge on wheeling of the electricity by the Petitioner from its own generating stations at Village Karodia to its own manufacturing unit at Pithampur for self consumption of 100 % units generated by solar plant as per law.*
- iii. *For order/direction to Respondent No. 1 to refund of all amount paid by the Petitioner towards Additional Surcharge till date with interest.*

- iv. *For such other and further relief as the Commission may in the facts and circumstances of the present case, may deem fit and proper.*

4. The petition was admitted on 03.01.2020. In view of the issue involved in the subject matter, the petitioner was directed to add M.P. Power Management Co Ltd Jabalpur (MPPMCL) also as one of the Respondents in the subject matter. The petitioner was directed to serve a copy of the petition to the Respondent including MPPMCL. The Respondents were directed to file their reply to the subject petition within 15 days from the date of service of the petition. The case was fixed for hearing on 11<sup>th</sup> February' 2020 but the hearing in this matter could not be held due to outbreak of COVID followed by country wide lockdown.

5. At the hearing held on 07.08.2020, the Commission observed the following:

- (i) By affidavit dated 07.02.2020, the Respondent No.1 filed reply to the subject petition.
- (ii) On 05.08.2020, the petitioner filed rejoinder on the above reply filed by the Respondent No. 1.
- (iii) The representative who appeared for the Respondent No.1 stated that he has already filed written reply and no sur-rejoinder is required to be filed by the Respondent No.1.
- (iv) The Respondent No.2 (MPPMCL) did not file its reply to the subject petition.

6. In view of the above, the Respondent No.2 (MPPMCL) was directed to file reply to the subject petition at the earliest but not later than 05.09.2020. The case was fixed for arguments on 29.09.2020. The Respondent No.2 (MPPMCL) filed reply to the petition on 05.09.2020.

7. At the hearing held on the 29.09.2020, the representatives for the petitioner and both the Respondents concluded their arguments and sought ten days' time for filing their written submissions. They were allowed to file their written submissions by the 10<sup>th</sup> October' 2020. The case was reserved for order on filing of written submissions by both the parties within the above stipulated date.

#### **RESPONDENT NO. 1 SUBMISSIONS:**

8. The Respondent No. 1 (M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.) by affidavit dated 07.02.2020 submitted the following in its reply to the petition:

- "1. *That, from perusal of averment made in the petition along with relief claimed, it is apparent that the primary grievance raised by the petitioner vide instant petition is with respect to the billing of additional surcharge. That, essence of the petitioner's submission is this that two captive generating plant has been setup by the petitioner and there is no transaction of sale of electricity for consumption of power through open access from such generating plant. Accordingly as per provision of section 42(4) of the Electricity Act 2003 (hereafter referred as 'The Act') there shall not be*

any levy of additional surcharge on the consumption from these captive generating plant.

2. That, following are the particulars of petitioner's generating plant and service connections:

S.No.	Particular	
1	<b>Date of Commissioning of First Generating plant</b>	<b>27/12/2013</b>
2	Capacity	1.5
3	Address	Village Kadodia, Tehsil Tarana, Dist Ujjain
4	Registered under REC Mechanism	Yes
5	<b>Date of Commissioning of Second Generating plant</b>	<b>08/11/2017</b>
6	Capacity	2.55
7	Address	Village Kadodia, Tehsil Tarana, Dist Ujjain
8	Registered under REC Mechanism	No
9	<b>Name of the Premises where power from such plants being consumed</b>	<b>M/s Porwal Auto Component Ltd</b>
10	Address	Plot No. 209, Sector-1, Pithampur, District Dhar.
11	Service Number	4664904000
12	Date of Connection	12/09/1994
13	Supply Voltage	33 KV
14	Contract Demand with distribution licensee	3500 KVA

3. 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, 8 amendments have been made in the Regulations from time to time.
4. That, vide 7th Amendment to the MPERC (Co- Generation and Generation of Electricity from Renewable Sources of Energy) (Revision- I) Regulations, 2010 (hereinafter referred as 'Regulation of 2010') amended w.e.f 17/11/2017, this Hon'ble Commission has revoked exemption granted to open access charges on the consumers availing electricity from renewal source of electricity through open access. The relevant part of the amended and un-amended 'regulation of 2010' is reproduced as under:

Clause 12.2 after 2017 amendment

*“12.2 Wheeling charges, Cross subsidy surcharge, additional surcharge on the wheeling charges and such other charges, if any, under Section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by Commission in its retail Supply tariff order.”*

*Clause 12.2 before 2017 amendment*

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

5. *That, after amendment in ‘Regulation of 2010’ the answering respondent started levy of statutory charges u/s 42 of Electricity Act, 2003 (unless otherwise exempted) upon the petitioner who is procuring the electricity from the source other than from the distribution licensee of area after availing open access over the distribution network of answering respondent.*
6. *That petitioner vide letter no, PACL/ENP/23 dated 09/01/2018 & Letter No. PACL/ENP/04 dated 12/01/2018 disputed the levy of additional surcharge. Copy of the same enclosed as **Annexure-R1**. Answering respondents vide letter No. MD/WZ/05/COM/HT/2102 Indore dated 30/01/2018 decided these representations of the petitioner in the light of statutory provisions. Copy of the same enclosed as **Annexure -R2**. Thereafter, after one year petitioner vide letter No. ENP/Parwal Auto/Surcharge dated 04/01/2019 again disputed the levy of additional surcharge (**Annexure-P2 of Petition**). The said representation also decided in the light of prevailing statutory provisions and judicial pronouncement (**Annexure-P3 of Petition**).*
7. *That, the instant petition listed for motion hearing before Hon’ble Commission on dated 03/01/2020. Hon’ble Commission vide order dated 04/01/2019 admitted the petition and directed to the petitioner to serve a copy of the petition to the respondents. Further respondents were directed to file reply within 15 days from the date of service of the petition.*
8. *Daily order in respect of the instant petition received in the office of answering respondent on dated 18/01/2020 vide letter No. MPERC/D(T)/90 Bhopal Dated 14.01.2020. Petitioner has served the copy of the petition on dated 23/01/2020.*
9. *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.*

10. *To deal with the all contention and grounds raised by the petitioner and to analyse all relevant statutory provisions, issues in hand, is sub divided in the following manner:*
  - 10.1. *Rational behind Levy of Additional Surcharge*
  - 10.2. *Duties of distribution/transmission licensee in context of open access towards the 'Captive Generating Plant' vis a vis a 'Non Captiv Generating Plant'/'Generating Company'.*
  - 10.3. *Effect on 'Universal Service obligation (USO)' or 'Consumership with Distribution Licensee' post availing 'open access'.*
  - 10.4. *Effect of Section 9 of the Act on the liability of open access charges.*
  - 10.5. *Necessity of buyer-seller relationship to levy the additional surcharge under section 42(4).*
  - 10.6. *Liability of Additional surcharge vis a vis Liability of wheeling charge.*
  - 10.7. *Judicial pronouncement regarding levy of additional Surcharge in case of open access through captive route.*
  - 10.8. *Regulation/tariff order prevailing in the state of Madhya Pradesh vis a vis maintainability of challenge towards same in present proceedings.*

**RE: Rational behind Levy of Additional Surcharge**

11. *That, concept of open access has been statutorily introduced by Act in order to promote free trade of electricity. The Act, gives freedom to a consumer either to generate his own electricity (Captive Generation) or to purchase it from an Independent Power Generator of his own choice, if he/she/it do not want to get electricity from distribution licensee of his area. The relevant definition of open access given in the act is reproduced as under:*  
2(47) *"open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation **in accordance with the regulations specified by the Appropriate Commission;***
12. *As per Section 42 of the Act, open access shall be available only upon payment of open access charges. While introducing open access in the distribution system, Section 42 of Act empowers State Commission not only to determine the charge for wheeling of electricity but also determine cross subsidy surcharge and additional surcharge which is to be utilized to meet the requirement of current level of cross subsidy and stranded power cost arising out due to obligation of supply respectively.*
13. *That, with regard to levy of additional surcharge the relevant statutory provisions reproduced as under:*  
*"Section 42: (Duties of Distribution licensees and Open Access):*



(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

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

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

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

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

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

xxx xxx xxx”.

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

*Emphasis supplied*

**Section 8.5 of the Tariff Policy 2016 also provides;**

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

**Further, clause 5.8.3 of the National Electricity Policy notified by the Ministry of Power, Govt. of India, reads as under.**

“5.8.3...

*An additional surcharge may also be levied under sub-section (4) of Section 42 for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access.  
..."*

14. *It may be seen that sub section (2) of section 42 of the Act deals with the cross subsidy surcharge and sub section 42(4) of the Act deals with the additional surcharge. Further it is also clear that Act provide exemption to a person who has established a **captive generating plant** for carrying the electricity to the destination of his own use only with respect to cross subsidy surcharge (vide further proviso to section 42(2) and no such exemption provided with respect to additional surcharge under section 42(4).*

15. *That, the issue of open access and rational behind levy of additional surcharge came before consideration of the Hon'ble Supreme Court in case of Sesa Sterlite Limited v Orissa Electricity Regulatory Commission and Others ((2014) 8 SCC 444). The relevant part of the said judgment is reproduced as under:*

25. *While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.*

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

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

27. *The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. **There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply.** The presumption, normally is that generally the bulk*

consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.

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

29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorised to frame open access in distribution in phases with surcharge for:

- (a) current level of cross-subsidy to be gradually phased out along with cross-subsidies; and
- (b) obligation to supply.”**

*Emphasis supplied*

16. That, from the perusal provision of the Act, national tariff policy, national electricity policy and judgment of Hon'ble Supreme Court, rational behind levy of additional surcharge may be summarised as under:
  - i. Under the sub section (1) of section 43 of the Act, DISCOMs have a universal supply obligation and are required to supply power as and when required by the any consumer, owner /occupier of premises in its area of supply.
  - ii. To meet requirement of demand of all consumers of its area of supply, DISCOM enters into long term Power Purchase Agreements (PPA) with sellers (generators/ traders etc.) so as to ensure supply of power on request.
  - iii. While contracting energy through such long term PPAs, the tariff payable to the generators usually consists of two part i.e. capacity charges and energy charges. Therefore, the DISCOMs have to bear the fixed cost even when there is no off take of energy through such source.
  - iv. Whenever any person opts for open access and takes electricity through open access from any other source, the DISCOMs continue to pay fixed charges in lieu of its contracted capacity with generation stations. This leads to the situation where the

*DISCOM is saddled with the stranded cost on account of its universal supply obligation.*

- v. *In view of the adverse financial situation caused by arrangements made for complying with the obligation to supply, Section 42(4) of the Electricity Act, 2003 provides for levy of additional surcharge.*
- vi. *For levy of additional surcharge it is sufficient that power is being procured from any source other than the distribution licensee of area and there is no restriction regarding status of such other source captive or otherwise.*
- vii. *As per law laid down by Hon'ble Supreme Court to attract the levy of open access charges, there must be 'some other source' other than the distribution licensee of area. Captive generating plant is undisputedly falls within the four corner of such 'some other source'.*

***RE: Duties of distribution/transmission licensee in context of open access towards the 'Captive Generating Plant, vis a vis a 'Non Captive Generating Plant'/'Generating Company':***

- 17. *The Electricity Act, 2003 is an Act to consolidate the laws relating to generation, transmission, distribution, trading, use of electricity and for development of electricity industry, promoting consumer. It also is a law to ensure transparent policies. The statement of objects and reasons for the Act shows that radical reforms in generation and transmission of electricity are sought to be ushered in by the new legislation on the principles of de-licensing and open access in transmission/distribution. It also provides for; State Regulatory Commission, Central Regulatory Commission and an Appellate Tribunal to review the decisions of Regulatory Commissions.*
- 18. *The Act is divided into XVIII Parts. Part III deals with generation of electricity, Part IV with licensing methods, Part V deals with transmission of electricity and Part VI deals with Distribution. The fixation and administration of tariffs is contained in Part VII. Part X, which contains Sections 76 to 109 provide for constitution, powers and functions of Central Commission and State Commission. An overview of the Act especially the parts referred to herein would show that the Act brought in structural changes in generation, distribution and transmission of electrical energy. There is a distinct trichotomy among these three aspects of electricity. The Act also broadly deals with generation, transmission and distribution separately. As it may presently seen that except in the matter of levying surcharge for cross-subsidy, the Act does not make any distinction between a generating company and captive generating company. Indeed except a couple of provisions in Part I (Definitions clause in Section 2 of the Act), Part III dealing with generation of electricity, Part V dealing with transmission of electricity and in Part VI dealing with distribution of electricity, the regulatory mechanism in respect of a generating company and captive generating company are the same with regard to open access. To appreciate this, it is necessary to notice a few provisions in the definition clause and other related provisions.*

19. The words/terms like 'open access' '**person**', '**electrical plant**', '**generate**', '**generating company**', '**generating station**', '**captive generating plant**' and '**utility**' are defined as under:
  - 2(8) "captive generating plant" means a power plant set up by any person to generate electricity primarily for this own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.
  - 2(22) "electrical plant" means any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity but does not include--
    - (a) an electric line; or
    - (b) a meter used for ascertaining the quantity of electricity supplied to any premises; or
    - (c) an electrical equipment, apparatus or appliance under the control of a consumer;
  - 2(28) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person, which owns or operates or maintains a generating station;
  - 2(29) "generate" means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given;
  - 2(30) "generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch yard, cables or other appurtenant equipment, if any used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any Sub-station;
  - 2(47) "Open access" means the non-discriminatory provision for the use of transmission line or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.
  - 2(49) "person" shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;
  - 2(75) "utility" means the electric lines or electrical plant, and includes all lands, buildings, works and materials attached thereto belonging to any person acting as a generating company or licensee under the provisions of this Act;



20. The term "person" includes a juristic person and also association of body of individuals, whether incorporated or not. The term "power plant" is not defined, though section 2(22) defines "electrical plant" and section 2(30) defines "generating station". Generation means to produce electricity from generating station for the purpose of giving supply to any premises. Generating station is any station for generating electricity including any building and plant with necessary accessory equipment like transformers, switch-gears, Sub-stations etc. Keeping this view, we should now consider the definition of captive generating plant.
21. As seen above, Section 2(8) of the Act, which defines "captive generating plant", contains two parts, namely, main part and inclusive part. Main part is explanatory in nature and defines "captive generating plant" to mean a power plant set up by any person (including juristic person) to generating electricity primarily for his/its own use. The inclusive part expressly includes a power plant set up by (a) any co-operative society; (b) association of persons for generating electricity for use of its members. It is to be noticed that Section 2(8) does not contain exclusionary part. The Parliament was very cautious not to add exclusionary part in the definition of 'captive generating plant'. Presumably for the reason that Section 2(8) of the Act used the words and phrases, which are defined in the dictionary clause. The term '**power plant**' or the term '**for generating electricity**' have the same meaning as defined in Section 2(22) and 2(29) respectively. Therefore, any electrical plant set up for generating electricity by a person, an incorporated company, a co-operative society or an association of persons is a generating plant. If such generating plant primarily utilizes the electricity produced in its generating plant for the use of its members or for its own use, the same becomes '**captive generating plant**'.
22. The Government of India in exercise of their powers under Section 176 of the Act, promulgated Rules vide GSR No. 379(E), which were published in the Gazette of India extraordinary dated 8.6.2005. These Rules are called Electricity Rules, 2005. As per Rule 3 thereof, no power plant shall qualify as a captive generative plant under Section 9 read with Section 2(8) of the Act, unless 26 per cent of the ownership is held by the captive users and not less than 51 per cent of the aggregate electricity generated is consumed for captive use. Therefore, to be a captive generating plant, the requirement is that it should be an electricity generating plant or station owned to the extent of 26 per cent by captive users and 51 per cent of the aggregate electricity produced in such generating plant is consumed by such users. Further, insofar as the applicability of the provisions of the Act relating open access, the functions of regulatory authorities and the duties and functions of transmission licensees and distribution licensees except to a minor extent are the same for all generating companies whether power plants set up by them are for captive use or not.
23. Section 9(2) of the Act confers a right on the person who has constructed captive generating plant, to have open access for the purpose of carrying electricity from his plant to the destination of his use, subject to availability of transmission facility as

determined by the State Transmission Utility or Central Transmission Utility. As per second proviso to Sub-section (2) of the Act, any dispute regarding the availability of transmission facility shall have to be adjudicated by State/Central Electricity Regulatory Commission. Section 86(1)(f) of the Act provides that any kind of dispute between licensee and generating company shall be adjudicated by the State Commission.

24. Thus, it may be seen that insofar as establishing electricity generating plant and the right to open access for the purpose of carrying electricity, or dispute resolution mechanism for the said purpose, there is no distinction between a generating company having generating station and captive generating company or plant set up by a person.
25. Part V of the Act contains the procedure for Inter-State/Intra-State transmission of electricity, grid standards and also duties and functions of transmission utility. Part VI deals with distribution, duties of distribution licensee and provisions with respect to electricity trader. As noticed, for distribution and trading electricity, a licence is required under Section 14 of the Act. Be that as it is, Section 39 & 40 of the Act in Part V and Section 42 in Part VI are relevant to the consideration of issue. Section 42 is already reproduced above the relevant part of part V is reproduced as under:  
**Section 39. (State Transmission Utility and functions):**  
(1).....  
(2) The functions of the State Transmission Utility shall be -  
(a) to undertake transmission of electricity through intra-State transmission system;  
(b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with -  
(i) Central Transmission Utility;  
(ii) State Governments;  
**(iii) generating companies;**  
(iv) Regional Power Committees;  
(v) Authority;  
(vi) licensees;  
(vii) any other person notified by the State Government in this behalf;  
(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;  
(d) to provide non-discriminatory open access to its transmission system for use by-  
**(i) any licensee or generating company on payment of the transmission charges ; or**  
**(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:**

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

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

XXXX

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

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

*Section 40. (Duties of transmission licensees):*

*It shall be the duty of a transmission licensee -*

*(a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;*

*(b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be;*

*(c) to provide non-discriminatory open access to its transmission system for use by-*  
*(i) any licensee **or generating company** on payment of the transmission charges;*  
*or*

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

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

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

XXX

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

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

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

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

27. *A reading of Sections 9, 39, 40 and 42 of the Act would lead to the ensuing conclusion. A person or a company is entitled to set up a power plant for his/ its exclusive use. The power generated by such captive generating plant set up by a person has to be distributed and transmitted - in a given case; by a distribution licensee or transmission licensee. These licensees are entitled to collect transmission charges or wheeling charges as the case may be including surcharges (cross subsidy surcharge & additional surcharge) from any person who is availing power from any generating companies including from persons who set up captive generating plants but surcharge for cross-subsidy is not leviable on captive generating plant. That is the reason why the Parliament thought it fit to define 'generating plant' set up by any person for his own use as captive generating plant separately. Except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant.*
28. *In view of above as far as open access and levy of open access charges is concerned, except to the extent of non-levy of surcharge for cross-subsidy, there is no distinction in law between a generating plant and captive generating plant. Therefore, petitioner being captive generating cannot claim any immunity from any of statutory charges which is otherwise not exempted by the Act. Accordingly, petitioner is required to pay additional surcharge to answering respondents.*

**RE: Effect on 'Universal Service obligation (USO)' or 'Consumerism with Distribution Licensee' post availing 'open access':**

29. *The issue regarding effect of open access on the universal service obligation or consumership of any consumer situated in the area of supply of distribution licensee came under consideration of Hon'ble APTEL in the case of petition No. 1/2006 in case of Hindalco vs WBERC. The fact of the case before Hon'ble APTEL is this that M/s Hindaco the appellant applied to the WBERC for open access to **wheel captive power** (as is being done in the instant case) from its power plant at Hirakud, Orissa to its factory at Belur under Section 9 and 42 of The Electricity Act, 2003. On principle, the Power Grid Corporation of India, West Bengal State Electricity Board and Orissa Power Transmission Corporation Limited which are the concerned utilities accorded 'No Objection' to the proposed wheeling of power by the appellant from Hirakud to Belur. The WBERC allowed open access to wheel power as applied for but at the same time the WBERC held that the appellant shall cease to be a consumer of CESC (distribution licensee of area) and its status as such vis-à-vis CESC, from which it has earlier drawn power. The Commission further held that the appellant is being granted open access cannot claim supply of backup power from CESC as a matter of right. In this judgement apart from others the following issues were framed for consideration of the Hon'ble APTEL:*
- (A) *Whether the direction of the West Bengal State Electricity Regulatory Commission that the appellant shall cease to be a consumer of CESC limited as a condition for availing open access is sustainable?*
  - (B) *Whether in terms of The Electricity Act, 2003 a consumer who applies for open access should disassociate itself with the area DISCOM?*
  - (C) *Whether the appellant has to sever its existing consumer relationship with CESC Limited, the area DISCOM for grant of open access?*
  - (D) *Whether the area DISCOM is obliged to supply standby energy to the appellant and if so, under what conditions?*
30. *Considering the various statutory provision of the Act, Hon'ble APTEL held as under:*
15. *It is convenient to take up points A to C as they overlap each other. Concedingly open access from the appellant's CPP in Orissa to its plant in Belurmah in West Bengal is an inter-State transmission, as defined in Section 2(36) of The Electricity Act 2003. There is no controversy that the appellant has applied for short term open access. For the remaining portion of the transmission facility within the State of Orissa as well as the Powergrid is concerned, already open access has been approved.*
16. *Only in respect of the section of the length of 5 KM which falls within the State of West Bengal an application was moved by appellant before the State Commission. It is pointed out by the appellant that 2 KMs out of 5 KMs length is the dedicated transmission line built up at the cost of appellant as seen from the appellant's stand.*
17. ***The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an***



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

18. In law and as per statutory provisions so long as the appellant desires to continue its relationship with the area distribution licensee and agree to abide by the stipulations, there can be no direction or compulsion to sever its contractual relationship as a consumer of the area DISCOM. In the present case, the appellant as already pointed out, had agreed to comply with the existing terms and conditions of supply and is ready to remit all the charges prescribed as a consumer of electricity to CESC Limited. It is rightly pointed out that the appellant has not sought for any variation with respect to its being a consumer of CESC for the connected load of 8.5 MW at 33 KV nor it has sought for any reduction in demand charges or energy charges or other charges consequent to open access being allowed in its favour.

19. We are to point out that Sub-Section (2) of Section 42 of The Electricity Act 2003 mandates the State Commission to introduce open access in such phases and subject to such conditions, including cross subsidies and other operational constraints, having due regard to all the relevant factors including such cross subsidies and operational constraints. Sub-Section (4) of Section 42 provides that where the State Commission permits a consumer to receive supply of electricity from a person other than the distribution licensee of its area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of its obligation to supply. Nothing in the The Electricity Act 2003 which either directs or mandates that a consumer who applies for open access should cease to be a consumer of the area DISCOM. Section 39(2) enumerates that the State Transmission Utility to provide non discriminatory open access to its transmission system for use by any consumer as and when open access is provided under Section 42(2) on payment of transmission charges.

20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply.

***Admittedly the appellant's plant in Belurmatah is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.***

***21. As already pointed out, Section 43 mandates that the area licensee shall supply power so long as the consumer remits the charges prescribed as per Tariff Notification and as provided in Section 45 of The Electricity Act 2003. Section 48 enables the distribution licensee to impose certain additional conditions when open access is permitted.***

*Section 49 which has a bearing reads thus:-*

*"49. Agreements with respect to supply or purchase of electricity.-Where the Appropriate Commission has allowed open access to certain consumers, under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."*

***22. It is to be pointed that Section 49 of The Electricity Act 2003 provides for an agreement being entered between an open access consumer and the distribution licensee for supply or purchase of electricity on such terms and conditions, including the tariff as may be agreed upon by them. Section 56 of The Electricity Act 2003 provides for disconnection of supply in default of payment by the area DISCOM, which applies to all consumers, whether the consumer has been permitted open access or not.***

***23. On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP. The appellant has unequivocally made it clear that the appellant is willing to pay the charges prescribed by the area distribution licensee including demand charges, energy charges and other charges for the connected load of 8.5 MW in the same manner as in the case of identically placed industrial consumers in the area and the appellant is ready and willing to remit the charges payable to the area distribution licensee.***

***24. There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual relationship with the area distribution licensee or shall cease to be a consumer of the area DISCOM/ Licensee.*** Section 49 of The Act provides for an agreement being entered into when open access is allowed to consumers for supply or purchase of electricity on such

terms and conditions including tariff as may be agreed upon. We do not find any justifiable reason for the direction issued by the Regulatory Commission in this respect. The West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 also do not impose such a condition. In fact, Regulation 12 of the said Regulations provides for entering into a commercial agreement with a distribution licensee and abide by various conditions relevant thereto. Regulation 13.4 also in no way provides for issue of such a direction.

**25. We are unable to appreciate the view of the Commission that the appellant cannot demand supply of back-up power from the CESC Ltd. as a matter of right** even though nothing could prevent the appellant to enter into a separate agreement for supply of back-up power on terms and conditions mutually acceptable to both. None of the provisions of The Act or the Rules framed there under or the Regulations framed by the West Bengal State Electricity Regulatory Commission has been placed before us to show that the appellant should sever its relationship as a consumer with CESC on its being granted open access. So long as the appellant is agreeable to pay the charges prescribed in this behalf to an identical industry, the appellant, an existing consumer cannot be directed to sever its relationship with area distribution licensee. The construction placed on Section 42 (3) of The Electricity Act runs counter to the very section. The object and scope of the provision has been lost sight and as an existing consumer the appellant could continue its relationship. Such a construction cannot be appreciated as it runs counter to plain meaning of the provisions of the Act. Section 42(3) enables an existing consumer of an area DISCOM Licensee requires supply of electricity from a generating company or any licensee other than the area licensee, such consumer may require the Distribution Licensee for wheeling of electricity in accordance with Regulations framed by Regulatory Commission and area DISCOM is to act as a common carrier.

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

31. That, in this context, it is also relevant to reproduce the following observations of Hon’ble Supreme Court in *Chandu Khamaru v. Nayan Malik* reported in (2011) 12 SCC 314:  
 “7...These provisions in the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every

owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee.”

32. From the perusal of the observation of Hon’ble APTEL and law laid down by the Hon’ble Supreme Court, it can be safely concluded that the answering respondent being a distribution licensee of area, has an universal service obligation towards the consumers situated in the area of supply even after availing the open access. This fact is also irrelevant that said open access is availed through captive route. Therefore, any person being owner or occupier of any premises in the area of distribution licensee, who is consuming power even through captive route, can ask as a matter of right any quantum of electricity supply from the answering respondent and answering respondent is under obligation to supply the same. It is further held that the person who availed open access shall not cease to be a consumer of the area DISCOM/ Licensee upon being granted open access. We have already discussed that **‘obligation to supply’** is the foundation of additional surcharge. Thus in the instant case additional surcharge arising out due to obligation to supply is payable by the petitioner to the answering respondent.

**RE: Effect of Section 9 of the Act on the liability of open access charges:**

33. Part of PART III Act pertains to the generation. Section 9 provides for the captive generation. The said sections are reproduced as under:

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

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

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

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

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

34. It may be seen that Section 9 enables a person or a company to construct, maintain and operate a captive generating plant with dedicated transmission lines but as per the proviso to Sub-section (1) of Section 9 of the Act, the supply of electricity from a captive generating plant through the grid shall be regulated in the same manner as the generating station or a generating company. Section 9(2) confers the right of open access to the destination of use. However all these provisions are in the nature of enabling provision to set up the plant and for evacuation of power from such plant. None of the plant dealing with the open access charges for availing such open

access. Thus, it may only be concluded that as far as levy of open access charges is concerned, respective provisions of the Act (i.e Section 39-State Transmission utility, Section 40-Transmission licensee, Section 42-Distribution licensee) are also applicable to open access availed for carrying power to the destination of use, in the same manner as applicable to the open access availed for procurement of electricity from any generating company. This view found supports from the fifth proviso to section 39 (2)(d), fifth proviso to section 40 (c) and forth proviso to section 42(2) of the Act. These provisions provide the exemption to captive generating plants from the levy of cross subsidy surcharge. Exemptions presuppose the liability, unless there is liability no exemption can be provided. Since exemptions from the levy of cross subsidy surcharge provided in these sections of the act, it can only be concluded that all other open access charges (wheeling charges, transmission charges and additional surcharge) leviable under these provisions or under any other provision of the act are payable by the person availing open access through captive route.

35. In view of above, section 9 doesn't provide any immunity to any person from the levy of any statutory charges. Accordingly reliance upon the section 9 to escape the liability of additional surcharge is misplaced. As such petitioner is liable to pay additional surcharge to the answering respondents.

**RE: Necessity of buyer-seller relationship to levy the additional surcharge under section 42(4) :**

36. That, the primary contention of the petitioner is this, since power being consumed through captive route there is no buyer seller relationship as necessary required under section 42(4) of the Act, to levy additional surcharge. This claim of the petitioner possibly based on the '**supply**' used in the section 42(4) of the Act. Relevant provision again reproduced for ease of reference:

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

37. Term '**Supply**' is defined in section 2(70) of the Act. Same is reproduced as under:  
"2(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;"

It may be seen that as per aforesaid definition, '**supply**' means sale of electricity. Relying upon this definition (although not expressly referred) petitioner is claiming that since power is being consumed through captive route, there is no sale of electricity. Hence additional surcharge is not payable by petitioner to the answering respondent.

38. Before dealing with the contention of the petitioner, it is necessary to refer the concept of distribution and distribution licensee in the Act. Under section 14 of the Act, the Commission may, on an application made to it under section 15, grant a



license to any person to distribute electricity as a distribution licensee. Distribution licensee has been defined in the Act under section 2(17) :

*"Distribution licensee means a licensee **authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply.***

Further Sub-section (1) of section 42 and sub section (1) of section 43 of the Act, imposes the following duties upon a distribution licensee:

*"Section 42 (**Duties of distribution licensee and open access**) (1): -' It shall be the duty of a distribution licensee to develop and maintain an efficient coordinated and economical distribution system in his area of supply and to **supply** electricity in accordance with the provisions contained in this Act."*

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

On reading the above-mentioned provisions one can see that according to the Act, it is the duty of a distribution licensee to develop and maintain the distribution system and also to supply the electricity in accordance with the Act. The Act confers a dual duty on the distribution licensee to be the distribution system operator and to supply electricity at the same time. The Act does not contemplate two different types of distribution licensees or distribution licenses. It is submitted that in the context of dual role of distribution licensee we have to understand the meaning of term "Supply" used in the different provision of the Act. Since dual role is being performed by the distribution licensee, in the various provision of the Act term 'supply' is also used for the activity of 'wheeling'. Meaning of 'supply' as sale of electricity cannot be considered throughout the Act. Even the definition clause cautioned us regarding possible different meaning of any term defined in the said clause depending upon the context. The relevant provision is reproduced as under:

***"Section 2. (Definitions): --- In this Act, unless the context otherwise requires,--"***

39. Considering the dual role of the distribution licensee, there may be following two combinations of duties of the distribution licensees and depending upon the context meaning of term supply would be different:

**39.1. Section 42 (1) read with Section 43:**

As per section 42(1) a distribution licensee shall develop and maintain the distribution system. Through this distribution system, distribution licensee shall supply (i.e sale) electricity to all consumers of its area of supply. Thus, in the context of supply obligation provided in section 43, meaning of term 'supply' used in section 42 (1) and section 43 (1) would be sale of electricity to consumers of area of supply.

**39.2. Section 42 (1) read with Section 42 (2) to 42 (4)**

As per section 42(1) a distribution licensee shall develop and maintain the distribution system. The said distribution system shall be used as common carrier

when any person availed open access over such system in accordance with the section 42(2) to (4). In other words in scenario of open access, distribution licensee only acts as the network operator and not the seller of electricity. Therefore, in the context of open access over distribution system term 'supply' would mean 'wheeling of electricity'. Such wheeling of electricity may or may not be the result of transaction of sale of electricity between procurer and source of supply. Thus in the context of open access meaning of term 'supply' used in section 42(4) is 'wheeling of electricity'. Therefore, based on the meaning given in definition clause it cannot be said that there is no 'supply' in case of electricity being consumed through captive route. There is certainly a 'supply' of electricity although in a different context.

40. The aforesaid interpretation is in consonance of the scheme of the Act and purpose of levy of additional surcharge. Assuming that Act doesn't permits levy of surcharges upon availing open access. In such cases distribution licensee would not be able to perform its duty of common carrier/network operator judiciously due to its already concluded contract of procurement of power to fulfil 'duty to supply on request'. Therefore, to balance the interest of the person availing open access and distribution licensee concept of surcharge introduced by the Act.

41. This, aforesaid contextual interpretation of term 'supply', found supports from the Definition of term generation given in the Act. The same is reproduced as under for ease of reference:

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

It may be seen that term '**generate**' means production of electricity for the purpose of giving '**supply**'. In other words, electricity cannot be produced except for the purpose of giving 'supply'. Accordingly, when electricity generated from a captive generating plant wheeled to the destination of use even without any sale consideration, such wheeling can be treated as 'supply' only and not otherwise.

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

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

It is stated that as per aforesaid definition of term 'supply' it is clear that 'supply' includes sub-transmission i.e 'wheeling'. Therefore this definition provided in the MP Act also supports the contextual interpretation of term 'supply' ( used in section 42(4) of the Act ) done in the foregoing paras.

43. The issue of contextual interpretation of definition clause of the Electricity Act 2003 came under consideration of Hon'ble Supreme Court in the case of The Executive

*Engineer vs M/S Sri Seetaram Rice mill Civil appeal No. 8859 of 2011. Upholding the interpretation of any term defined in the definition clause depending upon the context in which it is used in the enactment, vide order dated 20/10/2011 Hon'ble Apex Court held as under:*

*32. The expression 'means' used in the definition clause of Section 126 of the 2003 Act can have different connotations depending on the context in which such expression is used. In terms of Black's Law Dictionary (Eighth Edition) page 1001, 'mean' is - 'of or relating to an intermediate point between two points or extremes' and 'meaning' would be 'the sense of anything, but esp. of words; that which is conveyed'. The word ordinarily includes a mistaken but reasonable understanding of a communication. 'Means' by itself is a restrictive term and when used with the word 'includes', it is construed as exhaustive. In those circumstances, a definition using the term 'means' is a statement of literal connotation of a term and the courts have interpreted 'means and includes' as an expression defining the section exhaustively. It is to be kept in mind that while determining whether a provision is exhaustive or merely illustrative, this will have to depend upon the language of the Section, scheme of the Act, the object of the Legislature and its intent.*

.....  
 38. *The expression 'means' would not always be open to such a strict construction that the terms mentioned in a definition clause under such expression would have to be inevitably treated as being exhaustive. There can be a large number of cases and examples where even the expression 'means' can be construed liberally and treated to be inclusive but not completely exhaustive of the scope of the definition, of course, depending upon the facts of a given case and the provisions governing that law. In the case of K.V. Muthu v. Angamuthu Ammal [(1997) 2 SCC 53], this Court was dealing with a case under the Tamil Nadu Rent Act and the expression 'member of his family' as defined under Section 2(6-A) of that Act. Section 2(6-A) provides that 'member of his family' in relation to a landlord means his spouse, son, daughter, grand-child or dependent parents. If the principle of construction advanced by the learned counsel appearing for the respondent is to be accepted, then even in that case, the Court could not have expanded the expression 'members of his family' to include any other person than those specifically mentioned under that definition. The definition and the expression 'means', if construed as exhaustive would necessarily imply exclusion of all other terms except those stated in that Section but this Court, while adopting the principle of purposive construction, came to the conclusion that even a foster son, who is obviously not the real son or direct descendant of a person, would be included. This Court, observing that there was consensus in precedent that the word 'family' is a word of great flexibility and is capable of different meanings, held as under :*

*"While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which*

would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.

**Where the definition or expression, as in the instant case, is preceded by the words "unless the context otherwise requires", the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied."**

39. Another comparable example of such interpretation by this Court can be traced out in the case of *Union of India v. Prabhakaran Vijaya Kumar & Ors.* [(2008) 9 SCC 527] wherein it was dealing with the provisions of Section 123(c) of the Railways Act, 1989 which read as under :

"123 (c) "untoward incident" means--

(1) (i) the commission of a terrorist act within the meaning of sub-section (1) of section (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ; or

(ii) the making of a violent attack or the commission of robbery or dacoity; or

(iii) the indulging in rioting, shoot- out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or (2) the accidental falling of any passenger from a train carrying passengers."

40. As is obvious from the bare reading of the above provision, the provision used the expression 'untoward incident means' and under clause (2) of that provision 'accidental falling of any passenger from a train carrying passengers' is included. If it was to be understood as an absolute rule of law that the use of the term 'means' unexceptionally would always require an exhaustive interpretation of what is stated in or can be construed to that provision, then a person who was climbing on the train which was carrying passengers and who meets with an accident, would not be covered. However, this Court, while repelling this contention, held that by adopting a restrictive meaning to the expression 'accidental falling of a passenger from a train - carrying passengers' in Section 123(c) of the Railways Act, 1989, this Court would be depriving a large number of railway passengers from receiving compensation in railway accidents. Treating the statute to be a beneficial piece of legislation, this Court applied purposive interpretation, while observing as under :

"No doubt, it is possible that two interpretations can be given to the expression "accidental falling of a passenger from a train+ carrying passengers", the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for

*compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence, in our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose should be preferred vide Kunal Singh v. Union of India [(2003) 4 SCC 524 para 9], B.D. Shetty v. Ceat Ltd. [(2002) 1 SCC 193 – para 12) and Transport Corpn. Of India v. ESI Corpn. [(2000) 1 SCC 332]"*

**41. The above judgments clearly support the view that we have taken with reference to the facts and law of the present case. It cannot be stated as an absolute proposition of law that the expression 'means' wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be statutory provisions whose interpretation demands somewhat liberal construction and require inclusive construction. An approach or an interpretation which will destroy the very purpose and object of the enacted law has to be avoided.**

.....  
42. *The expressions 'means', 'means and includes' and 'does not include' are expressions of different connotation and significance. When the Legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of other two expressions has not been favoured by the Legislature. To put it simply, the Legislature has favoured non-use of such - expression as opposed to other specific expression. In the present case, the Explanation to Section 126 has used the word 'means' in contradistinction to 'does not include' and/or 'means and includes'. This would lead to one obvious result that even the Legislature did not intend to completely restrict or limit the scope of this provision.*

44. *In view of above as far as section 42 (4) is concern meaning of term 'supply' provided in the section 2(70) cannot be applied ignoring the contextual meaning i.e 'wheeling'.*

45. *It is submitted that since distribution licensee is duty bound to provide non discriminatory open access as network operator and at the same time has an obligation to supply on demand, levy of additional surcharge is provided to protect the interest of the remaining consumer of the area of supply, if any bulk consumer go out of the fold of said distribution licensee. Existence or non existence of any commercial relationship between procurer and other source of electricity not at all relevant for the levy of additional surcharge. If claim of petitioner is accepted, in case bulk consumer goes out of the fold of the distribution licensee through captive route, in the absence of compensation towards fixed cost in the form of additional surcharge, such fixed cost required to be borne by the remaining consumer of the distribution licensee by way of increase in their tariff. This cannot be the intention of law makers. Otherwise same would have been exempted specifically.*



46. In *Sitram Rice Mills* supra Hon'ble Apex Court discussed various principle of statutory interpretation and held that rule of purposive and contextual interpretation should be applied while doing interpretation of the statue like Electricity Act 2003. The relevant part is reproduced as under:

**"1(a) Interpretation**

10. First and foremost, we have to examine how provisions like Section 126 of the 2003 Act should be construed. From the objects and reasons stated by us in the beginning of this judgment, it is clear that 'revenue focus' was one of the - principal considerations that weighed with the Legislature while enacting this law. The regulatory regime under the 2003 Act empowers the Commission to frame the tariff, which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. We are not prepared to accept the contention on behalf of the respondent that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms. **This is a legislation which establishes a regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions of this entire regime. In our considered view, the two maxims which should be applied for interpretation of such statutes are ex visceribus actus (construction of the act as a whole) and ut res magis valeat quam pereat (it is better to validate a thing than to invalidate it). It is a settled cannon of interpretative jurisprudence that the statute should be read as a whole. In other words, its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject matter. A construction which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.**

11. .... At this stage, suffice it to note that this Court would prefer to adopt purposive interpretation so as to ensure attainment of the object and purpose of the 2003 Act, - particularly, of the provisions of Section 126 in question. We may usefully refer to the judgment of this Court in the case of *Balram Kumawat v. Union of India & Ors.* [(2003) 7 SCC 628] wherein this Court discussed various tenets of interpretation and unambiguously held that these principles could be applied even to the interpretation of a fiscal or a penal statute. This Court held as under :

**"20. Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject- matter. The rule of 'ex visceribus actus' should be resorted to in a situation of this nature.**

21. *In State of West Bengal v. Union of India* [1964] 1 SCR 371], the learned Chief Justice stated the law thus :

"The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

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25. A statute must be construed as a workable instrument. *Ut res magis valeat quam pereat* is a well-known principle of law. In *Tinsukhia Electric Supply Co. Ltd. v. State of Assam* [AIR 1990 SC 123], this Court stated the law thus :

"118. The courts strongly lean against any construction, which tends to reduce a statute to a futility. The provision of a statute must be so construed as to make it effective and operative, on the principle "*ut res magis valeat quam pereat*". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (1900) 2 Ch 352, Farwell J. said : (pp. 360- 61) "Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty."

In *Fawcett Properties Ltd. v. Buckingham County Council* [(1960) 3 All ER 503] Lord Denning approving the dictum of Farwell, J. said :

"But when a Statute has some meaning, even though it is obscure, or several meanings, even though it is little to choose between them, the courts have to say what meaning the statute to bear rather than reject it as a nullity."

It is, therefore, the court's duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and that nothing short of impossibility should allow a court to declare a statute unworkable. In *Whitney v. Inland Revenue Commissioners* [1928 AC 37] Lord Dunedin said :

"A statute is designed to be workable, and the interpretation - thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

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27. The Courts will therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. [See *Salmon v. Duncombe* (1886) 11 AC

827]. Reducing the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that the Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. [See *BBC Enterprises v. Hi-Tech Xtravision Ltd.*, (1990) 2 All ER 118]."

12. Further, in the case of *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity* [(1979) 4 SCC 85], this Court held as under :

"Exposition ex visceribus actus is a long recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation. For instance, the use of the - word "may" would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, "of an ineffectual angel beating its wings in a luminous void in vain". If the choice is between two interpretations", said Viscount Simon L.C. in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* [(1940) A.C. 1014] :

'the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result'."

.....

**33. 'Purposive construction' is certainly a cardinal principle of interpretation. Equally true is that no rule of interpretation should either be over-stated or over-extended. Without being over-extended or over-stated, this rule of interpretation can be applied to the present case. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent.**

**34. The precepts of interpretation of contractual documents have also undergone a wide ranged variation in the recent times. The result has been subject to one important exception to assimilate the way in which such documents are interpreted by judges on the common sense principle by which any serious utterance would be interpreted by ordinary life. In other -words, the common sense view relating to the implication and impact of provisions is the relevant consideration for**

*interpreting a term of document so as to achieve temporal proximity of the end result.*

*35. Another similar rule is the rule of practical interpretation. This test can be effectuatedly applied to the provisions of a statute of the present kind. It must be understood that an interpretation which upon application of the provisions at the ground reality, would frustrate the very law should not be accepted against the common sense view which will further such application.*

*36. Once the court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind. We have already indicated that keeping in view the legislative scheme and the provisions of the 2003 Act, it will be appropriate to adopt the approach of purposive construction on the facts of this case."*

47. *In view of above statutory provisions, judicial pronouncement and the purpose sought to achieve by the levy of additional surcharge. Petitioner M/s Porwal auto is liable to pay additional surcharge to the answering respondent.*

**RE: Liability of Additional surcharge vis a vis Liability of wheeling charge:**

48. *It is now a settled legal position that additional surcharge can be levied even in the absence of levy of wheeling charges (Ref: Order of the Hon'ble MPERC in the review petition No. 02 of 2019). However, even it is assumed (but not admitted) that additional surcharge is leviable on the charge of wheeling; in the instant case additional surcharge is payable as petitioner is liable to pay and paying the charges of wheeling without any demur.*
49. *As per section 42(4) of the Act nomenclature of the levy is 'additional surcharge on charges of wheeling'. Therefore, it is necessary to find out the meaning of 'surcharge'. In this regard kind attention is drawn towards the judgment in the matter of Sarojini Tea Co. (P) Ltd. v. Collector of Dibrugarh, Assam and Anr. (1992) 2 SCC 156 in which Hon'ble Court has considered various decisions relating to the meaning of surcharge. The relevant part of the said judgment is reproduced as under :*
10. *Since the question for consideration is whether the surcharge levied under the Surcharge Act can be held to be land revenue, it is necessary to examine the nature of the said levy. According to the Shorter Oxford English Dictionary the word surcharge stands for an additional or extra charge or payment. In Bisra Lime Stone Co. Ltd. v. Orissa State Electricity Board (1976) 2 SCC 167 after referring to the said definition, this Court had observed: (SCR pp. 310-11 : SCC p. 170, para 11) Surcharge is thus a superadded charge, a charge over and above the usual or current dues.*
11. *In that case the Orissa State Electricity Board had imposed a uniform surcharge of 10 per cent on the power tariff. It was argued that surcharge*

was unknown to the provisions of the Electricity (Supply) Act, 1948 and the Electricity Board had no power under the said Act to levy a surcharge. **This Court negated the said contention and in that context, after explaining the meaning of the expression surcharge, it was observed: (SCR p. 311 : SCC p. 170, para 11) Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act.**

12. Similarly, in *CIT v. K. Srinivasan* (1972) 4 SCC 526 a question arose whether the term income tax as employed in Section 2 of the Finance Act, 1964, would include surcharge and additional surcharge whenever provided. This Court while tracing the concept of surcharge in taxation laws of our country, has observed: (SCR p. 312 : SCC p. 528, para 5) The power to increase federal tax by surcharge by the Federal legislature was recommended for the first time in the report of the committee on Indian Constitutional Reforms, Vol. I Part I. From para 141 of the proposals it appears that the word surcharge was used compendiously for the special addition to taxes on income imposed in September 1931. The Government of India Act, 1935, Part VII, contained provisions relating to finance, property, contracts and suits. Sections 137 and 138 in Chapter I headed finance provided for levy and collection of certain succession duties, stamp duties, terminal tax, taxes on fares and freights, and taxes on income respectively. In the proviso to Section 137 the federal legislature was empowered to increase at any time any of the duties of taxes leviable under that section by a surcharge for federal purposes and the whole proceeds of any such surcharge were to form part of the revenue of the federation. Sub-section (3) of Section 138 which dealt with taxes on income related to imposition of a surcharge.
13. It was further observed at page 315 of the report: (SCR p. 315 : SCC p. 530, para 10) The meaning of the word surcharge as given in the Websters New International Dictionary includes among others to charge (one) too much or in addition also additional tax. Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge.
14. In *C.V. Rajagopalachariar v. State of Madras* AIR 1960 Mad 543: (1959) in the context of the Madras Land Revenue Surcharge Act, 1954 and the Madras Land Revenue (Additional Surcharge) Act, 1955, it has been laid down: [AIR p. 545, para (5)] **The word surcharge implies an excess or additional burden or amount of money charged. Therefore, a surcharge of land revenue would also partake the character of land revenue and should be deemed to be an additional land revenue.** Although Section 4 of the two enactments referred to above only deems it to be recoverable as a land revenue it is manifest that the surcharge would be a part of the land revenue. The effect of the two Acts would be, therefore, to increase the land revenue payable by a landholder to the extent of the surcharge levied. If therefore, a surcharge levy has been made, the government would be enabled to collect a



higher amount by way of land revenue from a ryotwari pattadar than what was warranted by the terms of the previous ryotwari settlement.

15. The said decision was approved by this Court in *Vishweshwari Thirtha Swamiar v. State of Mysore* (1972) 3 SCC 246. In that case this Court was considering the question whether the Mysore State legislature was competent to enact the Mysore Land Revenue (Surcharge) Act, 1961. After examining the nature of the levy the Mysore High Court had held that the so-called land revenue surcharge was but an additional imposition of land revenue or a land tax and fell either within Entry 45 or Entry 49 of the State List. This Court agreeing with the view of the High Court held that the surcharge fell squarely within Entry 45 of the State List, namely, land revenue. It was observed: (SCC pp. 249-50, paras 10 and 12) The legislation is but an enhancement of the land revenue by imposition of surcharge and it cannot be called a tax on land revenue, as contended by the learned counsel for the appellant. It is a common practice among the Indian legislatures to impose surcharge on existing tax. Even Article 271 of the Constitution speaks of a surcharge for the purpose of the Union being levied by way of increase in the duties or taxes mentioned in Article 269 and Article 270. It seems to us that the Act clearly levies land revenue although it is by way of surcharge on the existing land revenue. If this is so, the fact that the surcharge was raised to 100 per cent of the land revenue on the wet and garden land and 75 per cent of the land revenue in respect of dry lands, subject to some minor exceptions, does not change the nature of the imposition.
16. **From the aforesaid decisions, it is amply clear that the expression surcharge in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. A surcharge on land revenue is an enhancement of the land revenue to the extent of the imposition of surcharge. The nature of such imposition is the same viz., land revenue on which it is a surcharge.**

From the perusal of the aforesaid various judgment of Hon'ble Supreme Court, it may be seen that surcharge is basically over and above main levy. Further nature of surcharge remains the nature of main levy. On this analogy in the instant case following conclusion may be drawn:

- a. In the instant case main levy is 'Wheeling Charges'.
- b. 'Additional Surcharge' is additional imposition on the 'wheeling charges'
- c. Additional surcharge results enhancement of 'wheeling charges'.
- d. Nature of 'additional surcharge' is of 'wheeling charges' on which additional surcharge imposed.

50. It is submitted that petitioner is not disputing the levy of wheeling charges for use of distribution system for carrying the electricity to the destination of use, Therefore, additional wheeling charges in the form of 'additional surcharge' are also payable by the petitioner.

**RE: Judicial pronouncement regarding levy of additional Surcharge in case of open access through captive route:**

51. That, the issue of liability of additional surcharge of the captive consumer availing electricity from the captive generating plant came before consideration of this Hon'ble Commission in the Petition No. 02/2007 in the matter of M/s Malanpur Captive Power Limited, Mumbai Vs MP Madhya KshetraVidyutVitaran Co. Ltd. Bhopal. After considering the provision of the Section 42(4) of the Act and clause 8.5.4 of the National tariff policy, this Hon'ble Commission vide order dated 22/05/2007 has upheld the levy of additional surcharge on the electricity availed through captive route. The relevant part of the said order is reproduced as under:

17. The Commission is not in agreement with the argument of the respondent that he is entitled to recover the cross subsidy surcharge as per provisions of Section 42(2) of the Act. It is provided in the 4th proviso of Section 42(2) that such charge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use. Besides, the meaning of the words "primarily for his own use" has been made clear in Rule 3 as mentioned above. Therefore, the respondent is not entitled to recover cross subsidy surcharge under section 42(2) of the Act in this case. The petitioner is a generating plant qualified as a captive generation plant within the meaning of Rule 3 and as such no License is required to supply power from captive generating plant through dedicated transmission line to its captive users. The Commission agrees with the respondent that as per Section 42(4) of the Act, where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. However, the Commission would like to point out that clause 8.5.4 of the National Tariff Policy notified by the Central Government on 6th January 2006 (in terms of Section 3 of the Act) states as under:-

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

While the Commission would consider levying additional surcharge on wheeling charges, yet it is the responsibility of the licensee to demonstrate that they have an obligation in terms of existing power purchase commitments or they bear fixed costs consequent to such a contract. Hence, the Commission directs the licensee to demonstrate such commitments in order to levy additional surcharge on wheeling charges in terms of Section 42(4) of the Act.

18. ***Therefore, the Commission concludes from the combined reading of Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules, that captive generating plant and dedicated transmission line can be constructed, maintained and operated by a person for generation of power and supply to its captive users. However, the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard.***
52. *Petitioner has placed reliance upon the judgment of Hon'ble APTEL in the Appeal No. 311 of 2018 (M/s JSW Steel Ltd Vs MERC) and Appeal No 315 of 2018. In this regard it is stated Hon'ble Supreme Court in the civil appeal No. 5074-5075 /2019 vide order dated 01/07/2019 has already granted stay on the operation and implementation of the said judgment. Copy of the said judgment of Hon'ble Supreme Court enclosed as **Annexure- R3**. Accordingly, as of now the law laid down by the Hon'ble APTEL in the said petitions cannot be said as good law.*
53. *It is further stated that the judgment given in the 'JSW Steel Ltd' cannot be considered as binding precedent, as the same has delivered without noticing the earlier judgment of coordinate bench of Hon'ble APTEL in HINDALCO Industries Limited Vs WBERC supra, in which Hon'ble APTEL upheld the levy of additional surcharge on the electricity consumed through captive route. Para 11 of the said judgment recorded the finding of the West Bangal Electricity Regulatory Commission which had been challenged by the consumer before APTEL. The said para is reproduced as under:*
11. ***The Commission determined the wheeling charges at 83.54 paise/kwh and the same shall be subject to appropriate annual revision. The Commission also concluded that the HINDALCO is liable to pay additional surcharge and the distribution licensee has been directed to submit a report to the Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer from captive route and thereafter quantum of additional surcharge payable by the open access customer shall be assessed and determined.***

*It may be seen that Hon'ble WBERC has upheld the levy of additional surcharge on the migration of open access customer through captive route. After discussing the provision of the Act and universal service obligation of the Discom, Hon'ble APTEL has framed the question and answered the same with regarding to levy of additional surcharge in the para 14 and 28 of the said judgment in the following manner:*

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

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

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

*It may be seen that Hon'ble APTEL has upheld the order of the Hon'ble WBERC levying the additional surcharge on the electricity consumed through captive route. It is settled legal position that a coordinate bench of same strength cannot take a contrary view than what has been earlier held by another coordinate bench.*

54. *With regard to precedent value of judgement which has been given without noticing the earlier judgment of coordinate bench, Five judge constitution bench of Hon'ble Apex Court in SLP (Civil) NO. 25590 of 2014 vide order dated Oct 31, 2017 held as under:*

- (i) *The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.*
- (ii) *As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.*

*Since the later judgement in the appeal No. 311 & 315 of 2018 has not taken note of earlier binding decision given in the Hindaco case (both two member bench judgement), the decision given in the appeal No. 311 & 315 of 2018 is not a binding precedent.*

55. *Petitioner has also placed the reliance upon the judgment of the Hon'ble Commission in the petitioner No. 38 of 2018. The reliance upon the said judgment is also misplaced, as in the said judgment Hon'ble Commission has merely held that since co-generation plant is not a captive generating benefit of exemption available under fourth proviso to section 42 (2) (i.e cross subsidy surcharge) shall not be available. Thereafter petitioner in that petition has filed a review petition No. 02 of 2019. Vide order dated 27/03/2019 Hon'ble Commission has held that additional surcharge shall be applicable even there is no use of distribution system.*
56. *By Referring the report of forum of regulator issued in the December 2017, it is sought to be established by the petitioner that FoR has held that additional surcharge cannot be levied on the captive consumers. In this regard it is submitted that petitioner has only referred the deliberation held in the working group formed by the FoR in this regard whereas no such recommendation has*

been made by the FoR in its report. The relevant part of the very same report is reproduced as under:

*"7. Conclusions and Recommendations*

*7.1 Recommendations on Barriers to Open Access*

*.....*

*7.1.2 Examination of Rules on captive generation and their impact on implementation of Open Access were also discussed. The FOR observed that suitable changes in the Rules related to Captive consumption were planned to be introduced by the Ministry so as to manage the issues related to captive consumption and to make up for the concerns of DISCOMS.*

*7.1.3 The suggestions of the FOR that have emerged after the analysis data of 4-5 States are:*

*a. Need for uniform methodology for the determination of various charges such as OA charges, Cross Subsidy Surcharge and additional surcharge.*

*b. Leverage technology solutions and automate processes for NOC issuance, energy scheduling and energy settlement.*

*c. Conduct impact assessment for DISCOMS as well as OA users*

*7.2 Recommendations on the Consultative Paper of the Ministry of Power*

*7.2.1 Issue1:-Frequent shifting of open access consumers:-*

*It is necessary to have a schedule for Open Access Consumers so that DISCOM can easily schedule power. Members agreed that the measures taken by Rajasthan Electricity Regulatory Commission as also that suggested in consultation paper (that Open access customers should be required to schedule power for at least 24 hours whenever they seek open access) is acceptable. It is however suggested that Open Access Consumers should schedule minimum continuous 8 (eight) hours of supply through Open Access.*

*7.2.2 Issue 2:- Cross Subsidy Surcharge (CSS)*

*.....*

*7.2.3 Issue 3- Additional Surcharge*

*The proposal suggested in the Consultation Paper to have three components of Additional Surcharge to fully recover the losses due to stranded capacity and regulatory assets is accepted.*

*....."*

*It may be seen from the aforesaid recommendation and conclusion part of the report that there is no such recommendation of FoR regarding non recovery of additional surcharge from captive consumer as sought to be claimed by the petitioner. As against the claim of the petitioner FoR emphasise the need of determination of the additional surcharge in such a manner so as to fully recover the losses of the Discoms. Even otherwise FoR is merely a coordination forum constituted under section 166 (2) of the Act. Accordingly recommendation of FoR cannot override the express provision of the Act or FoR cannot subsume the jurisdiction of this Hon'ble Commission regarding determination of the open access charges for all the open access consumer irrespective of status.*

57. *Order of the Maharashtra Electricity Regulatory Commission referred by the petitioner is not at all relevant as this Hon'ble in the petitioner No. 02 of 2007 supra*



*categorically held that additional surcharge shall be applicable even in case of captive consumption.*

58. *In view of above as held by this Hon'ble Commission (in petition 02 of 2007) and Hon'ble APTEL in (Appeal No 01 of 2006 Hindalco Case), petitioner is liable to pay additional surcharge to answering respondent.*

***RE: Provision of regulation/tariff order prevailing in the state of Madhya Pradesh and maintainability of challenge in the present proceedings:***

59. *The Hon'ble MPERC in exercise of power conferred by the Act of 2003 has notified the MPERC (Terms and Conditions for Intra State Open Access in Madhya Pradesh) Regulations, 2005 (Herein after referred as 'OA Regulation 2005') and subsequent amendment thereof. The OA Regulations, 2005 provides as under::*

*"Open Access Customer" means a person permitted under these regulations to receive supply of electricity from another person other than the distribution licensee of his area of supply, or a generating company (including captive generating plant) or a licensee, who availed of or intends to avail of open access;*

***3: ELIGIBILITY FOR OPEN ACCESS AND CONDITIONS TO BE SATISFIED***

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

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

***13: CHARGES FOR OPEN ACCESS***

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

.....  
.....

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

.....

60. *Aforesaid provision of OA Regulations 2005 makes it abundantly clear that each open access consumer (including the Captive Generating plant) is liable to pay the open access charges prescribed by the Hon'ble MPERC. It is also pertinent to mention that captive generating plant specifically included in the definition of open access customers. Further additional surcharge is defined as one of the charges for open access.*

61. *Hon'ble MPERC vide tariff order of FY 2017-18, FY 2018-19 and FY 2019-20 has approved the additional surcharge for all open access consumers and no exemption has been provided to consumers availing power through their captive generating plant. The relevant part of the tariff order FY 2017-18 is reproduced as under:*  
*".....3.29 The Commission has thus determined the additional surcharge of Rs 0.646 per unit on the power drawn by the Open Access consumers from the date of applicability of this Retail Supply Tariff Order."*  
*Similar provision exists in the subsequent tariff orders.*
62. *It is further submitted that neither the order of MPERC in the petition no. 02 of 2007 nor aforesaid tariff orders approving additional surcharge on all the open access consumer has been challenged by any consumer, accordingly these orders has attained finality in this regard. Further these orders, particularly tariff order cannot be challenged in the present proceedings initiated under Section 42, Section 86(1)(a) and 86(1)(e).*
63. *In view above discussion, particularly regulation and orders of MPERC prevailing in the state of Madhya Pradesh, petitioner is liable to pay additional surcharge to the answering respondent.*

#### **Prayer**

***In the light of the aforementioned facts and circumstances of the present case, it is therefore most respectfully prayed that:***

- i) Petitioner not deserves for any interim relief as petitioner failed to establish any prima facie case or balance of convenience in its favour. Further petitioner itself approached this Hon'ble Commission after expiry of period of two years after rejection of its representation by the answering respondent.***
- ii) Petition filed by the petitioner is devoid of merit; therefore same may please be dismissed.***
- iii) Condone any inadvertent omissions/errors/shortcomings and permit the answering respondent to add/change/modify/alter this filing and make further submissions as may be required at later stage.***

**9.** The petitioner submitted the following in its rejoinder to the above reply filed by the Respondent No.1:

- 1. That subsequent to filing of the Petition hearing on admission was fixed on 3.1.2020 and Petition was duly admitted by the Hon'ble Commission vide order dated 3-4<sup>th</sup> January 2020. The petitioner was directed to add M.P. Power Management Co. Ltd Jabalpur (MPPMCL) also as one of the Respondents in the subject matter. Copy of the order is annexed and marked as **Annexure P-10**.***
- 2. The Respondent MPPKVVCL has accordingly filed their reply to the Petition and in rejoinder to the said reply the petitioner humbly states as under ;***

- 2.1 In reply to para 1-4 the Petitioner humbly submits that the contents of the said paras are formal in nature and needs no reply. That it is not disputed by the Respondent in their reply that the Petitioner owns a Captive Generating Plant and consumes the energy produced from the said Captive generating Plant for its own use, there is no supplier other than licensee of the area.
- 2.2 In reply to para 5 the Petitioner submits that the Respondent has mis interpreted by stating that Hon'ble Commission vide clause 12.2 of 7<sup>th</sup> amendment dated 17/11/2017 of regulation RG 33 (I) imposed "additional surcharge on wheeling on Captive Generators " in fact on bare perusal of the said clause 12.2 under 7<sup>th</sup> amendment it can be seen that it directs wheeling charges, Cross subsidy surcharge , additional surcharge on the wheeling charges and such charges , if any , under section 42 of the Electricity Act 2003 shall be applicable at the rate as decided by Commission in **retail supply tariff**.
- 2.3 Additional surcharge on Captive generators were not imposed even prior to said regulation, as is clear from Hon'ble Commission's various order for reference in case no 08/2008 dated 18/3/2008, 09/2008 dated 18<sup>th</sup> March 2008, and Petition No.01 of 2009 dt 19/2/2009 ( Copy annexed as **Annexure P-11** ) , relevant para 7 of reproduced below :-

"The Commission heard both the parties. Having considered the submissions made by both the parties, the Commission grants permission to the petitioner for wheeling of energy generated from his WEGs located at location no. 23 and 24 in the windfarm at Jamgodrani, Distt. Dewas to his works at the Hind Spinners (Division of the Hind Syntex Ltd.) Pillukhedi, Dist Rajgarh for self-use on the condition of payment of 2% wheeling charges, line rent and reactive charges subject to the condition of revision from time to time, for the balance period of 8 years of plant life i.e. w.e.f. 29/03/2008 to 28/03/2016.

The Commission also directs the petitioners to execute a fresh tri-party PPA for wheeling of power to be approved by the Commission and power purchase agreement on the terms and conditions as mentioned in the above mentioned tariff order.

The Commission directs the respondent M.P. Tradeco to submit the draft of tri-party agreement for wheeling of power within a month.

The PPA in this case shall be made effective from 29<sup>th</sup> March 2008 and credit of power fed into the grid shall be allowed by the concerned Discom w.e.f. 29/03/2008.

The Commission also grants permission to the petitioner to sell its surplus power, if any, to the M.P. Tradeco. at the rate determined in the tariff order dated 21/11/2007. The petitioner shall apply to the Nodal Officer for open access as per the regulations. The above permission is subject to the following conditions:-

The petitioner shall comply with the provisions of the Act and Regulations, and the directions given by the Commission in its tariff order mentioned above.

*The Commission is entitled to impose other terms and conditions from time to time as it considers appropriate."*

*Hence Respondent contention that Hon Commission imposed "addl surcharge on wheeling of Captive generators" is wrong.*

*2.4 That the Petitioner further submits that FORUM OF REGULATORS in "REPORT ON OPEN ACCESS DECEMBER 2017 in para 3 has state as under :*

*"Para 3. Deliberations of the FOR Working Group: 1st Meeting-As per clause 2.5 The FOR in its 62nd Meeting held on 15 December, 2017 at New Delhi, deliberated on the Report of the Working Group and endorsed the Report of the Working Group on Open Access.*

*c) Additional Surcharge: [ ] An open access consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge in addition to wheeling charges and cross-subsidy surcharge, to meets the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-section (4) of Section 42 of the Electricity Act 2003. [ ] Additional surcharge shall not be levied in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.*

*2.5 . In reply to para 6 of the reply it is submitted that the action of the Respondent 1 was dehors the provisions under Section 9 ( 2 ) of The Electricity Act 2003 .*

*Further in CASE No. 23 of 2017 before the MERC Mumbai Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) has filed a Petition on 25 January, 2017 citing Regulations 36 and 37 of the MERC (Distribution Open Access) Regulations ('DOA Regulations'), 2016 and Rule 3 of the Electricity Rules, 2005 seeking in-principle approval to a pre-condition of furnishing Bank Guarantee/Revolving Letter of Credit as a payment security mechanism, equivalent to the Cross Subsidy Surcharge (CSS) and Additional Surcharge applicable to an Open Access consumer, from an entity which claims to be a Captive or Group Captive Power Plant (CPP/ GCPP) before grant of Open Access. The said case was disposed off vide order dated 17 January, 2018*

*Relevant part of the order is reproduced below:*

*".....in its Judgment in M. U. Sinai Vs Union of India (1975) 2 SCR 640....."*

*11.8 The Supreme Court has held that the objects of a statute cannot be defeated in an indirect manner. This principle applies fully to the present matter. When the Principal Act (EA, 2003) itself exempts CPP users from any surcharges, the demand for Bank Guarantee or Letter of Credit in advance as a security mechanism amounts to indirectly charging the CPP Users, which defeats the very object of the Act.*

11.9 The objectives of stipulating liberal provisions, i.e. exemption to Captive Users (small and medium industries), are cost-effectiveness, fast and efficient growth of industry and creation of employment opportunities. Hence, if the Commission allows the present Petition, the very object of the provisions of the EA, 2003 will be defeated. It is a known fact that the power sector is facing financial constraints and other challenges. Allowing this Petition would add a further financial burden on CPP Users which will hamper industry growth and creation of employment opportunities and ultimately defeat the legislative intent.

11.10 The grounds are contradictory to each other, untenable and baseless. In ground (a), MSEDCL states that, if the CPP user fails to comply with Rule 3 of the Electricity Rule, 2005, the Distribution Licensee may face the brunt of loss of CSS and Additional Surcharge; whereas in ground (d), it states that, in case of failure to comply with Rule 3, the CSS and Additional Surcharge will be levied on the captive consumers of such entity.

11.11 In case any consumer fails to pay a bill to MSEDCL, appropriate remedies, including disconnection of supply, are provided for under the EA, 2003. Therefore, it is not the case that MSEDCL is remediless in case a Captive User fails to satisfy the criteria under the Electricity Rules, 2005.

Moreover, the contention of MSEDCL that, in the present regime, deliberate manipulation in complying with the criteria set out under Rule 3 leads to unwarranted litigation also does not support its case because, in the proposed scheme, litigation regarding invocation of Bank Guarantee, etc. will also arise, apart from the litigation pertaining to adjudication of the status of CPP Users.....

In reply

12.3 The Electricity Rules, 2005, define the term "Captive User" as a person who avails electricity for his own use from his CPP. Further, the Captive User and the CPP have to comply with the conditions specified in Rules 3(1) (a), which are that the Captive Users have to own a minimum of 26% of the equity share capital, and consume a minimum of 51% of the electricity generated by the CPP. Therefore, if these conditions are fulfilled, the person availing electricity is termed as a "Captive User" and not a "consumer" as per Section 2(15) of the EA, 2003, thereby being exempt from payment of CSS and Additional Surcharge under Section 42(4).

12.4 Rule 3 further provides that, if a Captive User defaults in fulfilling the conditions specified in Rule 3(1)(a), such person is deemed to be a consumer availing electricity from a Generating Plant (Independent Power Producer (IPP)). In such an event, the consumer has to pay CSS in accordance with the 4th proviso of Section 42(2) of the EA, 2003. Therefore, unless a Captive User fails to meet the conditions in Rule 3 of the Electricity Rules, 2005, it is a distinct consumer entity as compared to any other consumer falling within Section 2(15) of the EA, 2003.



12.5 Hence, a Captive User has been envisaged as a special category of consumer which is beyond the jurisdiction of the Commission qua imposition of any tariff or any other financial condition

12.6 A Captive User can only be imposed with any levy or Regulation which is strictly permitted by the EA, 2003, and not otherwise. Further, the Legislature has consciously provided that a Captive User is on a completely separate footing with the sole aim of incentivizing or promoting industries to develop their own CPPs so that the burden on the Distribution Licensees is reduced, and the industries are able to secure their energy needs more efficiently and cheaply than the rates at which a Distribution Licensee provides power.

12.7 There is no provision which gives powers to the Commission to impose any restrictions or levy or to make any Regulations for Captive Users. In other words, by virtue of the Electricity Rules, 2005, the Regulatory Commissions cannot regulate Captive Users in any other manner whatsoever;

12.8 The Legislature has consciously created the Electricity Rules, 2005, through Section 176, so as to provide for regulation of Captive Users, and not given these powers to the Commissions to regulate.

12.9 Since Captive Users are a separate category of consumers falling outside the scope of Section 2(15) of the EA, 2003, as per the proviso to Section 86(1) (a) such Captive Users are only subject to the provisions relating to CSS and wheeling charges;

12.10 As per the 4th proviso of Section 42(2), Captive Users are exempted from payment of CSS. As per the 1st proviso of Section 42(2), they are only liable to pay wheeling charges if the Transmission/Distribution System of a Licensee is used for wheeling of power. Hence, the Regulatory Commission have been expressly barred from exercising any jurisdiction over Captive Users, other than levy of wheeling charges, as provided under the 1st proviso of Section 42(2) read with the proviso of Section 86(1)(a). The Regulatory Commissions and Distribution Licensees are, at best, are only

enabled to verify, at the end of a financial year, whether a CPP has maintained its captive status. It is only when the Plant loses its captive status (by defaulting on the conditions specified under Rule 3(1)(a)) that the role of Regulatory Commissions and Distribution Licensees comes into play with respect to imposition of CSS as per the 4th proviso of Section 42(2) of the EA, 2003.

12.11 In view of the above, the present Petition is beyond jurisdiction of the Commission as such directions cannot be issued keeping in mind the provisions and scheme of the EA, 2003 and the Electricity Rules, 2005. When, except for wheeling charges, these do not envisage any other requirement for a Captive User to avail Open Access from a Distribution Licensee to source power from its own CPP, there can be no requirement of furnishing any Bank Guarantee/Revolving Letter of Credit.

### **Commission's Analysis and Ruling**

13. MSEDCL has proposed that Group CPPs and Inter-State CPPs furnish a Bank Guarantee or a Revolving Letter of Credit as payment security equivalent to the CSS, Additional Surcharge, etc. that would become payable if they are eventually found not to have met the CPP criteria, as a pre-condition for granting Open Access. It has now excluded Intra-State non-Group CPPs from its proposal. MSEDCL is also not pressing for CPPs not to be allowed STOA.

14. MSEDCL has justified such a payment security mechanism as follows: i. Earlier disputes regarding CPP status determination have gone upto the Supreme Court, result in delay in the recovery of CSS and Additional Surcharge by MSEDCL and a corresponding financial burden on consumers of the Distribution Licensee such as MSEDCL. ii. The shareholding pattern of captive consumers of Group CPPs keeps on changing. Hence, at the end of financial year when the CPP status of the Generator is determined, MSEDCL has to follow up with each of its consumers for recovery of CSS and Additional Surcharge in case they fail to satisfy the CPP criteria in the Electricity Rules, 2005. iii. Manipulation is observed in showing compliance with the criteria prescribed in the Rules, leading to unwarranted litigation and causing wrongful loss to the Distribution Licensee.

15. The Commission notes that, under the 4<sup>th</sup> Proviso to Section 42 (2) of the EA, 2003 governing the provision of Open Access by Distribution Licensees, CPP Users are not liable to payment of CSS: "...such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use." As explained most recently in the MSEDCL Multi-Year Tariff (MYT) Order dated 3 November, 2016 in Case No. 48 of 2016, CPP Users are also not required to pay Additional Surcharge, if any. Accepting MSEDCL's proposal would amount to requiring a payment security at the initial stage of giving permission for Open Access instead of awaiting the CPP status verification after the close of the year, notwithstanding these statutory exemptions...."

2.6 It is submitted that levy of addition surcharge on wheeling is also contrary to provision under clause 5.2.24, 25, 26 of the National Electricity Policy Dated the 12th, February, 2005 which provides for cost effective power for small and medium industries through captive generation.

2.7 .In reply to para 7 of the reply it is submitted that the Respondent have decide the representation without applying the relevant provisions of the Electricity Act,2003 .

2.8 .In reply to para8 it is submitted that the contents are matter of record and the same needs no comments however pursuant to the order of the Hon'ble Commission copy of the petition was served to the M.P.Power trading Corporation ltd. They are yet to file the reply. The Petition was admitted by the order of the Hon'ble Commission.

2.9 .In reply to para 9 and 10 are formal in nature and needs no comments.

2.10 In reply to para 11 it is submitted that the Respondent has completely misunderstood the entire concept of the Captive Generators and the provision of Section 9 of the Electricity Act,2003.

2.11 In reply to para 12-17 it is humbly submitted that the Respondent has misinterpreted Section 42 of the Electricity Act, 2003 with regard to CONSUMER as defined under section 2 (15) of the Electricity Act and Captive Generating plant CGP ( section 2 (8 ) of the Electricity Act, 2003). As per section 42 ( 2) of the Act, State commission shall introduce open access in such phases and subject to such conditions ( including cross subsidies, and other operational constraints ) as may be specified within ONE YEAR of the appointed date by it and in specifying the extent of open access in successive phases Provided that (such open shall be allowed on payment of a surcharge )in addition to charges for wheeling as determined by State commission .

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

In lieu of section 42 ( 2) of the Act, Hon'ble Commission notified Open Access regulation 2005 on dated 24th June 2005.

However as per section 9 (2) of the Act "Every person , who has Captive Generating Plant and maintains and operates such plant, shall have the right to open access for the purpose of carrying electricity from his Captive Generating Plant to the destination of its use"

Thus provision for open access for a Consumer and for a Captive Generating Plant are quiet different in the Act.

2.12 It is further submitted that The Electricity Rules, 2005, define the term "Captive User" as a person who avails electricity for his own use from his CPP. Further, the Captive User and the CPP have to comply with the conditions specified in Rules 3(1) (a), which are that the Captive Users have to own a minimum of 26% of the equity share capital, and consume a minimum of 51% of the electricity generated by the CPP. Therefore, if these conditions are fulfilled, the person availing electricity is termed as a "Captive User" and not a "consumer" as per Section 2(15) of the EA, 2003, thereby being exempt from payment of CSS and Additional Surcharge under Section 42(4).

- 2.13 Further Respondent has also ignored clause 5.2.24, 5.2.25 and 5.2.26 of the National Electricity Policy the same are reproduced below, which clearly says that provision with respect to Captive Generating Plant have been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment.

*“Captive Generation*

*5.2.24 The liberal provision in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.*

*5.2.25 The provision relating to captive power plants to be set up by group of consumers is primarily aimed at enabling small and medium industries or other consumers that may not individually be in a position to set up plant of optimal size in a cost effective manner. It needs to be noted that efficient expansion of small and medium industries across the country would lead to creation of enormous employment opportunities.*

*5.2.26 A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer a sizeable and potentially competitive capacity that could be harnessed for meeting demand for power. Under the Act, captive generators have access to licensees and would get access to consumers who are allowed open access. Grid inter-connections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid. Towards this end, non-conventional energy sources including co-generation could also play a role. Appropriate commercial arrangements would need to be instituted between licensees and the captive generators for harnessing of spare capacity energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant”*

***RE; Duties of distribution /transmission licensee in contest of open access towards the “CGP vis a vis a “ Non CGP/ Generating company”***

- 2.14 In reply to para 18-29 the Petitioner humbly submits that only difference between the two as projected by the Respondent in their reply is not levy of surcharge for cross subsidy on Captive Generating Plant. It is denied that the Act does not make any distinction between a generating company and captive generating company. Tariff of a Captive Generating Company, it appears that Respondent has overlooked very important and vital provisions under section 61 of the Act on Tariff Regulations and section 62 Determination of tariff. The said provisions are reproduced below :-

*“PART-VII TARIFF Section 61. (Tariff regulations):*

*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- (e) the principles rewarding efficiency in performance;*
- (f) multi year tariff principles;*
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]*
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
- (i) the National Electricity Policy and tariff policy: Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.*

*Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

*(a) supply of electricity by a generating company to a distribution licensee:  
Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*

*(b) transmission of electricity ;*

*(c) wheeling of electricity;*

*(d) retail sale of electricity:*

*Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.*

*(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*



*(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*

*(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified*

*Section 63. (Determination of tariff by bidding process):*

*Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*

*The cost of retail power supply for any category of consumer is determined under Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, (First Amendment) Regulations 2015 {RG-35 (II) of 2015}, notified on 7th December, 2018. (hereinafter referred to as the Tariff Regulations or Regulations)*

*It is thus submitted that under the Act definition of CGP and Generating plant are different, duties are different, CGP are small and medium scale plants (as defined under national electricity policy para 5.2.24, 5.2.25 and 5.2.26 ) and that provision with respect to CGP have been made with a view to not only securing reliable , quality and cost effective power but also to facilitate creation of employment. Whereas Generating plants have duties as defined under Section 10 of the Electricity Act. Even CERC REC regulations 2016 treat CGP differently than independent generators and does not grant REC certificates to Renewable energy CPP.*

2.15 *In light of the above the claim of the Respondent that there is no distinction in law between a generating plant and CGP is not tenable and it can be humbly submitted that Petitioners CGP is not required to pay additional surcharge on wheeling as explained hereinabove.*

***RE : Effect on Universal Service obligation (USO) or 'consumer ship with Distribution licensee' post availing "open Access"***

2.16 ***In reply to para 30-33 It is not disputed that Respondent 1 has a USO under section 43 of The Act even if an open access is availed ( as also held by Hon'ble APTEL in case no 1/2006 in case of Hindalco vs WBERC ), However it is denied that payment of "additional surcharge on wheeling " can be imposed due to USO obligation to a CGP availing open access for carrying power to its destination of use , as section 43 does not provide for same.***

*Also the penalty for defaulting in compliance of section 43 is a minimal amount of MAXIMUM Rs 1000*

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

*Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:*

*Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.*

*1[Explanation.- For the purposes of this sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.]*

*(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1) : Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.*

*(4) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.*

2.18 *It is further stated that "open access" in case of Petitioner is guided by section 9 (2) of the Act as explained in detail above in reply to para 12-17 hereinabove. Since Petitioner is CGP and it has establish CGP for 100 % self use , there is no purchase of power , no sale of power , no SPV , no person supplying power , nor a Group Captive Power plant (GCPP) hence there is no agreement . While granting open access, no such agreement was required from Petitioner since power is use by self. Section 49 does not impose agreement as pre- condition and only say "MAY ENTER INTO AN AGREEMENT WITH ANY PERSON .. ). Relevant part is reproduced below :-*  
*Section 49. (Agreement with respect to supply or purchase of electricity): Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.*

*The agreement is signed by Petitioner with Respondent as per provisions in the supply code 2013 as per section 50 of The Act.*

*[Section 50. (The Electricity Supply Code): The State Commission shall specify an electricity supply code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity; measures for preventing tampering, distress or damage to electrical plant, or electrical line or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter; entry for replacing, altering or maintaining electric lines or electrical plants or meter and such other matters.]*

### ***Effect of section 9 of the Act on the liability of open access charges***

2.19 *In Reply to para 34, 35, 36 It is admitted that section 9 (2) of the Act confers the right to open access for CGP to destination of use but it is denied that section 9 (2) does not provide any immunity to the Petitioner CGP against levy of additional surcharge on wheeling . It is also admitted that section 39 (2), section 40 and section 42 ( 2) proviso 4 of the Act provides exemption to CGP from levy of cross subsidy surcharge. It is also admitted that transmission and wheeling charges are applicable if respective network is utilized however additional surcharge on wheeling are not applicable. It is denied that wheeling charges, transmission charges are open access charge Though it is admitted that additional surcharge on wheeling, cross subsidy charges are open access charges, however the transmission charges and wheeling charges are determined by the State commission under Section 62 1 (c) of the Act reproduced below.*

*Transmission and wheeling charges are determined by State commission under section 62 (1) (c) of the Act, reproduced below is part of retail tariff*

*Section 62. (Determination of tariff):*

*(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for – supply of electricity by a generating company to a distribution licensee: Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*

*(a) transmission of electricity ;*

*(b) wheeling of electricity;*

*(c) retail sale of electricity:*

*Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.*

2.20 *The Petitioner submits that the Applicability of wheeling charges under different scenarios in Retail Supply Tariff Order FY 2019-20 Various scenarios of location of Open Access*

*generators and their consumers and the consequent applicability of transmission and wheeling charges are as under:*

*a) Scenario 1: Generator is connected to Transmission network (EHT voltages), while the consumer is connected to the distribution network at 33 kV of Distribution Licensee. The scenario shall attract both transmission and wheeling charges since power required by the open access consumer will flow downstream from the transmission network through distribution network up to the consumer's connection.*

*b) Scenario 2: Generator is connected to distribution network at 33 kV of Distribution licensee, while the consumer is connected to the transmission network (132 kV or above): In this scenario, the consumer's requirement will be met by power flow over transmission network alone. The power generated by the open access generator will be locally consumed within the Discom and will not flow upstream to the open access consumer. Hence, such transactions shall attract only the transmission charges.*

*c) Scenario 3: Both Generator and consumer are connected to the transmission network (132 kV or above): Only transmission charges shall apply, since there is no usage of distribution network.*

*d) Scenario 4: Both generator and consumer are connected to the distribution system of any of the Distribution Licensee at 33 kV: The power generated by the open access generator will be consumed within the Discoms under the conditions of uniform retail tariff throughout the M.P. and hence it will contribute to meeting the demand of the open access consumer. Therefore, there is no additional usage of transmission network in this transaction. Hence, such transactions shall attract only the wheeling charges.*

*The Commission has determined the applicability of above charges for encouraging open access. Above formulations also confirm to the principle that power flows on the network by displacement method. Thus for CGP connected at 132 KV at injection and drawl point even the wheeling charges are not payable.*

***RE: Necessity of buyer-seller relationship to levy the additional surcharge under section 42 ( 2)***

*In Reply to para 37 to 48 it is submitted that Respondent is relying on old definition of supply given in MPVSA 2000, prior to the enactment of The Electricity Act 2003, which does not hold good in light of provisions in The Electricity Act 2003 and also in MPVSA 2000.*

***Provisions in MPVSA 2000***

***60. Effect of the Act on the Electricity Regulatory Commissions Act, 1998 (Central Act 14 of 1998)***  
:

***(1) On the commencement of this Act the State Electricity Regulatory Commission constituted under section 17 of the Central Act shall exercise all powers and functions in accordance with the provisions of this Act and not under the Central Act.***

*(2) Except as provided in sub-section (1) the provisions of the Central Act in so far it deals with the State Commission shall have no application in the State.*

*61. Savings : (1)Notwithstanding anything contained in this Act the powers , rights and functions of the Central Commission, Regional Electricity Board, the Central Electricity Authority, the Central Government and authorities under the Central Government under the Indian Electricity Act, 1910 (No. 9 of 1910) or the Electricity (Supply) Act, 1948 (No. 54 of 1948) or rules framed thereunder shall remain unaffected and shall continue to be in force.*

*(3) Nothing contained in this Act will apply to the Power Grid Corporation of India Limited or other bodies or licensees in relation to the inter-state transmission of the electricity or generating companies owned or controlled by the Central Government or undertakings owned by the Central Government.*

*(4) All actions taken by any person or authority including the Board under the Indian Electricity Act, 1910 (No. 9 of 1910) or the Electricity (Supply) Act, 1948 (No.54 of 1948) prior to the commencement of this Act shall be valid and enforceable notwithstanding the modifications to the said Acts made by this Act.*

*2.21 That The Electricity Act 2003 was introduced by legislature in year 2003 for consolidation of the laws relating to Generation, transmission, distribution, trading and se of electricity and generally for taking measures conducive to development of electricity Industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas , rationalization of electricity tariff ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, Constitution of central electricity authority, Regulatory Commission and establishment of Appellate Tribunal and for matters connected therein or incidental therein.*

*The Madhya Pradesh Electricity Regulatory Commission was constituted by Government of Madhya Pradesh vide Gazette Notification dated 20th August, 1998 under Electricity Regulatory Commission's Act, 1998, subsequently after the M.P. Vidyut Sudhar Adhiniyam, 2000 came into effect from 03-07-2001, the State Regulatory Commission was deemed to have been constituted under State Act.*

*Consequent to the constitution of Madhya Pradesh Electricity Regulatory Commission the state was divested of its regulatory functions.*

*The Electricity Act 2003 (No. 36 of 2003) enacted by parliament has come into force w.e.f. 10th June 2003 and the Commission is now deemed to have been constituted and functioning under the provisions of Electricity Act 2003.*

*2.22 As per Annexure to the Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for supply and wheeling of electricity & methods and principles for fixation of charges) regulation' 2009 (G – 35 of 2009) Statement of Objects and Reasons clause 8.5 with regard to wheeling are reproduced below :-*



Clause no	Provision as per Draft Regulation	Stakeholders' Comments	Commission's view
8.5	The Distribution Licensee's aggregate revenue requirement shall be presented to the Commission through a petition in three distinct parts i.e. first for the energy cost i.e. power purchase cost including transmission and distribution losses and inter-state and intra-state transmission charges, second for wheeling expenses and third for expenses pertaining to supply of energy to consumers, including customer services	MP Poorv Kshetra Vidyut Vitaran Company Limited: Accounting system being followed in East Discom captures expenditure related to wheeling activity and supply activity together, therefore, segregation of wheeling expenses and retail supply expenses is not possible at present. It is requested that norms may be prescribed by Hon'ble MPERC for allocation of total expenses to wheeling activity and supply activity. Similar comments are therefore made for clause 8.15 (b) & (c)	There is an urgent need to capture the expenses of retail and wheeling activities separately and the Commission has been in the past emphasizing on the licensees to modify their accounting system to meet this requirement, which should be ensured

Thus supply and wheeling are two distinct activities and Respondent's claim that supply shall include sub-transmission and distribution is legally not tenable.

Subsequently, on 29 November, 2012 No. 3296/MPERC/2012. In exercise of powers conferred under Section 181(2) (zd) read with Section 45 and 61 of the Electricity Act, 2003 (No. 36 of 2003), the Madhya Pradesh Electricity Regulatory Commission makes the following Regulations to specify the methods and principles for fixing the charges for electricity supplied by a Distribution Licensee and to specify the terms and conditions for determination of tariff for wheeling and supply of electricity in Madhya Pradesh during the Tariff Period of three years commencing from 1st April 2013 and continuing up to 31st March 2016.

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION (TERMS AND CONDITIONS FOR DETERMINATION OF TARIFF FOR SUPPLY AND WHEELING OF ELECTRICITY AND METHODS AND PRINCIPLES FOR FIXATION OF CHARGES) REGULATIONS, 2012 {RG -35\_ (I)\_OF 2012}**

*1. Short Title and Commencement : 1.1. These Regulations shall be called “Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, 2012{RG-35\_(I) of 2012”.*

*(w) “Long-Term Customer” shall mean a person having a long-term lien exceeding three years over an inter / intra-Distribution Company System by virtue of paying wheeling charges;*

***5. Determination of Tariff 5.1. The Commission shall determine Tariff and charges including terms and conditions thereof under Section 62 of the Act read with Section 86 for wheeling and supply of electricity to consumers.***

*6.2. The tariff shall provide for recovery of prudent cost incurred in the operation of the licensed activities of wheeling and supply of the Distribution Licensee plus Return on Equity (RoE) at prescribed level of performance. The Distribution Licensee shall be required to prepare their Accounting Statements, which shall be regularly submitted before the Commission as detailed in clause 10.1.*

*8.15. While determining the Aggregate Revenue Requirement of the Distribution Licensee, the Licensee, apart from details of energy cost, shall also provide accounting details / cost allocation details of activities pertaining to Wheeling (distribution wires) and Supply separately.*

*a. The items allocated to energy cost i.e. power purchase cost*

*(j) Fixed Cost of power purchase*

*(i) Variable Cost of power purchase*

*(ii) Inter-State Transmission Losses*

*(iii) Inter-State Transmission Charges*

*(iv) Intra-State Transmission Losses*

*(v) Intra-State Transmission Charges*

*(vi) SLDC charges*

*(vii) Any taxes or levies that are applicable as per law*

*(ix) Any other charges attributable to power purchase*

*b. The items allowable to wheeling activity may include:*

*(k) Operations and Maintenance expenses of the distribution network relating to wheeling activity;*

*(ii) Depreciation on assets identified with wheeling activity;*

*(iii) Interest and finance charges on project loans identified with wheeling activity as far as possible or notionally;*

*(iv) Interest and finance charges on Working Capital identified with wheeling activity;*

(v) Return on Equity allowable to wheeling activity;

(vi) Lease / Hire purchase charges;

and (vii) Cost of hedging or swapping to take care of FERV

Thus supply and wheeling are two distinct activities and respondents claim that supply shall include sub-transmission and distribution is legally not tenable.

As per Conditions of distribution license for distribution licensee (including deemed licensee), 2004 Bhopal, Dated: 23rd July, 2004 Central Act" means the Electricity Act, 2003 (36 of 2003)

**"Consumer"** means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be. Any person who has applied for availing electricity supply or a person whose electricity connection has been disconnected shall also be regarded as consumer;;

**"Distribution"** means the conveyance of electricity by means of a Distribution System; **"Distribution Business"** means Authorised business of the licensee in Distribution of electricity in the Area of Supply'

**"Distribution System"** means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers ;

**"Supply"** in relation to electricity means the sale of electricity to a licensee or consumer

**"Use of System"** means use of the Distribution System for the conveyance of electricity by a Person, in accordance with clause 22.4.

#### **CENTRAL VS STATE ACT:-**

- 2.23 It is a well settled fact that Central Act always prevails over any State Act. Hence Respondent argument on definition of "supply" as given in MPVSA 2000 does not hold good in light of the definition given in The Electricity Act 2003. The Definition under The Electricity Act 2003 Section 2 (70)"supply", in relation to electricity, means the sale of electricity to a licensee or consumer; Will prevail over definition given under MPVSA 2000- Section 2(r) "Supply" shall include sub-transmission and distribution;

*Hon'ble Commission in many of its orders have held that provisions under The Electricity Act 2003 will have overriding effect over State Act. Relevant part of order Petition No. 36/2009 dated 30/10/2009 are reproduced below :-*

*"(1) Notwithstanding anything contained in the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (No. 4 of 2001) or any other State law dealing with electricity, the following provisions shall apply to the generation, transmission, distribution, supply, sale and use of electricity in the Zone, namely, -*

*(I) The Developer or Co-developer or any other person designated as such by the Development Commissioner shall be deemed to be the Licensee to undertake in the Zone, the activities of transmission, distribution, supply and sale of electricity, with authority to purchase the energy requirements in the Zone from such sources as may be considered appropriate and conducive to the development of the Zone.*

*(ii) The Developer or the Co-developer or any other person designated as such by the Development Commissioner shall be deemed to be permitted to generate electricity for the purpose of supplying it within the Zone.*

*(viii) The Unit established in the Zone shall be entitled to generate electricity either individually or in association with other Units in the Zone for captive use and consumption of such Unit or Units or sell and supply electricity to other units in the Zone.*

*(ix) The tariff terms and conditions of the generation, transmission, distribution, sale, supply and use of electrical energy in the Zone shall be subject to such regulations as may be made by the Development Commissioner.*

*(2) The Development Commissioner shall perform functions and exercise powers with regard to matters specified in sub section (1) in place of the Madhya Pradesh Electricity Regulatory Commission constituted under the Madhya Pradesh Vidyut Sudhar Adhiniyam 2000 (4 of 2001).*

*(3) Save as provided in sub-sections (1) and (2) the Commission constituted under the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (No.4 of 2001) and other concerned authorities connected with the operation of the power system shall exercise all powers including but not limited to safety, security and technical standards to be maintained in the generation, transmission, distribution, supply, sale and use of electricity in the Zone.*

*However Hon'ble MPERC in its order directed as under*

*3. During the course of hearing on 30th October, 2009, the issue regarding the status of SEZ, Indore as licensee was deliberated further. The Indore Special Economic Zone (Special Provisions) Act, 2003 at Section 11 provides authority to Development Commissioner of the SEZ to designate the Developer or Co-Developer or any other person to undertake the activities in the Zone for Transmission, Distribution, Supply and Sale of electricity with authority to purchase the energy requirements in the Zone from such consumers as may be considered appropriate and conducive to the Development of the Zone. The Development Commissioner has been further authorized to prescribe the terms and conditions as well as the tariff for the generation,*

transmission, distribution, sale, supply and use of electricity in the Zone. Subsequently, the GoI notified the Special Economic Zones Act, 2005. The GoI further notified the Special Economic Zones Rules, 2006, Ministry of Commerce and Industry and also issued guidelines vide No.P.6/3/2006-SEZ.1 dated 27.02.2009 for power generation, transmission and distribution in area of SEZs. The Special Economic Zone Rules, 2006 at Section 5 (c) provides that generation, transmission and distribution of power within a SEZ shall be subject to the provisions of the Electricity Act, 2003. The guidelines, as mentioned above, provide that distribution of power is a licensed activity as specified in Section 14 of the Electricity Act, 2003. It further provides that tariff of the electricity for any sales within SEZ's shall be determined in accordance with the provisions of the Electricity Act, 2003/Rules made there-under. It also states that all the provisions of the Electricity Act, 2003 and Electricity Rules, 2005 as amended from time to time by Ministry of Power along with various resolutions issued by the Ministry of Power will be applicable including amongst others to the power distribution activities in the SEZ's. In view of the provisions as indicated above, the Commission felt that the latter Central SEZ Act, 2005 would prevail over the earlier said State Act namely Indore Special Economic Zone (Special Provisions) Act, 2003 and shall be overriding in case of any conflict in the provisions. The Commission is of the opinion that the SEZ, Indore is required to obtain a license for the distribution and supply of electricity and other activities related thereto within the Zone.

9. The Commission considered all the facts submitted before it and is of the opinion that there is an urgent need to make an interim arrangement so that the industries coming under SEZ, Indore area do not suffer for want of supply of power. This is felt necessary in the larger interest of State as development of new industries in the State would not only help the State exchequer but will also generate employment and attract more investment in future. Moreover, while the industries in areas other than SEZ are free to avail as much power as they require and as and when required, the industries which are situated in SEZ area should be treated at par and should at least get similar benefits/ facilities, if not more. The Commission, therefore, directs the M.P. Paschim Kshetra V.V. Co. Ltd., Indore to release a new 5 MVA, HT connection at 33 KV to the SEZ, Indore, as an interim measure, subject to the following conditions and also directs the petitioner to comply with these conditions:- (i) The supply to the SEZ will be provided by installing proper metering arrangements and shall be billed at the rates prescribed under Tariff Schedule HV 3.1 (Industrial) in the Commission's Retail Supply Tariff Order for the year 2009-10.

(ii) All the terms and conditions as prescribed in the Tariff Order for the year 2009-10 applicable to the connections under Tariff Category HV 3.1 shall also be applicable on the HT connection provided to SEZ, Indore.

(iii) The SEZ, Indore may recover tariff for electricity supplied to various industries and other connections situated within the area of SEZ at the rates not more than the rates prescribed in the Retail Supply Tariff Order for the year 2009-10 issued by the Commission, based on the applicability for the purpose for which the connections are being used. All the terms and conditions of the Retail Supply Tariff Order 2009-10 shall also be applicable in such cases.



(iv) This interim arrangement shall continue up to the period for which the Retail Supply Tariff Order 2009-10 issued by the Commission on 29th July, 2009, is applicable or upto the time SEZ Indore on being made a licensee gets the tariff determined by the Commission, whichever is earlier.

(d) The SEZ, Indore shall submit the application for license for distribution of supply within the SEZ, along with all the details including supportive documents and fulfill all other requirements related there to, to the Commission by 30th Nov., 2009.

(vi) The Commission expects that the SEZ, Indore should be able to submit its ARR/Tariff proposals, subsequent to issue of license, by 15th Jan., 2010.

(vii) The SEZ, Indore shall also comply with the provisions of Electricity Act, 2003, Rules made there under, and the Regulations applicable while availing the 5 MVA HT connection and its continuance thereafter. The Commission decides to close the case.

Ordered accordingly.”

**RE: Liability of Additional surcharge vis a vis Liability of wheeling charges**

2.24 In Reply to para 49-51 it is humbly submitted that Respondent in its reply has referred case no 02 of 2019 which was a review Petition against order in case no 38/2018 dated 29th November 2018 in the matter of M/s. Narmada Sugar Private Limited, Vs. The Managing Director, M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd and ors Hon'ble commission had held (under para 15 of the order) that Petitioner has not been able to establish its cogeneration plant as CGP hence it is liable to pay CSS and additional surcharge on wheeling.

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

This means that if the Petitioner plant was CGP then CSS and additional surcharge on wheeling shall not be payable. In present case the Respondent has not disputed regarding CGP status of the Petitioner hence addl surcharge on wheeling is not payable.

2.25 That under Section 42 (4) additional surcharge on charges of wheeling has been defined for open access consumers there is no mention of addl surcharge on wheeling on CGP, who are not open access consumer but are open access user. Under Section 42(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State

*Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply*

2.26 *Further in CASE No. 23 of 2017 In the matter of Petition of Maharashtra State Electricity Distribution Co. Ltd. proposing Bank Guarantee / Letter of Credit equivalent to Cross-Subsidy Surcharge and Additional Surcharge from Captive Generators as payment security before providing Open Access has clearly directed that a CPP is a Captive user and not a consumer as per rule 15. Relevant part of the order is already discussed herein above and the same is nt repeated for the sake of brevity.*

2.27 *Petitioner has not disputed payment of wheeling charges as same is required to be paid in lieu of section 62 ( C) and section 9 ( 2 ) of the Act. Petitioner being an undisputed CGP, addl surchahre on wheeling are not applicable*

***RE: Judicial pronouncement regarding levy of additional surcharge in case of open access through captive route.***

2.28 *In reply to para 52-59 While putting all the argument of the Respondent with regard to levy of additional surcharge in case of open access through Captive route Respondent has overlooked the fact that vide 8th vide amendment dated 17th December 2019 , clause 12 B ( iv) of MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION (COGENERATION AND REGULATIONS, 2010, Hon'ble Commission has exempted CGP from payment of CSS, wheeling charges and Additional surcharge on wheeling , the relevant clause is reproduced below :-*

*"The RE captive consumers of renewable energy based Captive generating plants shall not be liable to pay cross subsidy surcharge, wheeling charge and additional surcharge but it shall be liable to bear losses for carrying the generated electricity from its plant to the destination for its own use or for the use of its captive user as defined by the Act or the rules made thereunder.*

*Provided that the captive user shall not bear the losses in case the captive consumption is done without using the distribution and /or transmission system of the distribution and /or transmission licensee, as the case may be:"*

2.29 *In case no 02/2007 dated 22nd May 2007 as referred and relied by the Respondent as per clause 17 this Hon'ble Commission had directed as under :-*

*"17. The Commission is not in agreement with the argument of the respondent that he is entitled to recover the cross subsidy surcharge as per provisions of Section 42(2) of the Act. It is provided in the 4th proviso of Section 42(2) that such charge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use. Besides, the meaning of the words "primarily for his own use" has been made clear in Rule 3 as mentioned above.*

*Therefore, the respondent is not entitled to recover cross subsidy surcharge under section 42(2) of the Act in this case. The petitioner is a generating plant qualified as a captive generation plant within the meaning of Rule 3 and as such no License is required to supply power from captive generating plant through dedicated transmission line to its captive users.*

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

*However, the Commission would like to point out that clause 8.5.4 of the National Tariff Policy notified by the Central Government on 6th January 2006 (in terms of Section 3 of the Act) states as under:-*

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

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

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

*That Said order was with regard to validation and approval of scheme for constructing a Group Captive Power Plant and removal of difficulties in its implementation under MPERC (Power Purchase and other matters with respect to conventional fuel based Captive Power Plants) Regulation 2006.*

*Respondent has not submitted any documents in its reply that Respondent has complied with the directions of Hon'ble Commission and have demonstrated that Captive users have surrendered Respondents power( grid connection) which has resulted into :-*

- (i) stranded power under long-terms PPAs,
  - (ii) stranded physical assets and
  - (iii) cost of carrying regulatory assets or amortization of regulatory assets, as the case may be
- And that addl surcharge was imposed accordingly.

2.30 The facts of the petition no 2/2007 referred herein above are different from that of Petitioner and hence not applicable due to following reasons :-

1. the aforesaid petition was for conventional fuel based Group captive power plant which can generate power round the clock (RTC, 24 hrs) and as consequence the consumers can reduce their contract demand or even do away with grid power connection from Respondent 1. Petitioner has been paying wheeling charges even though entire cost of line and 33 KV bay at generator end was born by Petitioner and handed over to Respondent as per prevailing regulations.

2. Petitioner's CGP is not a Group Captive Power Plant.

3. Petitioner CGP is a solar PV plant and can generate power at average generation hours of about 7 hours daily ( with seasonal effect) , CUF on 16.5 % annually , which means a 1.6 MWp (DC) plant is equal to RTC power of 264 KW(AC) and 3 MWp (DC) plant is equal to a RTC plant of 495 KW app.

4. After establishment of CGP (solar PV power plant )Petitioner never surrendered or reduced its contract demand with Respondent due to said CGP. Copies of electricity bills for each year 2014 to 2020 are enclosed herewith as proof of same as **Annexure P-12 to P18**

2.31 That the Respondents have contended that the Hon'ble Apex court has stayed the APTEL order in Petition no 311 of 2018 ( M/s JSW Steel Ltd vs MERC) but that does not give permission to Respondent to charge additional surcharge on wheeling. The stay is an interim relief and not the final order, the matter is subjudice before the Hon'ble Apex Court.

2.32 Similarly in Hindalco case, additional surcharge imposed is subject to distribution licensee submitting a report to the State Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer from Captive rate and thereafter quantum of additional surcharge payable by the open access customer shall be asserted and determined.

From above it is clear that if the co generation plant was CGP, addl surcharge on wheeling could not have been imposed.

2.33 That the Respondents have failed to consider that all the SERC's are members of FOR and recommendation are made after lot of deliberation, opinion from experts. As per para 7.1 FOR in its report of December 2017 has recommended that addl surcharge on CGP are not payable. MERC in CASE No. 48 of 2016 has explained in detail the rationale for non applicability of additional surcharge on CGP hence same is reproduced again. the relevant part is reproduced as under

*"In the matter of Petition of Maharashtra State Electricity Distribution Co. Ltd. for Truing-up for FY 2014-15, Provisional Truing-up for FY 2015-16 and Multi-Year Tariff for 3rd Control Period FY 2016-17 to FY 2019-20 Dated: 3 November, 2016 para 8.40....."*

*B] Applicability of Additional Surcharge: During the public consultation process, some stakeholders have argued that Additional Surcharge should not be levied on RE-based transactions and captive transactions of CPPs.*

*C] In support of their contention, they have referred to the Orders of other State Commissions that have exempted captive consumption from levy of Additional Surcharge. On the other hand, MSEDCL has stated that the Additional Surcharge, being a compensatory amount payable towards the fixed cost of stranded power resulting from approved power purchase contracts, has to be determined commonly for all the OA Users, including captive consumers.*

*As per Section 42(4) of the EA, 2003, the levy of Additional Surcharge arises where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the Distribution Licensee of his area of supply. However, as per Section 9 of the EA, 2003, CPPs have been given the right to carry electricity from the Generating Plants to the destination of their own use. **The question of permit" and supply" does not arise to the extent of „self-consumption" by Captive Users of the CPPs. Thus, the is of the view that Additional Surcharge is not applicable to Captive Users of CPPs to the extent of their self-consumption from such Plants.** As per the second proviso to Section 9(1), the electricity generated from a CPP may be supplied to any consumer subject to regulations made under Section 42(2). Additional Surcharge shall be applicable in case of such supply from a CPP to OA Consumers. Further, as per Regulation 14.8 of the DOA Regulations, 2016, Additional Surcharge shall be applicable to all consumers who have availed OA to receive supply from a source other than the Distribution Licensee to which they are connected. No exemption or specific dispensation has been provided in the case of RE-based transactions as far as levy of Additional Surcharge is concerned. No such exemption is provided for such transactions in the EA, 2003 either. Therefore, the OA consumers/users sourcing power from RE Generating Plants come squarely within the purview of Section 42 (4) of the EA, 2003 and are liable to pay Additional Surcharge.*

*2.34 The Petitioner Further places reliance on an order passed in a review case no 195 of 2017 the Hon'ble Commission in para 9.38 had referred to Additional Surcharge-the Commission's Analysis and Rulings are referred in para 9.38.11 the relevant portion of the same is reproduced as under: -*

*"9.38.18. The Commission in its MYT Order dated 3 November, 2017 in Case No. 48 of 2016 has explained the rationale for the determination of the Additional Surcharge for Open Access Consumers. The Relevant Para is reproduced as below: "8.40. .... On the other hand, MSEDCL has stated that the Additional Surcharge, being a compensatory amount payable towards the fixed cost of stranded power resulting from approved power purchase contracts, has to be determined*



*commonly for all the OA Users, including captive consumers. As per Section 42(4) of the EA, 2003, the levy of Additional Surcharge arises where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the Distribution Licensee of his area of supply. However, as per Section 9 of the EA, 2003, CPPs have been given the right to carry electricity from the Generating Plants to the destination of their own use. The question of 'permit' and 'supply' does not arise to the extent of 'self-consumption' by Captive Users of the CPPs. Thus, the Commission is of the view that Additional Surcharge is not applicable to Captive Users of CPPs to the extent of their self-consumption from such Plants. As per the second proviso to Section 9(1), the electricity generated from a CPP may be supplied to any consumer subject to regulations made under Section 42(2). Additional Surcharge shall be applicable in case of such supply from a CPP to OA Consumers. Further, as per Regulation 14.8 of the DOA Regulations, 2016, Additional Surcharge shall be applicable to all consumers who have availed OA to receive supply from a source other than the Distribution Licensee to which they are connected.*

*9.38.19. Though, the Commission has specifically provided exemption of Additional Surcharge in the MYT Order for Captive Users of CPPs to the extent of their self-consumption from such Plants, the Commission noted that frequently changing captive users of GCPP was leading to stranded contracted capacity of Distribution Licensee. Such captive users are very different from static captive users of original Captive Power Plants as the latter have ceased to be consumers of Distribution Licensees having created their own permanent power requirement through captive mode. There is no power planning needed for such static captive users as against frequently switching users of group captive power plants for whom the power supply is planned and therefore becomes a stranded capacity. Such Group Captive users become liable to same Additional Surcharge due to stranded capacity as applicable to other open access consumers.*

*9.38.20. It is brought to the notice of the Commission that most of the GCPP users avail Open Access under short term basis. The GCPP matrix also keeps on changing frequently in order to meet 26 % equity criteria under Electricity Rules, 2005. Equity is apparently purchased as preferential share at a nominal cost. Hence, change in the consumer mix whereby Consumers switching out of GCPP matrix leads to stranded capacity on Short Term Open Access (STOA) as the quantum of power keeps changing as per the fluctuating number of GCPP users.*

*9.38.21. If there is stranded capacity created on account of such Consumers switching to Open Access Group Captive arrangement, the Additional Surcharge as determined by the State Commission shall be payable by such Captive Open Access users who are already factored in power procurement plan of Distribution Licensees.*

*9.38.22. With the increase in this GCPP based OA transactions, the obligation of the Distribution Licensee in terms of power purchase commitments has been and shall continue to be stranded, and there will be an unavoidable obligation and incidence to bear the fixed costs consequent to such commitments. Such fixed cost of power purchase has to be expected to be incurred with*

*reasonable certainty, and also that such fixed cost of power purchase cannot be recovered from OA Consumers through Wheeling Charges or Stand-by Charges alone.*

*9.38.23. The Commission is of the considered view that, unless such fixed costs due to stranded capacity are recovered from OA Consumers, this burden would be unjustly loaded onto other Consumers of Distribution Licensee. The Commission believes it would be unfair and unwarranted to pass such burden of fixed cost recovery of such stranded cost to other Consumers through consequent tariff hike.*

*9.38.24. The Commission is of the view that, under the circumstances and in pursuance of Regulation 14.8 of the DOA Regulations, 2016, there is a case for recovery of the part of fixed cost towards the stranded capacity arising from the power purchase obligation through levy of Additional Surcharge from OA Consumers including the Group Captive Consumers who have availed such arrangement henceforth.*

*9.38.25. Accordingly, the Commission has determined the two categories of captive users who procure power from CGP's viz., (a) Original Captive Users (who were never consumers of Distribution Licensee) and (b) Converted Captive Users (who subsequently switchover to GCPP mode) . The Original Captive Users are the Users who have been procuring power originally under the captive mode and whose demand has not been included in the power procurement plan of Distribution Licensee whereas Converted Captive Users are the Users who prior to issue of this Order were Consumers of Distribution Licensee and who have opted to procure power under Group Captive arrangement, creating stranded capacity for Distribution Licensee.*

*9.38.26. In view of the above the Commission holds that Additional Surcharge shall be applicable to Captive Users of Group Captive Power Plants; in addition to Open Access consumers."*

*In the present case of the petitioner also there is no question of permit by the State Commission there is no consumer to receive supply from the licensee therefore the additional surcharge cannot be made applicable in lieu of the various orders referred herein.*

***RE: Provision of regulation /tariff order prevailing in the State of MP and maintainability of challenge in the present proceedings***

*2.35 In reply to para 60-64 it is submitted that Petitioner is a Captive User as per provisions and definition given under The Electricity Rules 2005 notified vide Notification No. G.S.R 379(E) dt.8.6.2005 and not an Open Access consumer. Relevant part is reproduced below :-*

*"3. Requirements of Captive Generating Plant. (1) No power plant shall qualify as a „captive generating plant“ under section 9 read with clause (8) of section 2 of the Act unless (a ) in case of a power plant (i) not less than twenty six percent of the ownership is held by the captive user(s), and (ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:*

*Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;*

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

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

*(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant. Illustration: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users. (2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Explanation.- (1) For the purpose of this rule. a. "Annual Basis" shall be determined based on a financial year; b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly; c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the*

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

*Undisputedly Captive Generating Plant has right to open access under Section 9 of The Act which existed even before Hon'ble Commission notified open access regulation 2005, therefore open access charges are not applicable .*

2.36 *That as per said order of Hon'ble Commission the charges under Section 42 (2) proviso 4 and 42(4) are not applicable if the plant qualifies as Captive power plant as per the Act and the provisions under the Act.*

2.37 *That the Petitioner's plant is a captive generating plant therefore it qualifies for exemption under proviso 4 of Section 42(2) of the Electricity Act, 2003 as per the order of the Hon'ble Commission (supra). The levy of Additional Surcharge arises where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the Distribution Licensee of his area of supply. However, as per Section 9 of the EA, 2003, CPPs i.e the Petitioner have been given the right to carry electricity from the Generating Plants to the destination of their own use. The question of 'permit' and 'supply' does not arise to the extent of 'self-consumption' by Captive Users of the CPPs. Thus the Additional Surcharge is not applicable to Captive Users of CPPs to the extent of their self-consumption from such Plants.*

10. The Respondent No. 2 (MPPMCL) vide its letter dated 05.09.2020 submitted the following reply to the petition:

- (1) *That, by way of present Petition the Petitioner, being a captive power user drawing power from its power plant at a place different from place of consumption, has challenged additional surcharge on wheeling of electricity imposed on him by the Respondent No. 1 consequent to the 7<sup>th</sup> Amendment to the MPERC (Co-Generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010 ('cogeneration regulations' in short). The Petitioner has two numbers of Solar Electricity Generating Plants at Village Karodia and the entire electricity generated from it is consumed by it at its manufacturing Unit situated at Pithampur.*
- (2) *That, at the outset, the answering Respondent submits that the present petition is not maintainable as the Petitioner has not exhausted the alternative remedies available to him u/s. 42 (5) and (6) of the Electricity Act, 2003.*
- (3) *That, without prejudice to and in addition / alternative to above preliminary objection, the answering Respondent's reply on merits of the case is as in paragraphs hereunder:*
- (4) *That, the Petitioner has not challenged the vires, if any, in the Regulation 12.2 of the cogeneration regulations consequent to 7<sup>th</sup> amendment.*
- (5) *That, w.e.f. 17-11-2017, consequent to amendment, **Regulation 12.2 of the cogeneration regulations** provide as:*

**“12.2** Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act, 2003 shall be applicable at the rate as described by the Commission in its Retail Supply Tariff Order.”

Prior to the 7<sup>th</sup> Amendment, the said regulation provided as under:

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

**Section 42(4) of the Electricity Act, 2003** provides for additional surcharge as:

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

**Section 9 of the Electricity Act, 2003**, referring to its section 42(4) provides for Captive Generation as under:

**“9. Captive generation:**

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

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

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

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

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

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

**[Emphasis supplied]**



- (6) *That, it is undisputed fact that the Petitioner is a captive user. Its captive power plants are situated at a distant place from the point of consumption. The Petitioner does not have dedicated transmission line from the point of injection of electricity to the point of drawal and for this he is connected to the Grid and has been granted Open Access.*
- (7) *The issue of payment of cross subsidy and additional surcharge came to be decided in two separate judgments of the co-ordinate benches of the learned Appellate Tribunal for Electricity, New Delhi in two similar, rather identical, facts and circumstances as in present case. In the earlier judgment in the case of Indian Aluminium Company Ltd. (since known as HINDALCO Industries Limited) versus West Bengal Electricity Regulatory Commission & others as Appeal No. 1 of 2006 decided on 11-07-2006, the learned Tribunal held as:*

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

***[Emphasis supplied]***

*However, in the subsequent judgment in similar facts of the case, the Co-ordinate bench of the learned Tribunal in the case of JSW Steels Ltd. versus The Secretary, Maharashtra Electricity Regulatory Commission and others as Appeal No. 311 of 2018 decided on 27-03-2019 held as:*

*“67. Therefore it is clear that the word ‘supply’ has to be understood in the context it is used with reference to Section 42 (4) of the Act. .... Therefore, we are of the opinion that captive consumers are not liable to pay additional surcharge. ....will be defeated as argued by the Appellants.”*

***[Emphasis supplied]***

- (8) *That, in the former case of Hindalco, the Tribunal has held that captive users are liable to pay additional surcharge, whereas, in the latter case of JSW Steel Ltd. the co-ordinate bench of the learned Tribunal has held that captive consumers are not liable to pay additional surcharge. In case of contradictory judgements of co-ordinate benches of the learned Tribunal, the judgment in the case of Hindalco, being the former one, would prevail over the other. In this context, the answering Respondent places reliance on the judgment rendered by the Apex Court in Civil Appeal No. 9439/2003 in the case of Sant Lal Gupta versus Modern Co-operative Group Housing Society, wherein it was held as:*

*“18. A coordinate bench cannot comment upon the discretion exercised or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciate rules of law form the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a coordinate bench must be followed. (Vide: Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel & Ors., AIR 1968 SC 372; Sub-Committee of Judicial Accountability v. Union of India & Ors., (1992) 4 SCC 97; and State of Tripura v. Tripura Bar Association & Ors., (1998) 5 SCC 637).*

**[Emphasis supplied]**

- (9)** *That, from plain reading of the various provisions of law as extracted in para 5 hereinbefore, it is clear that the Petitioner, being a captive consumer, is receiving electricity from a person other than the distribution licensee. Therefore, he is liable to pay ‘Additional Surcharge’ in view of section 42(4) of the Act. Since, the amended Regulation 12.2 of the Cogeneration Regulations do not exempt the Petitioner from payment of Additional Surcharge.*
- (10)** *That, the answering Respondents stands with and adopts the views of the Respondent No. 1 in the present case.*
- (11)** *That, for the reasons aforesaid, the petition, as filed by the Petitioner, is san-merit and is prayed for being dismissed.*

**11.** The Respondent No. 1 (MPPaKVVCL) by affidavit dated 06.10.2020 submitted the following in its written note on arguments:

**“1. Meaning of Open Access:**

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

*From the aforesaid definition, it is clear that by definition itself, whenever open access availed by any person, same shall always be subject to Regulations of this Hon’ble Commission. In other words no open access is possible dehors the Regulations of this Hon’ble Commission.*

**2. Relevant Statutory provisions governing open access charges:**

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

(1) .....

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

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

.....

.....

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

xxx xxx xxx”.

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

*Emphasis supplied*

**Clause 8.5 of the Tariff Policy 2016 also provides;**

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

### **3. Why additional surcharge?**

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

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

**Note: Petitioner admitted this fact that respondent distribution licensee has USO even towards consumers availing power through captive generating plants vide para No. 3.16 of its rejoinder.**

- ii. To meet requirement of demand of all consumers of its area of supply, DISCOM enters into long term Power Purchase Agreements (PPA) with sellers (generators/ traders etc.) so as to ensure supply of power on request.
- iii. While contracting energy through such long term PPAs, the tariff payable to the generators usually consists of two part i.e. capacity charges and energy charges. Therefore, the DISCOMs have to bear the fixed cost even when there is no off take of energy through such source.
- iv. Whenever any person takes electricity through any other source, the DISCOMs continue to pay fixed charges in lieu of its contracted capacity with generation stations. This leads to the situation where the DISCOM is saddled with the stranded cost on account of its universal supply obligation. The mechanism of additional surcharge is meant to compensate the licensee on this aspect.
- v. The issue of open access and rational behind levy of surcharge came under consideration of the Hon'ble Supreme Court in case of **Sesa Sterlite Limited v Orissa Electricity Regulatory Commission and Others Civil Appeal No. 5479 of 2013 order dated 25/04/2014 (Annexure-1)**. The relevant part of the said judgment is reproduced as under:

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

demand (stranded costs). ***The mechanism of surcharge is meant to compensate the licensee for both of these aspects.***

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

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

- a) The adverse financial situation caused by arrangements made for complying with the obligation to supply, Section 42(4) of the Electricity Act, 2003 provides for levy of additional surcharge.
- b) Levy of additional surcharge is nothing but a compensation from a person who avail power other than from distribution licensee of area.
- c) For levy of additional surcharge it is sufficient that power is being procured from any source other than the distribution licensee of area
- d) Even the captive generating plant falls within the four corner of such 'other source' and there is no restriction regarding status of such other source captive or otherwise.

***4. Issue is already settled in favour of respondents through various judicial pronouncements:***

- i. This, Hon'ble Commission in the Petition No. 02/2007 in the matter of ***M/s Malanpur Captive Power Limited, Mumbai Vs MP Madhya KshetraVidyutVitaran Co. Ltd. Bhopal vide order dated 22/05/2007 (Annexure-2)*** has upheld the levy of additional surcharge on the electricity availed through captive route. The relevant part of the said order is reproduced as under:

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



- ii. Hon'ble Commission again vide **Wind Tariff Order dated 21/11/2007 (Annexure-3)** held as under:

Wheeling charges

**12.10 Wheeling charges and applicable surcharge on wheeling charges shall be levied as determined by the Commission from time to time for third party sale/captive consumption.** Wheeling charges shall be payable to the Discom where the energy is consumed irrespective of the point of injection. No wheeling charges are payable for sale to M.P. Power Trading Co. Ltd. on behalf of Discoms.

That, petitioner has relied upon the judgment of this Hon'ble Commission dated 18/03/2008 in the petition No. 09/2008(Ref: para 3.3 at page 2 read with Annexure P11 of rejoinder filed by petitioner) and contended that Commission never approved .The relevant part of the said judgment is reproduced as under:

"7. The Commission heard both the parties. Having considered the submissions made by both the parties, the Commission grants permission to the petitioner **for wheeling of energy generated from his WEGs located at location no. 23 and 24 in the windfarm at Jamgodrani, Distt. Dewas to his works at the Hind Spinners (Division of the Hind Syntex Ltd.) Pillukhedi, Dist Rajgarh for self-use on the condition of payment of 2% wheeling charges,** line rent and reactive charges subject to the condition of revision from time to time, for the balance period of 8 years of plant life i.e. w.e.f. 29/03/2008 to 28/03/2016. ....**The Commission also grants permission to the petitioner to sell its surplus power, if any, to the M.P. Tradeco. at the rate determined in the tariff order dated 21/11/2007.** The petitioner shall apply to the Nodal Officer for open access as per the regulations. The above permission is subject to the following conditions:

- (1) The petitioner shall comply with the provisions of the Act and Regulations, **and the directions given by the Commission in its tariff order mentioned above.**
- (2) The commission is entitled to impose other terms and conditions from time to time"

**The tariff order dated 21/11/2007 explicitly provide for the levy of additional surcharge in case of third party sale as well as captive consumption. Thus, The submission of petitioner in para 3.3 page 2 of rejoinder is incorrect to that extant.**

- iii. Hon'ble APTEL in **HINDALCO Industries Limited Vs WBERC Petition No. 01/2006** (Ref: Annexure-1 to the reply filed by respondent No. 2 MPPMCL page No. 10-34), upheld the levy of additional surcharge on the electricity consumed through captive route. Para 11 of the said judgment recorded the finding of the West Bangal Electricity Regulatory Commission which had been challenged by the consumer before APTEL. The said para is reproduced as under:

11. The Commission determined the wheeling charges at 83.54 paise/kwh and the same shall be subject to appropriate annual revision. The Commission also concluded that the HINDALCO is liable to pay additional surcharge and the

distribution licensee has been directed to submit a report to the Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer from captive route and thereafter quantum of additional surcharge payable by the open access customer shall be assessed and determined.

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

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

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

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

- iv. In case of **A.P. Gas Power Corporation Ltd v. A.P. Electricity Regulatory Commission AIR 2006 AP 12, 2005 (6) ALD 368 (Annexure-4)** the Hon'ble High Court except with respect to levy of cross subsidy from which "captive generation plant" has been exempted no other privilege is available to captive generating plant. Relevant portion of the ruling of Hon'ble Court, vide order dtd. 27/07/2005 is mentioned below-

19. A reading of Sections 9, 39, 40 and 42 of the Act would lead to the ensuing conclusion. A person or a company is entitled to set up a power plant for his/ its exclusive use. The power generated by such captive generating plant set up by a person has to be distributed and transmitted - in a given case; by a distribution licensee or transmission licensee. **These licensees are entitled to collect transmission charges or wheeling charges as the case may be including surcharge from generating companies including from persons who set up captive generating plants but surcharge for cross-subsidy is not leviable on captive generating plant.** That is the reason why the Parliament thought it fit to define 'generating plant' set up by any person for his own use as captive generating plant separately. **Except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant.** This is further made clear by Electricity Rules, 2005. If 26 per cent of the ownership in a plant is held by captive users and 51 per cent of electricity produced is used by them, a generating plant can be treated as a captive generating plant. It only means that the electricity

*generated over and above 51 per cent has to be necessarily go to the grid, in which event a transmission licensee and distribution licensee come into picture. **Even in the case of distribution and transmission of 51 per cent aggregate electricity generated in a captive generating plant, is to be wheeled to the destination of captive use, the same procedures have to be followed. Merely because a captive generating plant at least to the extent of 51 per cent consumes its electricity for captive use, the State Transmission Utility or a transmission licensee or distribution licensee, cannot discriminate while discharging their duties and functions.***

- v. *Petitioner has placed reliance upon the judgment of Hon'ble APTEL in the Appeal No. 311 of 2018 (M/s JSW Steel Ltd Vs MERC) and Appeal No 315 of 2018 ( ref: Annexure-2 to the reply filed by Respondent No. 2 MPPMCL ref page No. 35-123):*

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

- vi. *In this regard it is stated Hon'ble Supreme Court in the civil appeal No. 5074-5075 /2019 vide order dated 01/07/2019 (ref: Annexure-3 to the Reply of the petition by Respondent 1) has already granted stay on the operation and implementation of the said judgment.*
- vii. *It is further stated that the judgment given in the 'JSW Steel Ltd' cannot be considered as binding precedent, as the same has delivered without noticing the earlier judgment of coordinate bench in which Hon'ble APTEL has upheld the order of the Hon'ble WBERC levying the additional surcharge on the electricity consumed through captive route. It is settled legal position that a coordinate bench of same strength cannot take a contrary view than what has been earlier held by another coordinate bench.*
- viii. *With regard to precedent value of judgment which has been given without noticing the earlier judgment of coordinate bench, Five judge bench of Hon'ble Apex Court in SLP (Civil) NO. 25590 of 2014 vide order dated Oct 31, 2017 (Annexure-5) held as under:*

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

*.....*

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

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

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

**5. Whether consumption of power from captive generating plant through open access comes within the scope and ambit of Section 42(4):**

The relevant provision governing the levy of additional surcharge is again reproduced as under for ease of reference:

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

**To answer the case under consideration following issue need address:**

- i. Whether there is any element of '**Permit/permission**' from Commission exist in case of a captive consumer consuming power through open access:
  - a. It is contended by the petitioner that when a captive consumer consumes electricity from its captive generating plant by availing open access there is no permission from the Hon'ble Commission hence in absence of permission additional surcharge can not be levied.
  - b. As already discussed that as per section 2(47) open access shall be regulated by the Hon'ble Commission through Regulations notified in this regard. This Hon'ble Commission in exercise of power conferred by the Act of 2003 has notified the MPERC (Terms and Conditions for Intra State Open Access in Madhya Pradesh) Regulations, 2005 (here in after referred as 'OA Regulation 2005') and subsequent amendment thereof. The OA Regulations, 2005 provides as under:

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

**i. For Non-Conventional Energy Sources:**

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

**ii. For Captive Generating Plants of Conventional Energy:**

Open access for the captive power plants shall be provided with immediate effect.

**iii. For all other open access customers:**

.....

**13: CHARGES FOR OPEN ACCESS**

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

a. Transmission Charges –The transmission charges for use of the transmission system of the transmission licensee for intra-state transmission shall be regulated as under,namely: -

.....

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

.....

.....

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

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

.....

**Note: The submission of the Petitioner in its rejoinder (para 3.19 of rejoinder) that wheeling charge is not a open access charge is contrary to aforesaid provision of the regulation.**

- c. Permission does not mean that permission shall be granted to individual consumers by this Hon’ble Commission by its order on case to case basis. Permission of open access is governed by the regulation commonly for all users of the transmission/distribution system whether captive or otherwise.



- d. Therefore, availing open access after compliance of the procedure prescribed along with the other provisions of regulation **is nothing but the 'permission'** of open access provided by the Hon'ble Commission.
- ii. **'Whether petitioner consuming electricity through open access from its captive generating plant is a 'consumer'?**

- a. Act defines the term consumer as under:

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

In the present case premises of the petitioner connected with the works of licensee for receiving electricity from the captive generating plants. Thus petitioner is consumer. Further petitioner is also maintaining the contract demand with the distribution licensee. Thus petitioner is a consumer while consuming power through its solar generating plant.

- b. Andhra Pradesh High Court in ***Rane Engineering Valves Ltd, Vs State of Andhra Pradesh and others (Writ Petition Nos. 6095 of 2004 Dated :19-05-2016) (Annexure-6)*** held that a producer of electricity can also be a consumer and such person is playing dual role. The relevant part of the said judgment is reproduced as under:

25.12. ....**As held in Jijajee Cotton Mills Ltd that a producer of electricity can also be a consumer. Such person is playing a dual role.** Levying of tax/duty on such person towards consumption of electricity is directly under entry 53 of List-II. Merely because he also generates electricity, levying duty on consumption does not and cannot amount to levying tax on generation.....”

- c. In ***Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015) (Annexure-7)***, it was contended by appellant captive generating plant that the Act of 2003 has totally liberalized the establishment of captive power plants and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, it not the consumer of distribution licensee & cannot be regulated by the Regulatory Commission. Rebutting the submission Hon'ble Supreme Court held as under:

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

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

- d. In view of above dictum of Hon'ble High Court as well as Hon'ble Apex Court it is clear that a person who has setup the captive generating plant has dual role/capacity, one as a generating plant and other as a consumer. Further similar to the RPO obligation additional surcharge is not being levied in the capacity of generator but being levied in the capacity of consumer. Further if additional surcharge not levied on captive consumers the regular consumer of the distribution licensee will be in a disadvantageous position.
- iii. Whether arrangement of availing power from captive generating plant amounts to 'supply'?
- a. Petitioner is contending that in the transaction of consuming power from captive generating plant there is no element of 'supply' hence additional surcharge is not applicable. Petitioner is solely relying on the definition of term 'supply' given in the Act same is reproduced as under:

**"2. Definitions.-In this Act, unless the context otherwise requires,-**  
**2(70) –supply, in relation to electricity, means the sale of electricity to a licensee or consumer;"**

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

- b. *It is submitted that aforesaid Section 2 of the Electricity Act, 2003, which contains the definition of supply, opens with the phrase “**unless the context otherwise require**”. Therefore, depending upon the context meaning of any term defined in the definition clause may be varied.*
- c. *In the issue under consideration the context is of the open access and additional surcharge being levied to compensate the distribution licensee. While performing the duties of common carrier a distribution licensee is only concern with the conveyance of electricity from point of injection to the point of drawl and distribution licensee has nothing to do with the commercial arrangement (if any) between sender and receiver of the electricity. Therefore in the present context meaning of supply cannot be same as given in the definition clause.*
- d. *Hon’ble Supreme Court in the case of **The Vanguard Fire and General Insurance Co. Ltd vs M/s. Fraser And Ross And Another (Annexure-8)** held as under:*  
*“....It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word "insurer " in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word " insurer " as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning.”*
- e. *The issue of contextual interpretation of Electricity Act 2003 came under consideration of Hon’ble Supreme Court in the case of **The Executive Engineer Vs. M/S Sri Seetaram Rice Mill Civil appeal No. 8859 of 2011 (Annexure-9)**. Upholding the contextual and purposive interpretation of statute, vide order dated 20/10/2011 Hon’ble Apex Court held as under:*  
*“41. The above judgments clearly support the view that we have taken with reference to the facts and law of the present case. **It cannot be stated as an absolute proposition of law that the expression ‘means’ wherever occurring in a provision would inevitably render that provision exhaustive***

**and limited. This rule of interpretation is not without exceptions as there could be statutory provisions whose interpretation demands somewhat liberal construction and require inclusive construction.** An approach or an interpretation which will destroy the very purpose and object of the enacted law has to be avoided.....”

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

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

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

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

g. Aforesaid conclusion drawn by us found support from the meaning of term ‘supply’ given in various dictionary:

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

supply

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

❑ Electrical power is supplied by underground cables.

**Oxford Advance Dictionary**

Supply

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

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

h. Hon’ble Supreme Court in the case of National Insurance Co. Ltd vs Deepa Devi & Ors (**Annexure-10**) held as under:

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

Therefore in the case in hand the term supply is required to same meaning which a common man understand from this term i.e. **providing what is required i.e. electricity.**

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

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

- j. This, Hon'ble Commission in the case of Malanpur supra termed the arrangement between captive generating plant and captive user as 'supply':

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

- k. Hon'ble Supreme Court in the matter of **Civil Appeal No. 1879 of 2003 Karnataka Power Transmission Corpn. & Anr. Vs Ashok Iron Works Pvt. Ltd. (Annexure-11)** held that supply of electricity doesn't mean sale. The relevant part of the said judgment is reproduced as under:

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

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

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



**Court has already held in Southern Petrochemical Industries (supra) that supply does not mean sale.....”**

- l. It is also noteworthy to mention that in Section 42(4) term ‘**supply of electricity**’ is preceded by the term ‘**receive**’. If for the purpose of section 42(4) ‘supply’ only mean as **sale** then in that case legislature would have used term ‘**purchase**’ in place of term ‘**receive**’. Term ‘**Receive**’ means **to accept the delivery of, to take possession e.t.c.** Use of term ‘**receive**’ further fortifies our conclusion that in the present context ‘supply’ does not mean sale.
- m. Hon’ble Commission vide tariff order of FY 2017-18, FY 2018-19 and FY 2019-20 has approved the additional surcharge for all open access consumers and no exemption has been provided to consumers availing power through their captive generating plant. The relevant part of the tariff order FY 2017-18 is reproduced as under:  
 “.....3.29 The Commission has thus determined the additional surcharge of Rs 0.646 per unit on the **power drawn** by the Open Access consumers from the date of applicability of this Retail Supply Tariff Order.”
- It may be seen that tariff order used term ‘drawn’ and not the term ‘purchase’. Therefore additional surcharge is leviable even if there is no sale or purchase during the consumption of power through captive generating plant.
- n. There are many instances in the Act where meaning of term supply cannot be considered as ‘Sale’. Following is the summary of such provision. are the other provisions of the Act where term ‘supply’ and distribution are used interchangeably:

<b><u>Provisions</u></b>	<b><u>Meaning of term ‘supply’</u></b>
2(3) "area of supply" means the area within which a distribution licensee is <b>authorised by his licence to supply electricity</b> ;	It may be seen that while section 2(3), 2(17), heading of section 12 provides that licensee is authorized for Supply of Electricity. Whereas Section 12(b) and Section 14(b) speaks about the license for distribution of electricity. Therefore it can only be inferred that term supply also include
2(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for <b>supplying</b> electricity to the consumers in his area of supply;	
<b>Section 12. (Authorised persons to transmit, <u>supply</u>, etc., electricity):</b> No person shall (a) transmit electricity; or (b) <b>distribute</b> electricity; or (c) undertake trading in electricity, <b>unless he is authorised to do so by a licence</b> issued under section 14, or is exempt under section 13.	
<b>Section 14. (Grant of licence):</b> The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person - (a) to transmit electricity as a transmission licensee; or (b) <b>to distribute electricity as a distribution licensee</b> ; or (c) to undertake trading in electricity as an electricity trader,	

<i>in any area as may be specified in the licence:</i>	<i>'distribution' within its domain.</i>
<i>2(14) –conservation   means any reduction in consumption of electricity as a result of increase in the efficiency in <b>supply</b> and use of electricity;</i>	<i>Here supply has its ordinary meaning ie make available.</i>
<i>24. Suspension of distribution licence and sale of utility.-(1) If at any time the Appropriate Commission is of the opinion that a distribution licensee-</i> <i>(a) has persistently failed to maintain uninterrupted <b>supply of electricity</b> conforming to standards regarding quality of electricity to the consumers; or</i> <i>.....</i>	<i>Here supply means make available electricity and not the sale of electricity. Distribution licensee cannot compromise quality of supply even if it is providing supply to captive consumer.</i>
<i>56. <b>Disconnection of supply in default of payment.</b>-(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:</i>	<i>Here the supply means availability of electricity and not the sale. Otherwise distribution licensee can not disconnect supply even if a captive consumer not making payment of wheeling charges or other dues of distribution licensee.</i>
<i>53. <b>Provision relating to safety and electricity supply.</b>-The Authority may, in consultation with the State Government, specify suitable measures for-</i> <i>(a) protecting the public (including the persons engaged in the generation, transmission or distribution or trading) from dangers arising from the generation, transmission or distribution or trading of electricity, or use of electricity supplied or installation, maintenance or use of any electric line or electrical plant;</i> <i>(c) <b>prohibiting the supply</b> or transmission of electricity except by means of a system which conforms to the specification as may be specified;</i>	<i>Here supply means making available electricity. Safety provisions are applicable notwithstanding the sale is being made or not.</i>

<p><b>Section 139. (Negligently breaking or damaging works):</b> Whoever, negligently breaks, injures, throws down or damages any material connected with the <u>supply</u> of electricity, shall be punishable with fine which may extend to ten thousand rupees.</p>	<p>Here expression supply would only mean making available</p>
<p><b>Section 139. (Negligently breaking or damaging works):</b> Whoever, negligently breaks, injures, throws down or damages any material connected with the <u>supply</u> of electricity, shall be punishable with fine which may extend to ten thousand rupees.</p>	<p>electricity. Any other interpretation would mean that damaging the captive generating plant is not an offence because it is not saleing power.</p>

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

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

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

**In view of above submission it is stated that expression 'supply' not always mean sale of electricity. Depending upon context its meaning shall be different. In the present context meaning of 'supply' would be its natural meaning i.e. make available the electricity and not the sale as provided in the definition clause.**

6. **Whether exemption from cross subsidy surcharge also implied exemption from additional surcharge? :**
- (i) Section 2(47) specifically provided that open access shall always be subject to regulation of the Commission.
- (ii) In Hindustan Zinc Supra Hon'ble Supreme Court held as under  
34. .... **The mere fact that no licence is required for Establishment, Operation and Maintenance of a Captive Power Plant does not imply that the industries engaged in various commercial activities putting up such**

**Captive Power Plants cannot be subjected to Regulatory Jurisdiction of the Commission .....**

- (iii) **Role of proviso:** It may be seen that fourth proviso to Section 42(2) specifically provided that cross subsidy surcharge shall not be payable in case of Captive Generating plants. A proviso in a statutory provision inserted only with the object of taking out of the scope of that principal clause what is included in it. If Open Access Charges on open access availed by Captive Generating Plant is not governed by Section 42, there was no need to insert such proviso to Section 42(2). With regard to the utility and scope of proviso following judicial pronouncement are relevant:

- a. Sales-tax Officer, Circle 1, Jabalpur v. Hanuman Prasad 1967 (1) SCR 831 (Annexure-12) stated that:**

*"5. .... It is well-recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the Legislature desires should be excluded. ...."*

- b. Haryana State Cooperative and Development Bank Ltd. v. Haryana State Cooperative Land Development Banks Employees Union and Another (2004) 1 SCC 574 (Annexure-13), it was held that:**

*"The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment...The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment **and its effect is confined to that case.**" (para 9)*

- (iv) **Hon'ble APTEL in its judgment (which is later stayed by Hon'ble SC) in the case of Appeal No. 311, 315 of 2018 supra made following observation:**

**71. It is relevant to refer to Section 39 of the Act which speaks of surcharge in general and not with reference to cross subsidy surcharge. Similar provisions are made in Sections 38 and 40. In these three provisions, i.e., 38, 39 & 40 it refers to open access in the context of sub-rule (2) of Section 42. It also refers to surcharge and cross subsidy in general but it does not restrict it to sub section (2) of Section 42. In that context, the surcharge, referred to, would include additional surcharge referred at sub-section (4) of Section 42 of the Act. Therefore, it is clear that the provisions with reference to surcharge, cross subsidy, referred to in sections 38, 39 and 40, is in the context of open access, which is allowed for conveyance of electricity, but not in the context of either cross subsidy surcharge or additional surcharge. In other words, these provisions i.e, Section 38(2)(d)(ii) and Section 39(2)(d)(ii) and Section 40(c)(ii) and proviso to sub-section (2) of Section 42 of the Act deal with the manner of procedure how this surcharge has to be utilised. **The utilisation of additional surcharge is also meant for****

***sharing the burden of fixed cost of power purchase and also for meeting the requirements of current level of cross subsidy existing in the tariff of the distribution licensees. ....***

**(v) With due respect to the Hon'ble APTEL the aforesaid observations are inconsistent with law on the following aspect:**

a. Surcharge referred in Section 38, 39 and 40 cannot be include the additional surcharge because as per first proviso to Section 38 (1) read with third proviso to Section 41 transmission licensee cannot be enter into power purchase and sale agreement and accordingly question of levy of additional surcharge does not arise. Relevant part is reproduced as under:

***38. Central Transmission Utility and functions.-(1) The Central Government may notify any Government company as the Central Transmission Utility: Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:***

***39. State Transmission Utility and functions.-(1) The State Government may notify the Board or a Government company as the State Transmission Utility: Provided that the State Transmission Utility shall not engage in the business of trading in electricity:***

***41. Other business of transmission licensee.-A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilisation of its assets: Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity.***

b. As per Ruling of the Hon'ble Supreme Court in Sesa Sterlight case Additional surcharge is meant for sharing of the burden of fixed cost of power purchase and not for the cross subsidy.

*In view of above it can safely concluded that except for the exemption from cross subsidy surcharge no other benefit available to captive generating plant.*

**7. Effect & implication of Section 9:**

**i. Relevant part of Section 9 reproduced as under:**

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

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



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

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

- ii. First proviso to Section 9 (1) clearly provides that use of grid shall be regulated in the similar manner as in case of the generating station of a generating company. Further sub-section 2 of section 9 merely provides that person establishing the captive generating plant shall have the right of open access and does not speak anything about charges of open access.
- iii. As already stated that open access shall always be subject to regulation of the Hon'ble Commission, open access shall be subject to payment of applicable open access charges in accordance with regulation.
- iv. It is also noteworthy to mention that the proviso to section 9(2) is indicating only about transmission open access and not the distribution open access.

**Thus, Section 9 has no application as far as liability of open access charges are concern and same are governed by section 42.**

**8. Since captive consumers are not exempted with regard to wheeling charges (wherever applicable) they are also liable to pay additional surcharge:**

- i. As per provision of the OA Regulation 2005 (ref para 5 above) wheeling charges, cross subsidy surcharge and additional surcharge are three independent open access charges. In other word levy of any one charge is not the conditional upon the levy of any other charges. In Sesa Sterlite supra Hon'ble Supreme Court clearly explained the scheme of surcharges in the Electricity Act 2003 and held that additional surcharge is nothing but the compensation of loss.
- ii. Clause 8.5.4 (ref: para. 2 above) of the National Tariff policy provides that the fixed cost of power purchase would be recovered through additional surcharge and the fixed costs related to network assets would be recovered through wheeling charges. Thus additional surcharge and wheeling charges being levied for two different purposes. However even assuming **(but not admitting)** that additional surcharge has any nexus with the wheeling charges, in the present case petitioner is not disputing the liability towards wheeling charges therefore petitioner is also liable to pay additional surcharge by its own admission.

**9. Recommendation of Forum of Regulators:**

- i. *Petitioner has relied upon the report issued by FoR in December 2017 (**Annexure-14**). The recommendation of FoR is given in the para 7 of the Report. FoR as not given any recommendation regarding non levy of additional surcharge on captive generating plant.*
- ii. *It is incorrect to say that State Commission is member of the FoR hence recommendation of FoR is binding on the State Commission. The relevant section 166 of the Act reproduced as under:*  
*166. Coordination Forum.–*  
*(2) The Central Government shall also constitute a forum of regulators consisting of the Chairperson of the Central Commission and Chairpersons of the State Commissions.*  
*(3) The Chairperson of the Central Commission shall be the Chairperson of the Forum of regulators referred to in sub-section (2).*

*It may be seen that only chairperson of the State Commission and Central Commission are the members of the FoR.*

- iii. *Section 61 read with section 86 provides for the factors which shall be guided to the State Commission. Relevant part is reproduced as under:*

*61. Tariff regulations.–The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:–*

***(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;***

*.....*

***(i) the National Electricity Policy and tariff policy:***

*86. Functions of State Commission–*

*.....*

***(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.***

*It may be seen that report/recommendations of Forum of Regulators is not found place in the list of such guiding factors.*

- iv. *FoR has constituted under section 166 of the Act as coordination Forum. Recommendations of FoR do not have any binding force and cannot override provision of the Act and Tariff order issued there under.*

***In view of above factual matrix, statutory provisions and judicial pronouncements, it is submitted that instant petition lacks merit and Hon'ble Commission is requested to kindly dismiss the petition.***

### **Commission's Observations and Findings:**

**12.** The Commission has observed the following facts from the contents in the petition and the submissions made by the parties in this matter:

(i) The petitioner has two Solar PV power Plants at Village Karodia in Distt. Ujjain and the entire electricity generated from aforesaid plants is consumed by its manufacturing Unit situated at Pithampur. The petitioner is a captive power user and drawing power from its solar power plant at a place different from place of consumption, has challenged additional surcharge on wheeling of electricity imposed on him by the Respondent No. 1 consequent to the 7<sup>th</sup> Amendment to the MPERC (Co-Generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010.

(ii) The petitioner is availing open access through Distribution network of the licensee i.e. Respondent No.1 for wheeling of aforesaid electricity from captive solar power plant to its manufacturing unit at Pithampur.

(iii) The petitioner is a HT consumer of the Distribution Licensee i.e., Respondent No.1 having HT connection at 33kV voltage with contract Demand of 3500 KVA. This HT connection was served to the petitioner on 12.09.1994. The above mentioned captive solar power plants were commissioned on 27.12.2013 and 08.11.2017 with capacity of 1.5 MW and 2.55 MW respectively.

(iv) The Respondent No.1 started levying of additional surcharge on the petitioner under Section 42 of Electricity Act, 2003 after amendment in "MPERC Co-generation Regulation 2010". The petitioner vide letter dated 12/01/2018 submitted its representation to Respondent No.1 against levy of additional surcharge. The Respondent No.1 vide letter dated 30/01/2018 responded to the representations of the petitioner in the light of statutory provision. Thereafter, after one year the petitioner vide letter dated 04/01/2019 again represented against the levy of additional surcharge. The said representation was also decided by the Respondent No.1.

(v) The petitioner has filed the subject petition mentioning certain provisions under the Electricity Act'2003, some Judgments passed by the Hon'ble Tribunal for Electricity. The petitioner in support of its contention has placed detailed submissions on certain orders passed by Maharashtra Electricity Regulatory Commission (MERC) and one order of MPERC also.

(vi) The Respondent in its response on the issues raised in the subject petition has filed its detailed submission on the following issues:

- a. Rational behind Levy of Additional Surcharge
- b. Duties of distribution/transmission licensee in context of open access towards the 'Captive Generating Plant' vis a vis a 'Non Captive Generating Plant'/'Generating Company'.
- c. Effect on 'Universal Service obligation (USO)' or 'Consumer ship with Distribution Licensee' post availing 'open access'.
- d. Effect of Section 9 of the Act on the liability of open access charges.
- e. Necessity of buyer-seller relationship to levy the additional surcharge under section 42(4).
- f. Liability of Additional surcharge vis a vis Liability of wheeling charge.
- g. Judicial pronouncement regarding levy of additional Surcharge in case of open access through captive route.
- h. Regulation/tariff order prevailing in the state of Madhya Pradesh vis a vis maintainability of challenge towards same in present proceedings.

13. The relevant provisions with regard to the issue of Additional Surcharge under MPERC Regulations and the Electricity Act'2003 in the subject matter are reproduced below:

(i) Regulation 12.2 after amendment and prior to amendment is reproduced below:

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

**"12.2 Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission in its retail supply tariff order."**

(b) Prior to the 7<sup>th</sup> Amendment, the said regulation provided as under:

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

**(Emphasis Supplied)**

14. It is explicitly clear from the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 that the exemption from payment of open access charges provided to

Captive and Open Access Consumers prior to the said amendment has been withdrawn and it has been provided in the seventh amendment that the open access charges if any, under Section 42 of the Electricity Act'2003 shall be applicable in terms of retail supply tariff order issued by the Commission. The validity and legality of aforesaid amendment was challenged before the Hon'ble High Court of MP by some other parties but the same has been upheld by the Hon'ble High Court. Hence, the applicability of open access charges shall be as per provisions under Section 42 of the Electricity Act'2003.

**15. Let us look into the provisions under Section 42 of the Electricity Act which provides as under**

*(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

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

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

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

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

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

*....”*

***(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of***



**wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.**

16. It is observed that the abovementioned Section 42(4) of the Electricity Act provides that the Additional Surcharge is:

- (a) Levied on **an Open Access consumer** when the State Commission:
  - (i) Permits a **consumer or class of consumers,**
  - (ii) To **receive supply** of electricity **from a person other than his area of distribution licensee.**
- (b) Payable **on charges for wheeling**
- (c) To meet the **fixed cost of the distribution licensee** arising out of his obligation to supply electricity.

17. It is evident from the observations at Para 12 of this order that the petitioner is an Open Access Consumer having open access in terms of MPERC Open Access Regulations. The petitioner is receiving supply of electricity from a person (captive solar power plant) other than the distribution licensee of his area of supply. The petitioner is also using network of distribution licensee for wheeling of electricity from its captive solar power plant to its manufacturing unit. To examine the last condition for applicability of additional surcharge, let us look into the provisions under Section 43 of the Electricity Act'2003 which provides as under:

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

....”.

18. As per above provision under sub section (1) of Section 43 of the Act, the Distribution Licensee is required to supply power as and when required by the any owner /occupier of any premises in its area of supply. This means that the distribution licensee is always having an obligation under Section 43 of the Electricity Act'2003 to provide supply of electricity to owner or occupier of any premises without any discrimination whether it is a new consumer or an existing open access consumer or a captive user seeking additional/enhancement of demand in place of electricity which was otherwise being drawn through open access or from captive generation. In view of aforesaid provision, the distribution licensee is required to fulfill its obligation to supply electricity to a consumer, being petitioner in this case. Besides

the licensee is also required to pay fixed cost for procurement of power through long term PPAs which have to be signed to meet such obligations. Further, in the matter of Hindustan Zinc Ltd Vs. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015), Hon'ble Supreme Court has held that captive consumers are also consumers of the distribution licensee.

- 19.** In view of aforesaid observations and examination of facts and circumstances in the matter and in light of provisions under MPERC (Cogeneration and Generation of Electricity from Renewables Sources of Energy) (Revision I) Regulation, 2010 as amended read with provisions under Section 42 (4) of the Electricity Act 2003, the Commission finds no merit in the contention of petitioner and additional surcharge is therefore, leviable on the petitioner. With the aforesaid observations and findings, the prayer is disallowed and the subject petition is dismissed.

**-sd-  
(Shashi Bhushan Pathak)  
Member**

**-sd-  
(Mukul Dhariwal)  
Member**

**-sd-  
(S.P.S. Parihar)  
Chairman**