

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION  
BHOPAL**

**Sub: In the matter of petition filed under Section 42 read with Section 33(4), 86(1)(a), 86(1)(c), 86(1)(f) & 86(1)(k) of the Electricity Act, 2003, Clauses 18.15, 18.16, 18.18, 18.19 & 18.20 of MPERC (Terms & Conditions Intra-State Open Access in Madhya Pradesh) Regulation, 2005 and all other provisions enabling in that behalf, for direction to Indian Railway to make payment of open access charges on energy drawn through open access.**

**Petition No. 11 of 2020**

**ORDER**

**(Date of Order: 05<sup>th</sup> May' 2021)**

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| <p><b>(1) M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.</b><br/>Block No. 7, Shakti Bhawan, Rampur, Jabalpur – 482008</p> <p><b>(2) M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.</b><br/>GPH Compound, Pologround, Indore – 452001</p> <p><b>(3) M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.</b><br/>Nishtha Parisar, Govindpura, Bhopal – 462023</p> | <p>-</p> | <p><b>Petitioners</b></p> |
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**Vs.**

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| <p><b>(1) West Central Railways</b><br/>On behalf of Indian Railways, General Manager's Office,<br/>Electrical Department, Jabalpur – 482 001</p> <p><b>(2) M.P. Power Transmission Co. Ltd.</b><br/>Block No. 2, Shakti Bhawan, Rampur, Jabalpur – 482008</p> <p><b>(3) State Load Despatch Centre (SLDC)</b><br/>M.P. Power Transmission Co. Ltd.<br/>Block No. 2, Shakti Bhawan, Rampur, Jabalpur – 482008</p> | <p>-</p> | <p><b>Respondents</b></p> |
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Shri Prakash Upadhyay Advocate appeared on behalf of the petitioners. Shri Deepak Chandela, DGM appeared on behalf of the Petitioner No. 1.

Shri Shailendra Jain, Dy. Director appeared on behalf of the Petitioner No. 2.

Shri G.R. Patele appeared on behalf of the Respondent No. .3

Shri S.S Patel, SE appeared on behalf of the Respondent No.3.

Shri Pulkit Agarwal, Advocate appeared on behalf of the Respondent No.1

The petitioners, MPPoKVVCL, MPPaKVVCL and MPMKVVCL (DISCOMS) have filed the subject petition under Section 42 read with Section 33(4), 86(1)(a), 86(1)(c), 86(1)(f) & 86(1)(k) of the Electricity Act, 2003, Clauses 18.15, 18.16, 18.18, 18.19 & 18.20 of MPERC (Terms & Conditions Intra-

State Open Access in Madhya Pradesh) Regulation, 2005, for direction to Indian Railways to make payment of open access charges on energy drawn through open access.

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

(i) West Central Railways on behalf of Indian Railway is the consumer of electricity situated in the area of petitioner Distribution licensees. Earlier Indian Railway was availing HT power supply at various Traction Points in the State of Madhya Pradesh from the petitioner distribution licensees. West Central Railway (WCR), on behalf of Indian Railways availed long term open access w.e.f 22.01.2016 for wheeling/Transmission of Electricity to all of the TSS points of Railways in Madhya Pradesh for which earlier HT connections were availed. Subsequently, few new TSS were added by Railways in the State of MP and power has been availed through LTOA. Hon'ble Madhya Pradesh Electricity Regulatory Commission (MPERC) had already clarified in the case of M/s Jaiprakash Associates, Rewa that for availing facility of open access there is no requirement of maintaining contract demand with the distribution licensee of the area. A copy of clarification given by MPERC is annexed as **Annexure-1**. In the light of the said clarification of MPERC, request of West Central Railway on behalf of Indian Railways for termination of HT agreements as per the terms and conditions of respective agreements were considered by the petitioner Discoms and w.e.f 22.01.2016, Railway is consuming power for all of the Traction Load requirement through long term / short term open access. Before discontinuance of power supply from distribution licensee under HT agreements, Railway's total contract demand with MP Discoms was 593 MW and total average per month sale was around 152 MUs with monthly billing of about Rs 96 Crore. Therefore, it is explicit that Railway was contributing substantial revenue to the Discoms as a subsidizing bulk HT consumer.

(ii) In the Electricity Act 2003 (herein after referred as 'Act of 2003'), section 42 deals with the open access. The relevant extract is reproduced below:

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

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

regard to all relevant factors including such cross subsidies, and other operational constraints:

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

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

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

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

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

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

**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."**

- (iii) It is stated that concept of open access has been statutorily introduced by the Act of 2003 in order to promote free trade of electricity. The Section 2 (47) of the said Act defined the term open access as under:

*"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:***

- (iv) It is submitted that Act of 2003 gives freedom to a consumer to consume power either from his own generation (Captive Generation) or from purchase it from an independent power generator of his own choice besides distribution licensee of the area. However, at the same time Act of 2003 casts a statutory universal obligation upon distribution licensee to develop and maintain an efficient, co-ordinate and economical distribution system in his area to facilitate power supply to all the consumers of its license area and also provide Open Access through its distribution system or transmission system of Transmission Licensee subject to compliance of Regulations framed in this regard and payment of all statutory charges as determined by Regulatory Commission.
- (v) The Act of 2003 empowers the Regulatory Commission not only to determine the charge for wheeling/transmission of electricity but also to determine surcharge in Open Access (Cross Subsidy Surcharge & additional surcharge), which is to be utilized to meet the requirement of current level of Cross Subsidy and stranded capacity of power respectively, within the area of supply of the distribution licensee. **It submitted that Section 42 of the Act of 2003 makes it clear that Cross Subsidy Surcharge as well additional surcharge is a "Statutory Surcharge" and recoverable from all "Open Access Consumers"**. The consumers having captive power plants are however exempted from payment of cross subsidy surcharge on the energy availed through their captive power plants.
- (vi) 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 (Here in after referred as 'OA Regulation 2005') and subsequent amendment thereof. The OA Regulations, 2005 provides as under:

*2.1 In these regulations, unless the context otherwise requires:*

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

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

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

*other transmission licensee and intra state distribution system of the state distribution licensees or any other distribution licensee.*

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

**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.*

.....

.....

***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.***

.....

(vii) Aforesaid provision of OA Regulations 2005 makes it abundantly clear that each open access consumer including the Railway is liable to pay the open access charges prescribed by the Hon'ble MPERC. Hon'ble MPERC in its tariff order applicable for FY 2015-16 to 2019-20 prescribed the rate of cross subsidy surcharge and/or additional surcharge to be levied from open access consumers.

(viii) Considering the aforesaid provisions of the Act of 2003, OA Regulation 2005 and tariff orders issued by Hon'ble MPERC present petitioners raised demand of open access charges (cross subsidy surcharge and additional surcharge) upon Railway. Since WCR has applied for open access in the whole state of Madhya Pradesh on behalf of Railway, the MPPKVVCL, Indore and MPMKVVCL, Bhopal has authorized MPPPKVVCL, Jabalpur vide letter no. 14801 dated 24.08.2016 and 598 dated 01.09.2016, respectively, for raising demand of Cross Subsidy Surcharge and Additional Surcharge on Indian Railways. Accordingly, MPPKVVCL, Jabalpur on behalf of all the three Discoms started raising demand of CSS and additional surcharge on Indian Railways. The Financial year wise statement of demand is as under –

| FY                                  | Cross subsidy<br>Surcharge<br>in Cr. Rs. | Additional<br>Surcharge<br>in Cr. Rs. | Total  |
|-------------------------------------|--|---------------------------------------|--------|
| 2015-16                             | 39.06                                    | 0.00                                  | 39.06  |
| 2016-17                             | 238.36                                   | 0.00                                  | 238.36 |
| 2017-18                             | 6.17                                     | 115.24                                | 121.41 |
| 2018-19                             | 191.82                                   | 138.39                                | 330.21 |
| 2019-20<br>(Up<br>to<br>Nov-<br>19) | 138.87                                   | 96.42                                 | 235.29 |
| Grand<br>Total                      | 614.28                                   | 350.05                                | 964.33 |

**Copy of the bills raised to Railway enclosed as Annexure-2.** It may be seen that distribution licensee is continuously raising the demand of open access charges and requesting Railways to pay the same however railway is not making the payment of the same and dues of the petitioners is increasing every month.

- (ix) Hon'ble Supreme Court in the case of M/s. Sesa Sterlite Ltd Appellant(s) Vs. Orissa Electricity Regulatory Comm. & Ors. Civil appeal No 5479 of 2013 dated 25<sup>th</sup> April 2014 recorded the rational of the Cross Subsidy Surcharge (CSS) and additional surcharge in detail. The relevant portion of the said judgment is reproduced hereunder:

*(3) CSS: Its Rationale*

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

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

26. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.
27. With this open access policy, the consumer is given a choice to take electricity from any Distribution Licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for:
- (a) Current level of cross subsidy to be gradually phased out along with cross subsidies; and
  - (b) obligation to supply.
28. Therefore, in the aforesaid circumstances though CSS is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. **In nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not**, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low end consumer, if he falls in the category of subsidizing consumer. Once a cross-subsidy-surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. **A fortiori, even a licensee which purchases electricity for its own consumption either through a “dedicated transmission line” or through “open access” would be liable to pay Cross Subsidy Surcharge under the Act.** Thus, Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee.

#### *(4) Application of the CSS Principle*



29. In the present case, admittedly, the Appellant (which happens to be the operator of an SEZ) is situated within the area of supply of WESCO. It is seeking to procure its entire requirement of electricity from Sterlite (an Independent Power Producer ("IPP") (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude WESCO of the Cross Subsidy that WESCO would otherwise have got from it if WESCO were to supply electricity to the Appellant. **In order to be liable to pay cross subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a "consumer" within the aforesaid definition.**
30. Having regard to the aforesaid scheme, in normal course when the Appellant has entered to PPA with Sterlite, another Electricity Generating Company and is purchasing electricity from the said Company it is liable to pay CSS to the WESCO. Admittedly under the PPA, **the Appellant is purchasing his electricity from the said generating station and it is consumed by the single integrated unit of the Appellant. The Appellant therefore, qualifies to be a "consumer" under Section 2(15) of the Electricity Act.** It is also not in dispute that the unit of the Appellant is in the area which is covered by the licenses granted to WESCO as distribution licenses.
- .....
- .....
43. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, **in the present case no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Act. In order to avail further benefits under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA.** .....
44. Having regard to the aforesaid factual and legal aspects and **keeping in mind the purpose for which CSS is payable,** as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the Appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this Appeal which is accordingly dismissed.



- (x) In view of the ratio laid down by of Hon'ble Apex court as mentioned above, the Railway is liable to pay cross subsidy surcharge as well as additional surcharge as determined by the Hon'ble MPERC from time to time as compensation towards cross subsidy as well as to meet the stranded fixed cost arising out of obligation to supply.

Further aforesaid observations of the Hon'ble Supreme Court are highly relevant in the present case. Accordingly, to avoid the additional tariff burden on the consumer of the state of Madhya Pradesh and to ensure viability of the distribution licensee of the state, it is imperative that Railway be directed to make payment of the dues of the petitioners along with applicable delay payment surcharge without any further delay and in future also payment of bills of open access charges be made without any default.

- (xi) Clause 15.5 of the OA regulation 2005 provides that in the event of nonpayment of the dues, the licensee(s) shall have the right of disconnection of supply in accordance with section 56 of the Electricity Act 2003. Therefore, Hon'ble Commission is also requested that necessary direction be issued for disconnection of supply and withdrawal of open access facility in case of nonpayment of dues of the licensee by 1<sup>st</sup> respondent.

**3.** With the above submission, the petitioners prayed the following:

- i. Direct the 1<sup>st</sup> respondent to make payment of the dues towards the open access charges payable to the petitioners along with applicable delay payment surcharge without any further delay. 1<sup>st</sup> respondent may further be directed that future bills of open access charges raised by the petitioners should be made without any default. And*
- ii. Direct the 2<sup>nd</sup> Respondent to discontinue the supply/transmission/wheeling of electricity in the case of default by the 1<sup>st</sup> respondent in payment of dues of the present petitioners. And*
- iii. Direct the 3<sup>rd</sup> Respondent to discontinue the scheduling of power in the case of default by the 1<sup>st</sup> respondent in payment of dues of the present petitioners. And*
- iv. Condone any inadvertent omissions/errors/shortcomings and permit the petitioners to add/change/modify/alter this filing and make further submissions as may be required at later stage. And*
- v. Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.*

**4.** The subject petition was admitted on 25.02.2020 and the petitioners were directed to serve copies of subject petition on all Respondents in the matter and report its compliance to the Commission. The respondents in the subject matter were directed to file their response on the petition by 20<sup>th</sup> March' 2020 after serving a copy of the same on other side also. Thereafter, the petitioners were asked to file their rejoinder by 31<sup>st</sup> March' 2020. The case was fixed for hearing on 7<sup>th</sup> April' 2020.

5. At the hearing held on the 29.09.2020, the Commission observed the following:

- (i) The Respondent No. 1 (WCR) filed reply to the subject petition on the 18.06.2020.
- (ii) The Respondent No. 2 (MPPTCL) filed reply to the subject petition on 11.06.2020.
- (iii) The Respondent No. 3 (SLDC) filed reply to the subject petition on 26.05.2020.
- (iv) On 11.08.2020, the petitioner No.1 (East Discom) filed common rejoinder on behalf of all the petitioners to the reply filed by the Respondent No.1 (WCR).
- (v) On behalf of all the three petitioners, the Petitioner No.2 (West Discom) filed rejoinders on 04.09.2020 to the reply filed by Respondent No.2 and 3.
- (vi) On 18.09.2020, the Respondent No. 3 (SLDC) filed Sur-Rejoinder on the above rejoinder filed by the petitioner No. 2.

6. The representative for the petitioner No.1 requested for three weeks' adjournment in the matter as their Counsel being infected from COVID virus, was unable to attend the hearing scheduled on 29.09.2020. Considering the request of the petitioner No.1, the case was fixed for arguments on the 09.11.2020.

7. At the hearing held on 09.11.2020, Ld. Counsels who appeared for the petitioner and the Respondents concluded their arguments. They were directed to file their written submissions within a week. The case was reserved for order on filing the written submissions by both the parties within the stipulated time as above.

8. By affidavit dated 28.05.2020, the Respondent No.1 Western Central Railways submitted the following in its reply to the subject petition:

***"PRELIMINARY SUBMISSIONS:***

1. Indian Railways, Government of India represented by the Principal Chief Electrical Engineer, West Central Railways, is a Department of the Government of India, Ministry of Railways with Headquarters at Rail Bhawan, Raisina Road, New Delhi – 110001. The Indian Railways operate the rail system in India as per the provisions of the Railways Act, 1989.
2. *Section 2 (31) of the Railways Act, 1989 defines the term 'Railways' as under:*
  - "(31) "railway" means a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes—*

- (a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;*
- (b) all lines of rails, sidings, or yards, or branches used for the purposes of, or in connection with, a railway;*
- (c) all electric traction equipments, **power supply and distribution installations used for** the purposes of, or in connection with, a railway;*
- (d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water II works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway;*
- (e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and*
- (f) all ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland -waters for the purposes of the traffic of a railway and owned, hired or worked by a railway administration, but does not include-*
- (i) a tramway wholly within a municipal area; and*
- (ii) lines of rails built in any exhibition ground, fair, park, or any other place solely for the purpose of recreation;”*

*(Emphasis Supplied)*

- 3. *Section 2 (32) of the Railways Act, 1989 defines the term ‘Railway Administration’ as under:*  
*“(32) "railway administration", in relation to—*
  - (a) a Government railway, means the General Manager of a Zonal Railway; and*
  - (b) a non-Government railway, means the person who is the owner or lessee Of the railway or the person working the railway under an agreement;”*
- 4. *Section 11 of the Railways Act, 1989 deals with the powers of Railway Administration to execute all necessary works of Railways. Section 11 of the Act reads as under:*

*“11. Payment of amount for damage or loss.-(1) Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the*

*provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any contract between the non-Government railway and the Central Government, **a railway administration may, for the purposes of constructing or maintaining a railway—***

- (a) make or construct in or upon, across, under or , over any lands, or any streets, hills, valleys, road's, railway, tramways,. or any rivers, canals, brooks, streams or other waters, or any drains, water pipes, gas-pipes, oil-pipes, sewers, **electric supply lines**, or .telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of railways, passages, conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;*
- (b) alter the course of any rivers, brooks, streams or other water courses, for -the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;*
- (c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;*
- (d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;*
- (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead;*
- (f) erect, operate, maintain or repair any telegraph and telephone -Lines in connection with the working of the railway;*
- (g) **erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway;** and*
- (h) do all other acts necessary for making, maintaining, altering or repairing and using the railway."*

*(Emphasis Supplied)*

5. *In terms of the above, the powers of the Railways Administration include the power of construction and establishment of Electric Supply Lines or Telegraph Lines as specifically provided for in sub-clause (a). Sub clause (g) of Section 11 provides for the powers of the Railway Administration to erect, operate, maintain, repair etc any electric traction equipment, power supply and distribution installation in connection with the working of the Railways. Besides the above, sub-clause (h) of Section 11 provides for the power in the Indian Railways to do all other acts necessary for making, maintaining, altering and repairing and using railways.*

6. *Section 12 of the Railways Act empowers the Indian Railways to alter the Electric Supply Lines. Section 12 reads as under:*

***"12. Power to alter the position of pipe, electric supply line, drain or sewer, etc.-(1) A railway administration may, for the purpose of exercising the powers conferred on it by this Act, alter the position of any pipe for the supply of gas, water, oil or compressed air, or the position of any electric supply line, drain or sewer:***

***Provided that** before altering the position of any such pipe, electric supply line, drain or sewer, the railway administration shall give a notice indicating the time at which the work of such alteration shall commence, to the local authority or other person having control over the pipe, electric supply line, drain or sewer.*

*(2) The railway administration shall execute the work referred to in sub-section (1) to the reasonable satisfaction of the local authority or the person receiving the notice under the proviso to sub-section (1)."*

7. *Railways Act, 1989 is a special enactment relating to Railways and the functioning of Railways is governed by the said Act. In General Manager, Northern Railways represented by Union of India v Chairman, Uttar Pradesh State Electricity Board and Others decided on 09.2.2012 (Transferred Case No. 37 and 38 of 2001) (2012) 3 SCC 329, the Hon'ble Supreme Court had considered the status of the Railways under Railways Act and not Electricity Act. The Hon'ble Court held as under:*

*"15.....it is true that in terms of Section 27D of the Electricity Supply Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other than those authorized or otherwise exempted by an Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution of electricity. **However, in the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989, and not by the enactment governing electricity.***

16. That apart, Section 11(a) and (g) of the Railways Act, 1989 clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorises the Railway Administration to execute all works for the purpose of constructing or maintain railways. Sub-Section (a) of the Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-Section (g) thereof, the Railways are authorized to erect traction equipment, power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by UPSEB as well."

The said judgment was given in context of transmission of electricity, however, it is submitted that the position is same for distribution of electricity. Therefore the distribution of electricity by the Indian Railways is governed by the Railways Act, 1989 and not Electricity Act, 2003.

8. The empowerment of the Indian Railways to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Railways under Section 11 of the Railways Act, 1989 is not in any manner affected by provisions of Electricity Act, 2003.
9. Before the Electricity Act' 2003 there was no concept of payment of Cross Subsidy Surcharge. The Electricity Act' 2003 came into force on 10.06.2003. and though being a latter enactment, gives supremacy to the provisions of the Railway Act, 1989 under Section 173 as under:

**"173. Inconsistency in laws**

Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989."

Thus, in so far the Indian Railways are concerned, Indian Railways is authorised to distribute electricity for its own use under the Railways Act, 1989 is recognized notwithstanding anything contrary in the Electricity Act, 2003. So long there is a nexus between the erection, distribution and use of electricity by Indian Railways in connection with working of the Railways as envisaged in Section 11 of the Railways Act, 1989, the action of Railways will be within the scope of the authority vested under the Railways Act, 1989.



10. *In addition to the above, Indian Railways being a department and part of the Central Government under the Ministry of Railways, is a deemed distribution licensee under Third Proviso to Section 14 of the Electricity Act, 2003. In this regard, third proviso to Section 14 reads as under:*

*“Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not, be required to obtain a licence under this Act.”*

11. *The above aspects were duly considered by the Central Electricity Regulatory Commission (‘Central Commission’). Indian Railways has been recognized as a deemed distribution licensee by the Central Commission vide its order dated 05.11.2015 passed in Petition No 197/MP/2015. The Central Commission vide its order dated 05.11.2015 has held Indian Railways to be an authorized entity to distribute and supply electricity in connection with the working of the Railways under the Railways Act, 1989 and that it shall be entitled for grant of Open Access as a distribution licensee in connection with the working of the Railways as per the provisions applicable to a distribution licensee. A copy of the order dated 05.11.2015 passed by the Central Commission is annexed herewith as **Annexure – 1**.*
12. *Thus, in view of the above, Indian Railways being authorised under the Railways Act, 1989 and as a Deemed Distribution Licensee in terms of the Electricity Act, 2003 is entitled to procure electricity in the state of Madhya Pradesh, from any source of its choice including a Generating Company, a Captive Generating Plant, a Trader or through Power Exchange so as to carry out its operations as defined under section 11 of Railway Act 1989, as it may consider appropriate*
13. *An Appeal bearing Appeal No. 276 of 2015 has been pending before the Appellate Tribunal for Electricity against the above Order dated 05.11.2015. The Appellate Tribunal vide its order dated 16.12.2015 has rejected the relief interim orders in the Appeal being Appeal No.276 of 2015 filed against the order of the Central Commission. A copy of the order dated 16.12.2015 passed by the Appellate Tribunal is annexed herewith as **Annexure – 2**.*
14. *As per the deemed distribution licensee status under the third proviso to Section 14 of the Electricity Act, 2003, the Indian Railways is undertaking distribution of electricity within its area of operation and restricted to the purposes and in connection with the working of Railways. In fact, in so far as activities of Indian Railways is concerned, it has a distinct and separate area of jurisdiction and operational control, which is distinct from the distribution area of the Petitioner Discoms.*



15. *It is submitted that the Petitioners have sought for direction to Indian Railway to make payment of open access charges, i.e., cross subsidy surcharge and additional surcharge on energy drawn by Indian Railways through open access under Section 42. In this regard, it is submitted that Indian Railways is a distribution licensee in the state of Madhya Pradesh connected to Madhya Pradesh Power Transmission Company Limited, the State Transmission Utility and with a distinct area of operation to that of petitioners. The STU in compliance of its obligations as per section 39(d)(i) of Electricity Act, 2003 has provided non- discriminatory open access to its transmission system for its use by the Indian Railways and Indian Railways has been paying the necessary transmission charges to STU accordingly. However, no charges on account of Cross Subsidy Surcharge and Additional Surcharge are being paid as the same have no relation or relevance in so far as the activities of Indian Railways as Deemed Licensee are concerned. Further such charges would result in unreasonable amounts being imposed on Railways which is contrary to the intent and spirit of open access.*
16. *In this regard, it is stated that in the state of Madhya Pradesh, Indian Railways started procuring power on open access from 22.01.2016 on inter-state open access. The open access for inter-state transfer of power was sought and was granted to Indian Railways as deemed licensee by STU based on the No-Objection certificate issued by STU. Further, the connectivity agreements have also been executed by the Indian Railways for its Traction Substations as a Deemed Distribution Licensee with State Transmission Utility. Thus, Indian Railways is neither connected to Petitioner Discoms network nor in any way uses their network/facilities for the purpose of distributing electricity to its Traction Sub stations in the state of Madhya Pradesh. It is reiterated that Indian Railways is a deemed distribution licensee and distributing electricity of its own use with a distinct area of supply than that of petitioner Discoms. Such Open Access is being sought by the Indian Railways as a distribution licensee and not as a consumer. As long there is a nexus between the maintenance of the distribution system of the Indian Railways and use of the same for the purpose of railway administration, the Indian Railways sourcing power from the generator/trader etc, i.e., other than the distribution licensee of the area, need to be treated as a distribution licensee and not as a consumer of another distribution licensee in the area.*
17. *Open Access to transmission system for a distribution licensee are to be governed as per the provisions of Sections 38 (2) (d) (i), 39 (2) (d) (i), 40 (c) (i).*

***“Section 38. (Central Transmission Utility and functions):***

*.....*

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

*....*

*(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....”*

***“Section 39. (State Transmission Utility and functions):***

.....

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

....

*(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....”*

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

.....

*(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 ...”*

18. *As per above, Indian Railways shall have Open Access to transmission of CTUs/STUs on payment of transmission charges as decided by respective Commissions.*
19. *The cross subsidy surcharge is leviable in terms of the provisions of Section 42(2) read with Section 38(2)(d)(ii), Section 39(2)(d)(ii) and 40(c)(ii) only when the open access is sought for the conveyance of electricity to a consumer. There is no imposition of any surcharge including cross subsidy surcharge when there is procurement of power by a Licensee/Deemed Licensee. Thus, the petitioner Discoms cannot seek to levy cross subsidy surcharge on Indian Railway being a distribution licensee in the state of Madhya Pradesh on the energy being sourced by it through Open Access.*
20. *Section 42(2) and 42(4) of the Electricity Act, 2003 dealing with Cross Subsidy and Additional Surcharge provides as under:*

***“Section 42. (Duties of distribution licensee and open access):***

.....

- (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<sup>1</sup> [such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:*

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

*Provided also that such surcharge and cross subsidies shall be progressively reduced<sup>2</sup> [\*\*\*] in the manner as may be specified by the State Commission:*

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

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

.....

- (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 maybe specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."*

21. *Section 42(2) of Electricity Act 2003 provides for levying of cross subsidy surcharge in addition to wheeling charges on the consumer by the distribution licensee. The wheeling charges are towards the use of distribution network of Distribution licensee and cross subsidy surcharge to compensate it financially for subsidized electricity in its area of supply. Thus cross subsidy surcharge can only be in addition to wheeling charges. As submitted earlier, Indian Railways are not connected to/using petitioner's network, have a distinct area of supply and being distribution licensee are not liable to pay either wheeling charges or cross subsidy surcharge. The fact that, petitioner has prayed for imposition of cross subsidy surcharge only, makes his argument hollow as cross subsidy*

*charges can be levied on consumer of a distribution licensee only and Indian Railways being deemed distribution licensee in the state of MP is not liable for the same.*

22. *The Indian Railways in the present case, is availing power through Open Access from M/s. Jindal India Thermal Power Limited, RGPPL and BRBCL at its Traction Substations as a deemed distribution licensee. The Indian Railways as the distribution licensee is not supplying to any consumers of either of the State Distribution Licensees in the State of Madhya Pradesh thereby taking away their subsidizing consumers for which purpose the cross subsidy surcharge has been devised as payable. The Indian Railways is not therefore liable to pay cross subsidy surcharge to another distribution licensee.*
23. *With regard to Additional Surcharge, it is submitted that under Section 42(4) of the Electricity Act, 2003, 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. As mentioned earlier, Indian Railways are neither connected nor using Petitioner Discoms' network, hence the question of levying of wheeling charges or additional surcharge on wheeling charges towards the fixed cost of distribution licensee does not arise. Petitioners cannot seek imposition of charges de hors the Act.*
24. *Without prejudice to the above, Section 42 of the Electricity Act, 2003 deals with the Cross Subsidy and Additional Surcharge. Section 42 (2) specifically speaks about the Cross Subsidy Surcharge in the context of a consumer of electricity and not when the electricity is procured by a licensee. The purpose of Cross Subsidy Surcharge is to compensate the distribution licensee of the area in regard to the prevalent extent of the cross-subsidization of one category of consumers by another category. It cannot have any application in the case of a licensee. Similarly, Section 42 (4) speaks about the Additional Surcharge in the context of the State Commission permitting a consumer of a class of consumer and not in the case of a distribution licensee procuring power.*
25. *Thus, Section 42(2) of Electricity Act, 2003 only provides for applicability of cross subsidy surcharge and additional surcharge on wheeling charges on consumers of distribution licensee who are seeking Open access in the area of licensee and not on other distribution licensees who are neither connected nor using their distribution network. Therefore, there can be no cross subsidy surcharge and additional surcharge applicable on the Indian Railways being a deemed distribution licensee in the state of Madhya Pradesh.*
26. *The Hon'ble Commission has notified Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 (hereinafter referred to as '**Open Access Regulations**'). Regulation 2.1 of the 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 has availed of or intends to avail of open access;*

27. *Regulation 3 of the Open Access Regulation provides as under:*

**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.*

28. *As submitted hereinabove, Indian Railways is operating in its own area of distribution under its jurisdiction and control of Indian Railways which is distinct and separate from the area of distribution / area of supply. Thus, in terms of the above, the Indian Railways being a deemed distribution licensee is an "Open Access Customer" in so far as its procuring power through Open Access as a deemed licensee in terms of the Electricity Act, 2003.*

29. *An open access customer who is eligible for open access is required to pay charges as may be determined by this Hon'ble Commission. It is submitted that even in terms of Open Access Regulations as framed by this Hon'ble Commission, only a consumer of the distribution licensee is also liable to pay wheeling charges, cross-subsidy surcharge and additional surcharge as may be determined by this Hon'ble Commission. However, Indian Railways is procuring power through open access as a licensee. Therefore, the Indian Railways is not liable to pay any charges on account of cross-subsidy surcharge or additional surcharge.*

30. *In addition to the above, a perusal of the Regulations 13.1 (f) and (g) of Open Access Regulations dealing with Cross Subsidy Surcharge and Additional Surcharge would show that the same is applicable for open access consumers only and not on the entities, such as Indian Railways, procuring power through open access as a deemed licensee. Regulations 13.1 (f) and (g) provide as under:*

**13: CHARGES FOR OPEN ACCESS**

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

.....

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.*

31. *Thus neither the Electricity Act, 2003 nor the Open Access Regulations as framed by this Hon'ble Commission provide for the applicability of cross subsidy surcharge and additional surcharge on a licensee, the same cannot be sought to be levied by the Petitioners.*

32. *In the light of above para – wise reply to the petition filed by the Petitioners is as under:*

**Paras 1-3:** *The contents of Paras 1 to 3 of the Petition describe the Petitioners and as such need no reply.*

**Para 4:** *With regard to the contents of para 4 of the Petition, it is wrong and denied that the Indian Railways is a consumer of Petitioners and that also to the knowledge of the Petitioners. It is further wrong and denied that Indian Railways availed open access w.e.f. 22.01.2016 on payment of alleged wheeling charges. It is stated that in the state of Madhya Pradesh, Indian Railways started procuring power on open access from 22.01.2016 on inter-state open access. Such availing of power from other generators 2003 in case of conflict, and also in terms of Section 14 of the Electricity Act 2003, the Indian Railways are entitled to claim the status of a distribution licensee for any procurement of power for its own use. The object and purpose of the Indian Railways Act giving authority to the Indian Railways to undertake distribution of electricity for the purpose of carrying out its work as railway administration will be seriously hindered if the Cross Subsidy and Additional Surcharge are loaded on to the Indian Railways when it procures electricity from third party sources. The very objective of giving a deemed licensee status gets redundant in such a case.*

*It is submitted that the Indian Railways being a deemed licensee both under the Railways Act, 1989 and the Electricity Act 2003 is legally entitled to procure electricity from any source of its choice through open access to meet the electricity*



*requirements, as it may consider appropriate. The Petitioners cannot be legally prejudiced by Indian Railways procuring power under Open Access from sources other than the Petitioners. Any contention to the contrary is wrong and denied.*

*The averments made in the para under reply as regards availing of power by Indian Railways as a HT Consumer before procurement of power as a deemed licensee through open access and the clarification issued by this Hon'ble Commission are concerned the same are matters of record and need no comments. However, Indian Railways after disconnecting from the Petitioner Discoms, is neither connected to Petitioner Discoms network nor in any way uses their network/facilities for the purpose of distributing electricity to its Traction Sub stations in the state of Madhya Pradesh in its capacity as a Deemed Distribution Licensee. As regards, the clarification issued by this Hon'ble Commission is concerned, Indian Railways craves leave to deal with the same at the time of hearing. However, it is submitted that the same is with respect to the open access being sought by a consumer and not with respect to the open access being sought by a Distribution Licensee / Deemed Distribution Licensee. Further, the averment with regard to the average monthly billing of the Indian Railways is irrelevant in so far as adjudication of the present petition is concerned.*

*The Indian Railways reiterates the contents of preliminary submissions and any contention to the contrary is wrong and denied.*

**Paras 5 to 8:**

*The contents of Paras 5 to 8 of the Petition are the matters of record in so far as they refer to the Section 42 and Section 2(47) of the Electricity Act, 2003. Indian Railways craves leave of the Hon'ble Commission to refer to the same for its true scope, meaning and application.*

*The Electricity Act, 2003 only provides for applicability of cross subsidy surcharge and additional surcharge on consumers and not on licensees. Therefore, there can be no cross subsidy surcharge and additional surcharge applicable on the Indian Railways when the procurement of power is done as a licensee. Further, Indian Railways after disconnecting from the Petitioner Discoms, is procuring power through the network of STU and does not use Petitioner Discoms network for the purpose of distributing electricity to its Traction Sub stations in the state of Madhya Pradesh.*

*The concept of stranded power arises from the obligations of the Petitioners to supply power to its consumers and Additional Surcharge under Section 42(4) of the Electricity Act, 2003 is applicable to a consumer only. The Indian Railways, being a distribution licensee, cannot be subjected to Additional Surcharge. The Petitioners*



*are seeking to compare the Indian Railways to Industrial Consumers availing open access which cannot be permitted. It is reiterated that the Petitioners cannot seek imposition of charges de hors the Act.*

*It is reiterated that the Indian Railways has a legal right under the Electricity Act to procure power through open access as a licensee. The Indian Railways have also the authority to procure power for distribution of electricity under the provisions of the Railways Act. When the Indian Railways procures power in terms of the above, its status is as an authorised entity to procure power as a licensee and not as a consumer. Therefore, merely because, the Petitioners will lose out on the revenue, if any, in case, the Indian Railways procures power from sources other than the Petitioners, cannot be a justifiable reason to disallow Indian Railways to exercise its legitimate right. Further, the nature of the activities of the Indian Railways, do not mandate either as per Electricity Act 2003 or the Open Access Regulations for payment of any cross-subsidy surcharge or additional surcharge. The procurement of power through open access does not legally prejudice the Petitioners. It is submitted that the Petitioners are attempting to do in an indirect manner that which it is prohibited to do under the Electricity Act 2003 where open access is a mandate. It is also relevant to mention that the special exception which has been carved out for the Indian Railways is in the larger public interest. The Indian Railways one of the largest and busiest rail networks in the world and is playing a key role in India's social economic development by not only providing an affordable transport facilities to the common man but also facilitating transport of coal, minerals, steel, cement, mineral oil, food grains and fertilizer at a competitive rates.*

*The Indian Railways has made detailed submissions in this regard in the preliminary submissions and craves leave of the Hon'ble Commission to refer to the same in reply to paras under reply. Any contention to the contrary is wrong and denied.*

**Para 9 - 10:**

*The contents of Paras 9 and 10 of the Petition are the matters of record in so far as they refer to the Open Access Regulations notified by this Hon'ble Commission. Indian Railways craves leave of the Hon'ble Commission to refer to the same for its true scope, meaning and application.*

*It is submitted that the Indian Railways is an Open Access Customer as per Indian Electricity Act 2003 as it is operating in its separate and distinct area of operation as that of Petitioner Discoms. Further, Indian Railways is authorised to undertake distribution of electricity under the Indian Railways Act 1989. Indian Railways is*

*only liable to pay such charges as are required to be paid by an Open Access Customer as a licensee and not as a consumer of the Petitioners. The Petitioners are seeking to levy charges such as cross subsidy surcharge and additional surcharge, which are liable to be paid by a consumer of the distribution licensee who is procuring power through Open Access. Even as per Regulations 13 cross subsidy surcharge is liable to be paid by a 'Open Access Consumer', i.e., consumer of the distribution licensee who is procuring power through Open Access.*

*As per own showing of the Petitioners in their petition this Hon'ble Commission has been determining and prescribing the rate for cross subsidy surcharge and additional surcharge for the Open Access Consumers and not Open Access Customers. The Indian Railways has made detailed submissions in this regard in the preliminary submissions and craves reference to the same in reply to these paras also. Any contention to the contrary is wrong and denied.*

**Paras 11 :**

*With regard to the contents of Para 11 of the petition, various letters issued by the Petitioners for authorizing MPPPKVVCL and the demand being raised by Petitioners for cross subsidy surcharge and additional surcharge are a matter of record. It is reiterated that Indian Railways had already vide various letters clarified that Indian Railways is authorized to undertake distribution activities under the Railways Act, 1989 in connection with working of the railways and therefore is a licensee as per the Railways Act, 1989 and also under the Electricity Act, 2003 and is therefore not liable to pay cross subsidy surcharge and/or additional surcharge.*

*The Indian Railways has made detailed submissions in this regard in the preliminary submissions and craves leave of the Hon'ble Commission to refer to the same in reply to paras under reply. Any contention to the contrary is wrong and denied.*

**Para 12-13:**

*With regard to the contents of Paras 12 and 13 of the Petition, the judgement dated 25.04.2014 of the Hon'ble Supreme Court in the case of M/s. Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission & Others in Civil Appeal No.5479 of 2013 is a matter of record. The Indian Railways craves leave to refer to the same for its true scope, interpretation and application.*

*However, the reliance placed by the Petitioners on Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Ors (2014) 8 SCC 444 is misplaced. The said case was related to Special Economic Zone Act which provided for developers of SEZ as deemed licensee authorised to distribute electricity within the SEZ area. However, the provisions of Special Economic Zone Act and Railways Act are*

*materially different in its relation to the Electricity Act, 2003. It was noted by the Hon'ble Supreme Court that Section 49 of the Special Economic Zone Act gives authority to the Central Government to declare that any provisions of a Central Act shall apply to the Special Economic Zone and in furtherance to this, Government of India had issued a notification with regard to power generation in Special Economic Zone declaring that all provisions of the Electricity Act shall be applicable to the generation, transmission and distribution of power whether stand-alone or captive power. Unlike Railways Act 1989, the Electricity Act 2003 does not save the Special Economic Zones Act. On the other hand, the Notification under Special Economic Zone Act specifically recognized the applicability of provisions of the Electricity Act, 2003. Therefore, the Hon'ble Supreme Court considered the provisions of the Electricity Act, 2003 to hold that power must be supplied to consumers. However, the same cannot be applied to the present case. Railways Act, 1989 would prevail over the Electricity Act, 2003 as per Section 173 of the Electricity Act, 2003.*

*Indian Railways in terms of Section 11 and 12 of the Railways Act, 1989 is permitted to undertake distribution/supply of electricity only in relation to the Railways Administration, namely, for self or associated consumption.*

*The basis under the Electricity Act' 2003 is that a distribution licensee is required to supply electricity to its consumers in terms Section 2(17) and 2(70) of the Electricity Act, 2003. Section 2(17) and 2(70) of the Electricity Act, 2003 read as under:*

*(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;*

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

*Thus, there is inconsistency in so far as the obligation of Indian Railways to supply under the Railways Act, 1989 and Electricity Act, 2003 is concerned. However, in terms of Section 173, the requirement of supply under Section 2(17) and 2(70) of the Electricity Act, 2003 shall not have any effect in so far as distribution activity of Indian Railways in concerned.*

*Further, Section 2(17) and 2(70) of the Electricity Act, 2003 cannot have any overriding effect over the provisions of Railways Act, 1989 in terms of Section 174 of the Electricity Act, 2003. Section 174 of the Electricity Act, 2003 provides that subject to Section 173, the Electricity Act 2003 shall have overriding effect*

*notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act, 2003.*

*Further, the Appellate Tribunal for Electricity vide its interim order dated 16.12.2015 passed in IA No. 445 of 2015 (filed in Appeal No. 276 of 2015) has prima facie held Sesa Sterlite judgement to be not applicable in the case of Indian Railways. Relevant Paras of the order are as under:*

*“16. In our prima facie opinion, the Appellant cannot draw any support from **Sesa Sterlite Limited. In Sesa Sterlite Limited**, the Supreme Court was concerned with Special Economic Zones Act and the Electricity Act. As per Section 49 of the Special Economic Zones Act, the Central Government had issued a notification making all provisions of the Electricity Act applicable to the generation, transmission and distribution of power whether stand-alone or captive power. The Appellant therein had placed reliance on third proviso to Section 14 of the Electricity Act to claim deemed distribution licensee status. The Supreme Court considered Section 2(17) of the Electricity Act, which emphasis upon the distribution licensee to operate and maintain distribution system and supply power to the consumers. The Supreme Court considered definition of the term ‘supply’ appearing in Section 2(70) of the Electricity Act and observed that ‘supply’ means sale of electricity to consumers. The Supreme Court observed that being authorized to operate and maintain a distribution system as a deemed licensee would not confer the status of distribution licensee to any person. Power must be supplied to consumers and since the Appellant therein was consuming the power purchased by it for its own use and was not distributing and supplying it to consumers, it was not a distribution licensee. It must, however, be noted here that the Supreme Court was considering the provisions of the Special Economic Zones Act. Whereas Section 173 of the Electricity Act saves the Railways Act in case of inconsistency, it does not save the Special Economic Zones Act. Section 174 states that the Electricity Act shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act. Section 175 of the Electricity Act provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law time being in force. The observations of the Supreme Court must be considered against the backdrop of these provisions.*

17. *In the present case, we are concerned with the Railways Act and, the Electricity Act saves it in case of inconsistency. Therefore, Section 11 of the Railways Act which empowers Railway Administration to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Respondent No.2 is not affected by the provisions of the Electricity Act. Respondent No.2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act. It will also not lose its status as a deemed distribution licensee acquired under third proviso to Section 14 of the Electricity Act merely because it consumes the power procured by it. Reliance placed on **Sesa Sterlite Ltd.** prima facie appears to us to be misplaced."*

*Thus, the Indian Railways is not entitled to make payment of cross-subsidy surcharge or additional surcharge either in terms of Electricity Act, 2003 or as per Open Access Regulations. Any contention to the contrary is wrong and denied. The contents of the preliminary submissions are reiterated.*

**Para 14:** *With regard to the contents of Para 14 of the petition, it is reiterated that the Indian Railways is not liable to pay cross subsidy surcharge or additional surcharge as it is procuring power on open access as a deemed licensee and not as a consumer. As such, there is no occasion of the Petitioners to demand any action to be taken against Indian Railways in terms of Regulation 15.5 of the Open Access Regulations. Any contention to the contrary is wrong and denied. The contents of the preliminary submissions are reiterated.*

**Prayer Clause:** *For the reasons mentioned herein above, there is no merit whatsoever in the petition filed. The Petitioners are not entitled to any relief as prayed for or otherwise. In terms of the provisions of the Electricity Act 2003 and the Open Access Regulations as notified by this Commission, the Petitioners cannot seek imposition of either cross subsidy surcharge or additional surcharge on the Indian Railways.*

33. *In view of the above, there is no merit in the present petition and the present petition is liable to be dismissed.*

9. The petitioners submitted the following in their rejoinder to the above reply filed by the Respondent No.1, Western Central Railways:

1. *That, the respondent-WCR in its reply tried to challenge imposition of open excess charge along with delayed payment surcharge upon them, however, the submissions made in their reply sans*

*merit and not tenable as recovery of same has been duly authorized by section 42 of Electricity Act 2003 read with Retail Tariff Orders passed by this Hon'ble Commission from time to time and has never been challenged by respondent.*

- 2. That respondent WCR has also been billed by the petitioner for open access charges and none of the bill issued by petitioner and received by respondent WCR is under challenge in the present proceedings.*
- 3. That, the charges levied upon the respondent railway are statutory in nature which is applicable to all class of consumers as defined under Section 2(15) of Electricity Act, 2003. Railway is consumer falling within the definition under Electricity Act, 2003, therefore, they are not exempted from paying open access charges and associated surcharge under Section 42 of the Electricity Act, 2003.*
- 4. That, this Hon'ble Commission in its retail supply tariff order issued for the financial year 2016-17 onwards has treated Indian Railway as a consumer under the Electricity Act, 2003 and has approved open access charges to all class of consumers including Indian Railway availing power through open access. It is a matter of record that from June, 2016, the petitioners are continuously billing respondent-Railway for payment of open access charges but the respondent- railway has neither filed any objection to the said charges either before the petitioner or before this Hon'ble Commission. It is respectfully submitted that when charges are levied by statutory authority and the same was not disputed, then it is incumbent upon respondent Railways that they should make the payment within time stipulated in the said bill. The respondent-railway cannot challenge the recovery of the same in the present proceeding as neither application of Section 42 of Electricity Act 2003 nor the Retail tariff order, on the basis of which Open Access Charges are imposed upon WCR are not subject matter of the present petition. The objection raised by the Indian Railway in their reply are beyond the scope of present petition.*
- 5. That, without being prejudice to the submissions aforesaid made, the petitioner further submits that even on merit objection filed by respondent WCR does not hold water.*

**Reply to Objection 1 : ELECTRICITY ACT 2003 IS NOT APPLICABLE ON INDIAN RAILWAYS**

- 6. That, the first objection of the respondent Railway is that Electricity Act 2003 is not applicable to them by virtue of Section 11, 12 of the Indian Railway Act, 1989 read with Section 173 of the Electricity Act, 2003 the Electricity Act 2003 is not applicable to them therefore section 42 of the Electricity Act, 2003 and Rules and regulations framed therein are not governing provisions*



*regarding supply of electricity to Indian Railways. However said argument is misconceived because of following reasons*

*(a) It is respectfully submitted that Electricity Act, 2003 is the basic law governing Generation, Transmission, Supply and Distribution of Electricity in India whereas Railways Act, 1989 is a law governing various affairs relating to operation and maintenance of the railways tracks and railways in India. In certain areas the Electricity Act, 2003 and Railways Act overlap each other and in this area of overlap by virtue of Section 173 of Electricity Act, 2003, Railways Act would be governing law, however for rest of the areas both Acts operate in their respective field, thus section 173 of Electricity Act has its operation only for those provisions which came in direct conflict with any provision under Indian Railway Act. In the present case the Respondent WCR failed to point out any provisions of Indian Railway Act which is in direct conflict or creating inconsistency with Section 42 of Electricity Act, 2003, Thus drawing power through open access is govern by the provisions of Electricity Act 2003 r/w rules, regulations and order made thereunder by this Hon'ble Commissions*

*(b) It is respectfully submitted that there is no provision for drawing electricity through open access in the Railways Act and in fact the entire concept and mechanism of open excess has been introduced by Electricity Act, 2003. Indian Railway while making an application for open access has availed the benefit conferred by Section 42 of the Electricity Act, 2003 therefore they are bound by rules and regulation governing such access and also liable to pay open access charges levied under Electricity Act, 2003 .*

***Reply to Objection 2 :- Railway is deemed licensee and not Consumer under Electricity Act***

7. *That, the second issue which has been raised by the respondent –railway is that they are not a consumer, in fact, they are deemed distribution licensee and, therefore, they are not liable to pay open access charges including cross subsidy surcharge and additional surcharge under section 42 of Electricity Act, 2003 as these charges are applicable to consumers not to distribution licensee. However this issued has already been decided by hon'ble Supreme court and Hon'ble Electricity Regulatory Commissions of many States which are as under :-*

*(a) That similar issue/argument have already been adjudicated by Hon'ble Supreme Court in the matter of **Sese Sterlite Limited Vs. Orissa Electricity Regulatory Commission, Civil Appeal No.5479/2013** (2014) 8 SCC 444 whereby Hon'ble Supreme Court has elaborately explained the concept of open access charge and cross subsidy surcharge and it has been held that by virtue of deemed licensee, the only exemption an entity gets is that specifically applying for license under Section 14 of the Electricity Act. In order to availing further benefits under the Electricity Act, an entity is also required to show that it is having distribution system and has*



number of consumers to whom it is supplying electricity. If it is not the case, then the charges (open access) are payable by them. Coming to facts of present case, even in reply filed by the respondent-Railways, only status they have claimed is of deemed distribution licensee and it is not their case that in fact they are engaged in the business of distribution and supply of electricity to the consumers. In fact electricity procured by them through open excess is, in fact, consumed by them and, therefore, they cannot <sup>1</sup>be said to be engaged in the business of distribution and transmission of electricity, hence, even if for the sake of arguments, it is accepted that they are deemed licensee, they cannot escape from the statutory liability/charges under Section 42 of the Electricity Act, 2003.

(c) That, Indian Railway is not a consumer as defined under Section 2(15) of the Electricity Act, 2003, has already been dealt by other Regulatory Commission and by elaborately explaining Regulation, it has been held that they fall within the definition of consumer and liable to pay cross-subsidy surcharge and open excess surcharge. Rajasthan Electricity Regulatory Commission in **Petition No. RERC 1452/2019 (Jaipur Vidyut Vitaran Nigam Limited Vs. West Central Railway)** has categorically held that the West Central Railway is liable to pay open access for cross subsidy and additional surcharge to the distribution licensee. For ready reference of this Hon'ble Commission, Copy of order passed by Rajasthan Electricity Regulatory Commission is being filed herewith as **Document-P/1**.

(d) That, Maharashtra Electricity Regulatory Commission in **Case No.154/2019 in the matter of Indian Railway through Dy. Chief Engineer/TRD, Central Railway** has dealt with similar arguments and after analyzing the provisions of Electricity Act, 2003 and the Rules along with Indian Railways Act, has held that electricity distribution activity of the Indian Railway would be governed by the Electricity Act, 2003 as well and, thus, the railway is required to adhere to various regulations made by the Commission under Electricity Act, 2003. For ready reference of this Hon'ble Court, Copy of order passed by Maharashtra Electricity Regulatory Commission is being filed herewith as **Document-P/2**.

(e) That, in the matter of **Southern Railway Vs. Kerala Electricity Board Limited**, Kerala Electricity Regulatory Commission, Tiruvananthapuram in **Petition No.183/DE(T)/2020/KSERC** has held that railway is a consumer as defined under Section 2(15) of the Electricity Act, 2003 and, therefore, they are open access consumer and liable to pay open access charges under Section 42 of the Electricity Act. Copy of order passed by Kerala State Electricity Regulatory Commission is being filed herewith as **Document-P/3**. The same interpretation is made by the Haryana Electricity Regulatory Commission in **HERC/PRO-11/2017 in the matter of Dakshin Haryana Bijali Vitaran Nigam Limited (DHBVNL)**,

<sup>1</sup> Issue of deemed licensee for railways is pending adjudication before Hon'ble APTEL in Appeal No. 276/2015

***Hisar Vs. Northern Railway, New Delhi and others.*** Copy of order passed by Copy of order passed by Haryana Electricity Regulatory Commission is being filed herewith as **Document-P/4.**

(f) *In light of these settled preposition along with statutory provisions, relief prayed for by the petitioner is just and proper and the same may be granted to the petitioner.*

**10.** The Respondent No.3, SLDC submitted the following in its reply to the petition:

1. *It is most respectfully submitted that Indian Railways was earlier consumer of Discoms for supply of power to each Traction Sub Station located within the geographical area of Madhya Pradesh and also having separate contract demand with Discom in whose area Traction Sub Station is located.*
2. *That West Central Railway on behalf of Indian Railways has obtained Long Term Access for 200 MW from CTU and Bulk Power Transmission Agreement with STU for transmission of 200 MW power through STU network upto drawal points of Indian Railways. WCR w.e.f. 22.01.2016 has started availing 200 MW power from RGPPL for supplying power to the Traction Sub Stations located within Madhya Pradesh and discontinued the contract demand of each Traction Sub Station with Discoms of MP.*
3. *That with the increase of Traction Sub Stations load, West Central Railway has entered into first supplementary agreement on 26.04.2017 for transmission of 235 MW power through the STU/CTU network upto drawal point located within the MP. The transmission capacity has been further revised to 270 MW on Long Term basis w.e.f. 18.12.2017.*
4. *That West Central Railway on behalf of Indian Railways has been drawing power through 50 MW LTA of BRBCL, 85 MW LTA of RGPPL and 135 MW MTOA of JITPL located outside the State.*
5. *That Drawal schedule of West Central Railway is prepared and issued by the Western Regional Load Despatch Centre as the Generating Stations having allocation / PPA with WCR are located outside the State and are treated as Inter State Transactions. WRLDC schedules power to WCR based on the DC submitted by Generating Stations and requisition of WCR in each time block. SLDC forwards the drawal schedule issued by WRLDC to WCR for implementation.*
6. *That during the real time of operation if any Generating Unit having allocation / PPA with WCR goes under forced / partial outage, WCR used to overdraw from the grid to meet their essential consumer load, which violates the grid discipline.*

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7. *That on repeated request of SLDC to adhere to grid discipline all the time, WCR had started procuring power under Short Term Open Access to meet the traction load during forced / partial outage of Generating Units from May 2016 to May 2017 as WCR has not entered into agreement with MPPMCL to avail power under such circumstances.*
  8. *That regarding grant of permission for Short Term Open Access to WCR, it is submitted that WCR is fulfilling the mandatory regulatory requirements for availing STOA and the consent for interstate bilateral STOA is being granted by SLDC, as and when requested by WCR.*
  9. *That the Respondent No.3 i.e. State Load Despatch Centre, is discharging the statutory functions as defined under the Electricity Act 2003. The SLDC is a Apex Body as per Electricity Act 2003 and is the Nodal Agency for grant of Short Term Open Access in the State as per Regulation 8.2 of MPERC (Terms & Conditions for Intra-state Open Access in Madhya Pradesh) Regulations-2005.*
  10. *That as per Regulation-7.3 of MPERC (Terms & Conditions for Intra State Open Access in Madhya Pradesh), Regulations-2005, the Short Term Open Access shall be allowed if the request can be accommodated by utilizing-*
    - *Inherent design margins*
    - *Margins available due to variation in power flow*
    - *Margins available due to inbuilt spare transmission capacity created to cater to future load growth*
  11. *That further, as per CERC regulations for Open Access, it is mandated for SLDC before allowing Short Term Open Access, following is to verified-*
    - i. *The technical feasibility of transmission / wheeling network involved.*
    - ii. *Metering infrastructure for Energy Accounting.*
    - iii. *Consent between buyer and seller for transaction of power.*
  12. *That, subsequently WCR has entered into agreement with MPPMCL for supply of backup power upto 235 MW to WCR in case of reduction in schedule by WRLDC during forced / partial outage of Generation Units supply power to WCR, for the period from 01.04.2018 to 31.03.2020 which has been extended up to 31.03.2023*
  13. *That as per prevailing regulations i.e. MPEGC, IEGC and BSC 2015, power transacted under Long Term Access / Medium Term Open Access is to be scheduled by the RLDC/ SLDC, depending on the area of jurisdiction, on day ahead basis and any revision in schedule during the real time operation.*
  14. *That as per prevailing regulatory provisions in the instant petition the responsibility of MP SLDC*
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*is limited to forwarding drawal schedule issued by WRLDC to WCR and in case of any reduction in schedule by WRLDC due to partial / forced outage of Generating Units, to schedule curtailed power to WCR from MPPMCL.*

*15. That the charges to be recovered by STU and Discoms under regulatory provisions are beyond the purview of SLDC. If scheduling of WCR is to be stopped for recovery of any outstanding dues, the matter may be taken up with the WRLDC and decision on the issue shall be taken as per guidelines contained in IEGC, else Petitioner may initiate action for disconnection of WCR from the Grid and STU may cancel Bulk Power Transmission Agreement with WCR for transmission of 270 MW power through MPPTCL network.*

*16. It is most respectfully prayed that Hon'ble Commission may consider the above submissions made by Madhya Pradesh State Load Despatch Centre, the respondent no.3.*

**11.** The Respondent No.1, Western Central Railways submitted the following in its final written submission on arguments:

**Status of Indian Railways as Deemed Licensee**

1. *It is submitted that a combined reading of the following clearly show that the Indian Railways is a Deemed Distribution Licensee when it is procuring power through open access at its traction substations situated in the State of Madhya Pradesh:*
  - (a) *provisions of the Railways Act, 1989 empowering the Indian Railways to undertake distribution of electricity for the purpose of railway administration;*
  - (b) *Section 14 – third proviso of the Electricity Act, 2003 recognizing the Indian Railways which is part of the Government of India to be a deemed licensee for undertaking distribution of electricity;*
  - (c) *Section 173 of the Electricity Act, 2003 which provides for supervening application of the provisions of the Railways Act, 1989 viz-a-viz the Electricity Act, 2003;*
  - (d) *The decision of the Central Electricity Regulatory Commission (hereinafter referred to as Central Commission) in the judgement and Order dated 05.11.2015 passed in Petition No. 197/MP/2015;*
  - (e) *The decision of this Hon'ble Tribunal in IA No. 445 of 2015 filed in Appeal No. 276 of 2015 dated 16.12.2015 holding that the Indian Railways is a distribution license; and*

(f) *The decision of the Hon'ble Supreme Court in General Manager, Northern Railways v Chairman, Uttar Pradesh State Electricity Board and Others (2012) 3 SCC 329 recognizing that the Railways is governed by Railways Act, 1989.*

2. *The relevant provisions of the **Railways Act, 1989** are:*

*"2(31) "railway" means a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes—*

*(a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;*

*(b) all lines of rails, sidings, or yards, or branches used for the purposes of, or in connection with, a railway;*

*(c) all electric traction equipments, **power supply and distribution installations used for** the purposes of, or in connection with, a railway;*

*(d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water II works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway;*

*(e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and*

*(f) all ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland -waters for the purposes of the traffic of a railway and owned, hired or worked by a railway administration,*

*but does not include-*

*(i) a tramway wholly within a municipal area; and*

*(ii) lines of rails built in any exhibition ground, fair, park, or any other place solely for the purpose of recreation;"*

*"2(32) "railway administration", in relation to—*

*(a) a Government railway, means the General Manager of a Zonal Railway; and*

*(b) a non-Government railway, means the person who is the owner or lessee Of the railway or the person working the railway under an agreement;"*

***“11. Power of railway administration to execute all necessary works- Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway—***

- (a) make or construct in or upon, across, under or , over any lands, or any streets, hills, valleys, road's, railway, tramways,. or any rivers, canals, brooks, streams or other waters, or any drains, water pipes, gas-pipes, oil-pipes, sewers, **electric supply lines**, or .telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of railways, passages, conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;*
- (b) alter the course of any rivers, brooks, streams or other water courses, for -the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;*
- (c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;*
- (d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;*
- (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead;*
- (f) erect, operate, maintain or repair any telegraph and telephone -Lines in connection with the working of the railway;*
- (g) **erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway;** and*
- (h) **do all other acts necessary for making, maintaining, altering or repairing and using the railway.”***



***“12. Power to alter the position of pipe, electric supply line, drain or sewer, etc –***

*(1) A railway administration may, for the purpose of exercising the powers conferred on it by this Act, alter the position of any pipe for the supply of gas, water, oil or compressed air, or the position of any electric supply line, drain or sewer:*

*Provided that before altering the position of any such pipe, electric supply line, drain or sewer, the railway administration shall give a notice indicating the time at which the work of such alteration shall commence, to the local authority or other person having control over the pipe, electric supply line, drain or sewer.*

*(2) The railway administration shall execute the work referred to in sub-section (1) to the reasonable satisfaction of the local authority or the person receiving the notice under the proviso to sub-section (1).”*

***(Emphasis Supplied)***

3. *The powers of the Railways administration therefore includes construction and establishment of electric supply lines as well as erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with working of the railways. Further sub-clause (h) provides for power to all other acts necessary for making, maintaining, altering, repairing and using railways. The power to erect, maintain and operate traction equipment, lines, power supply and distribution installation necessarily means the distribution and supply of electricity.*

4. *The empowerment of the Indian Railways to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Railways under Section 11 of the Railways Act, 1989 is an overriding right on account of:*

*A. stipulation contained in Section 11 of the Railways Act, 1989; and*

*B. Section 173 of the Electricity Act, 2003 which reads as under*

***“173. Inconsistency in laws***

***Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.”***

5. *Independent of the above, Indian Railways is also a deemed licensee in terms of the provision of the Electricity Act, 2003. Section 14 Third proviso of the Electricity Act, 2003 provides as under;*

*Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement*



*of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:*

6. *Accordingly, the status of Indian Railways as a deemed licensee is statutorily provided for.*

**Letter dated 06.05.2014 issued by Ministry of Power**

7. *The status under Section 14 Third Proviso has been recognized by the Letter dated 06.05.2014 by Ministry of Power (attached herewith as **Annexure A**). The said letter is an acknowledgment of the Indian Railways being Central Government and therefore a deemed licensee under Third Proviso of Section 14.*

8. *The Central Commission vide Order dated 05.11.2015 in Petition No. 197/MP/2015 (attached herewith as **Annexure B**) has stated as under:*

*"44.....We have considered the objections. A plain reading of the third proviso to Section 14 does not reveal that a judicial pronouncement is required for determining the status of appropriate Government as a licensee under the said provision. In exercise of the powers under clause (3) of Article 77 of the Constitution of India, Hon'ble President of India has made the Government of India (Allocation of Business) Rules, 1961. Rule 2 of the AoB Rules provides as under:*

*"2. Allocation of Business - The business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Offices specified in the First Schedule to these rules (all of which are hereinafter referred to as "departments")."*

*Therefore, the business of the Government of India is transacted through the departments. Ministry of Power has been vested with the following function:*

*"4. Administration of the Electricity Act, 2003 (36 of 2003), the Energy Conservation Act, 2001(52 of 2001), the Damodar Valley Corporation Act, 1948 (14 of 1948) and Bhakra Beas Management Board as provided in the Punjab Re-organization Act, 1966 (31 of 1966)."*

*Therefore, administration of the Electricity Act, 2003 is the responsibility of Ministry of Power. Being the nodal Ministry, Ministry of Power has examined the proposal of the Ministry of Railways with regard to its deemed status as a licensee under the Electricity Act in consultation with Ministry of Law and Justice which has been vested with the power to render "advice to Ministries on legal matters including interpretation of the Constitution and the laws". Moreover, the clarification has been issued with the approval of the Hon'ble Minister of Power (Independent Charge). Therefore, we are of the view that the clarification issued by Ministry of Power with regard to the deemed licensee status of the*

*Indian Railways meets the requirement of Law. There is no requirement for a declaration to that effect to be issued by an Appropriate Commission."*

**Orders of Hon'ble Appellate Tribunal and Central Commission in regard to Status of Indian Railways as Distribution Licensee**

9. *On a petition filed by the Indian Railways being No. 197/MP/2015, the Central Commission by Order dated 5.11.2015 (**Annexure B**), inter alia, decided on certain specific issues related to Indian Railways and Open Access sought for by the Indian Railways to the Transmission System. In the said proceedings the Central Commission had framed the following issues for consideration:*
  - "(a) Whether the petition is maintainable before the Commission?*
  - (b) Whether the petitioner's claim as an authorized entity under the provisions of the Railways Act to undertake distribution of electricity in connection with the working of the railways can be sustained in law. If so, whether the petitioner is entitled for grant of connectivity and open access as a distribution licensee in connection with the working of the railways?*
  - (c) Whether the petitioner can be treated as a deemed licensee under the Electricity Act?*
  - (d) Whether the petitioner should be treated as a separate regional entity for the purpose of scheduling and energy accounting in terms of deviation settlement?"*
10. *On the first issue the Central Commission held the petition filed by the Indian Railways to be maintainable, rejecting the contention to the contrary raised by some of the State Utilities in the said petition.*
11. *On the second issue, the Central Commission was pleased to hold that the Indian Railways is an authorised entity to distribute and supply electricity in connection with the working of railways under the Railways Act, the Indian Railways shall be entitled for grant of Open Access in connection with the working of railways as per the provisions applicable to the distribution licensees. Relevant extract of order dated 05.11.2015 is as under:*
  - "40. From the above judgement, it is clear that in so far as Indian Railways are concerned, they will be governed by the provisions of the Railways Act for constructing transmission lines and distribution installations for the purpose of supply of power to the railways without having to take any licence from the appropriate Commission for transmission or distribution of electricity. In other words, the Indian Railways can be treated as authorized entity under the Railways Act for carrying out transmission and distribution activities for ensuring supply of power in connection with working of the railways. That being the case, the requirements of MSETCL for declaration regarding the area of operation, other*

*terms and conditions of licence and Standard of Performance as required in case of a distribution licensee under the Electricity Act will not be applicable in case of Railways.....*

41. *MSETCL has submitted that presently, the petitioner is connected to the grid as a consumer of MSEDCL and is seeking connectivity as a distribution licensee. As per Regulation 3.2 of the Maharashtra Electricity Regulatory Commission (Transmission Open Access Regulations), 2014, connectivity with the grid is a pre-condition for grant of open access. Therefore, the petitioner was required to apply and had rightly applied to MERC in Case No. 194 of 2014 to take on record the deemed distribution licensee status of the Indian Railways for issuing specific conditions of the licence. The ruling given by MERC in order dated 11.4.2012 in Case No. 157 of 2011 (M/s Serene Properties Private Ltd) has been relied upon regarding the requirement of issue of specific conditions of distribution licensees. In the light of our discussion regarding special status of Indian Railways under the Railways Act as interpreted by the Hon<sup>ble</sup> Supreme Court in the case of UOI through General Manager Indian Railways Vs UPSEB supra, the ruling of MERC in the case of M/s Serene Properties Private Limited will not be applicable in case of the Indian Railways.*
42. *In view of the above discussion, we hold that since the Indian Railways is an authorized entity to distribute and supply electricity in connection with the working of the Railways under the Railways Act, the petitioner shall be entitled for grant of Open Access in connection with the working of the Railways as per the provisions applicable to a distribution licensee."*
12. *On the third issue, the Central Commission was pleased to hold that the Indian Railways is a deemed licensee under the third Proviso to Section 14 of the Electricity Act, 2003 and there is no requirement for a declaration to that effect that it is the licensee.*
13. *On the fourth issue, the Central Commission was pleased to hold as under:*
  51. *The Indian Railways can be connected with ISTS directly or through state network. The Commission is inclined to consider option "c" as provided in CEA Report with slight modification. The drawl points from ISTS located within a State shall be treated as a single entity for the purpose of scheduling. This arrangement according to CEA and POSOCO may lead to fragmented control area. Therefore, the group of TSSs situated in a State and connected directly with ISTS shall be treated as one „fragmented control area" and the responsibility for the purpose of scheduling, metering, balancing, applicability of ISTS charges and losses etc, shall vest in the*

*concerned RLDC. In so far as the TSSs of Indian Railways connected to State network are concerned, the responsibility for these functions shall vest in the concerned SLDC."*

14. *Consequent to the above, the Central Commission was pleased to grant the following relief:*

*"52. In view of the above discussion, the prayers of the petitioner are decided as under:*

*(a) In the light of the judgement of the Supreme Court in UOI Vs UPSEB supra, it is held that the petitioner is an authorized entity under the Railways Act to undertake transmission and distribution activities in connection with the working of the railways, independent of its status under the Electricity Act. Therefore, the information sought by MSETCL vide its letter dated 6.7.2015 are not relevant for grant of connectivity and concurrence to the petitioner for scheduling of power from RGPPL and GUVNL through the ISTS and State networks by availing long term access or medium term open access in terms of Connectivity Regulations.*

*(b) The petitioner is a deemed licensee under third proviso to Section 14 of the Electricity Act and no separate declaration to that effect is required from the Appropriate Commission. The petitioner as a deemed licensee shall be bound by the terms and conditions of licence specified or to be specified by the Appropriate Commission under proviso to Section 16 of the Electricity Act.*

*(c) The drawl points from ISTS located within a State shall be treated as a single entity for the purpose of scheduling. The group of TSSs situated in a State and connected directly with ISTS may be treated as one "fragmented control area" and the responsibility for scheduling, metering, balancing, applicability of ISTS charges and losses etc, shall vest in the concerned RLDC. For the TSSs situated in a State and connected to State network, these functions shall vest in the concerned SLDC.*

*(d) All concerned RLDCs, State Transmission Utilities and SLDCs are directed to facilitate long term access and medium term access in terms of Connectivity Regulations from the generating stations or other sources to the facilities and network of Indian Railways."*

15. *The West Bengal State Electricity Distribution Company Limited filed an Appeal bearing Appeal No. 276 of 2015 before this Hon'ble Tribunal against the above Order dated 05.11.2015 passed by the Central Commission along with an application for interim orders. The Hon'ble Tribunal has rejected the application for interim stay vide IA no. 445 of 2015 in Appeal no. 276 of 2015 dated 16.12.2015 (attached herewith as **Annexure C**) and has held as under:*

*"10. We find substance in the contention of Respondent No.2 that the power to erect, maintain and operate traction equipment, lines, power supply and distribution installation*

*necessarily includes the distribution and supply of electricity because otherwise the power to erect, operate and maintain these equipment and installations would serve no purpose. This provision necessarily implies use of traction equipment, lines, distribution installation, etc. to distribute and supply electricity for the working of the Railways. Pertinently, power of the Railway Administration under Section 11 of the Railways Act is not curtailed by any provisions of the Electricity Act. Section 173 of the Electricity Act saves the Railways Act in case of inconsistency. Thus, prima facie, it appears to us that Respondent No.2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act particularly Section 11 thereof.*

11. *In this connection, Respondent No.2 has rightly relied on the judgment of the Supreme Court in UPSEB.....*
12. *Bearing in mind the Supreme Court's observation that Section 11 of the Railways Act cannot be given a restricted meaning, we need to approach this case. Prima facie, we feel that Respondent No.2 is empowered to carry out construction work necessary for power supply and distribution installations in connection with the working of the Railways and, therefore, it can distribute and supply electricity. It is not possible to agree with the submission of the Appellant that this judgment is not applicable to the present case because there the Supreme Court was not called upon to decide whether the Railway is a deemed distribution licensee or a distribution licensee.*
- .....
14. *It is the contention of the Appellant that a distribution licensee has to distribute electricity and if it is procuring power for self consumption it does not get the deemed distribution licensee status. It is submitted that Respondent No.2 is procuring electricity for self consumption. Respondent No.2 is not distributing electricity and, therefore, it does not get the status of deemed licensee. In this connection reliance is placed on **Sesa Sterlite Ltd.***
15. *The Supreme Court considered the definition of the term "distribution licensee" contained in Section 2(17) of Electricity Act and Section 2(70) of the Electricity Act which defines "supply" to mean sale of electricity to a licensee or a consumer. While confirming this Tribunal's order, the Supreme Court held that by virtue of the status of a developer in the Special Economic Zone, the Appellant therein was undoubtedly treated as a deemed distribution licensee. However, because of deemed distribution licensee status, the Appellant merely gets exemption from specially applying for license under Section 14 of the Electricity Act. In order to avail further benefits under the Electricity Act it has to show that it is in fact having distribution system and it has a number of consumers to whom it is supplying electricity.*
16. *In our prima facie opinion, the Appellant cannot draw any support from **Sesa Sterlite Limited. In Sesa Sterlite Limited**, the Supreme Court was concerned with Special*

*Economic Zones Act and the Electricity Act. As per Section 49 of the Special Economic Zones Act, the Central Government had issued a notification making all provisions of the Electricity Act applicable to the generation, transmission and distribution of power whether stand-alone or captive power. The Appellant therein had placed reliance on third proviso to Section 14 of the Electricity Act to claim deemed distribution licensee status. The Supreme Court considered Section 2(17) of the Electricity Act, which emphasis upon the distribution licensee to operate and maintain distribution system and supply power to the consumers. The Supreme Court considered definition of the term 'supply' appearing in Section 2(70) of the Electricity Act and observed that 'supply' means sale of electricity to consumers. The Supreme Court observed that being authorized to operate and maintain a distribution system as a deemed licensee would not confer the status of distribution licensee to any person. Power must be supplied to consumers and since the Appellant therein was consuming the power purchased by it for its own use and was not distributing and supplying it to consumers, it was not a distribution licensee. It must, however, be noted here that the Supreme Court was considering the provisions of the Special Economic Zones Act. Whereas Section 173 of the Electricity Act saves the Railways Act in case of inconsistency, it does not save the Special Economic Zones Act. Section 174 states that the Electricity Act shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act. Section 175 of the Electricity Act provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law time being in force. The observations of the Supreme Court must be considered against the backdrop of these provisions.*

17. *In the present case, we are concerned with the Railways Act and, the Electricity Act saves it in case of inconsistency. Therefore, Section 11 of the Railways Act which empowers Railway Administration to undertake erection, operate and maintain electric traction equipment as well as power supply and distribution installation in connection with working of Respondent No.2 is not affected by the provisions of the Electricity Act. Respondent No.2 has full authority to undertake electricity distribution and supply of electricity by virtue of the provisions of the Railways Act. It will also not loose its status as a deemed distribution licensee acquired under third proviso to Section 14 of the Electricity Act merely because it consumes the power procured by it. Reliance placed on Sesa Sterlite Ltd. prima facie appears to us to be misplaced.*

.....

- 19.....*In our prima facie opinion therefore Respondent No.2 will be entitled to open access if it fulfils the conditions and there can be no valid objection to its entitlement. We find substance in the contention that Respondent No.2 can get open access through the network of the Central Transmission Utility or other sources. The Appellant's resistance to it prima*



*facie appears to us to be without substance. It is rightly pointed out that Respondent No.2 i.e. the Indian Railways has one of the largest networks in the world. This network is an essential part of the transport infrastructure in India. It is the backbone of the Indian economy. It is, therefore, essential for Respondent No.2 to get reasonably priced power. If it is denied open access, it will be forced to procure more expensive power from the distribution licensees in the State which will ultimately adversely affect the general public. At this interim stage, these considerations outweigh the Appellant's possible loss of revenue as a distribution licensee, if Respondent No. 2 moves away from it. The application for interim stay will have to be, therefore, rejected and is rejected accordingly."*

16. *Though the above Order is an interim order and is subject to the final decision, this does not mean that the Order is not to be implemented. The Hon'ble Tribunal has recognised the importance of Indian Railways and given a specific finding that the adverse effect of denial of open access to Indian Railways outweigh the possible loss of revenue to the Appellant therein, the distribution licensee and rejected the interim application. Therefore the Hon'ble Tribunal has held that during the pendency of the appeal, the balance of convenience lies in favour of Indian Railways and grant of open access to Indian Railways. Further mere pendency of the Appeal is no ground for proceeding on the basis that decision of the Central Commission is not enforceable particularly when the Hon'ble Appellate Tribunal has by a detailed and reasoned order rejected the stay prayed for.*
17. *It is submitted that the decision of the Central Commission is a decision on the status of Indian Railways as distribution licensee. Once the Central Commission has recognized the status of Indian Railways as distribution licensee, the same is applicable to all STUs/SLDCs. Further once the Central Commission has decided an issue, the **principle of comity** would require that all the State Commissions also recognize the same. Otherwise this would result in contradiction wherein various Regulatory Commissions would decide differently. In this context, the Railways has already been granted open access as a distribution licensee in many states on the basis of the above Order of the Central Commission. If the Order of the Central Commission is not accepted, it would lead to an anomalous situations wherein the status of Railways as deemed licensee is recognized in some states and not in some, particularly when the said status is as per the interpretation of the Railways Act, 1989 and the Electricity Act 2003 which is equally applicable to all States.*

**Judgement of Hon'ble Supreme Court in General Manager, Northern Railways represented by Union of India v Chairman, Uttar Pradesh State Electricity Board and Others, (2012) 3 SCC 329**

18. Further, the Railways Act, 1989 is a special enactment relating to Railways and the functioning of Railways is governed by the said Act. In **General Manager, Northern Railways represented by Union of India v Chairman, Uttar Pradesh State Electricity Board and Others, (Supra)**, (attached herewith as **Annexure D**) the Hon'ble Supreme Court had considered the status of the Railways under Railways Act and not Electricity Act. The Hon'ble Court held as under:

"15.....it is true that in terms of Section 27D of the Electricity Supply Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other than those authorized or otherwise exempted by an Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution of electricity. **However, in the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989, and not by the enactment governing electricity.**

16. That apart, Section 11(a) and (g) of the Railways Act, 1989 clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorises the Railway Administration to execute all works for the purpose of constructing or maintain railways. Sub-Section (a) of the Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-Section (g) thereof, the Railways are authorized to erect traction equipment, power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by UPSEB as well."
19. The said judgment given in context of transmission of electricity, as the position is same for distribution of electricity, is applicable in respect of the distribution activity of the Indian Railways. Further, even the Hon'ble Supreme Court in paragraph 16 of the judgement (quoted above) has held that provisions of Section 11(a) and (g) of Railways Act, 1989 cannot be read in a restricted manner. This means that based on the above provisions, where there is distribution of electricity, even that has to be governed by Railways Act, 1989.
20. Further, the Hon'ble Appellate Tribunal in para 11 of the judgement dated 16.12.2015 in IA no. 445 of 2015 in Appeal no. 276 of 2015 (**Annexure C**) has held that the Indian Railways have rightly relied upon the decision of the Hon'ble Supreme Court as regards distribution activities of Indian Railways is concerned.
21. The Hon'ble Appellate Tribunal in its recent common judgement dated 22.10.2020 in Appeal No. 301 of 2018 and Appeal No. 26 of 2019 (attached herewith as **Annexure E**) has also recognized

*the status of Indian Railways as a Deemed Distribution Licensee. The Hon'ble Appellate Tribunal has held as under:*

*"*

*13.33 While taking note of the various provisions of the Railways Act, 1989, it is crystal clear that the Indian Railways have been empowered to construct, operate and maintain the required transmission and distribution lines for its operation across the country. Further, the Railways Act, 1989 has been saved under the Electricity Act, 2003 and the inconsistency clause stipulated in the Electricity Act further strengthens the powers of Indian Railways. Subsequently, in November, 2015 it has also been declared / notified a deemed distribution licensee. Further, Hon'ble Supreme Court in its judgment dated 09.02.2012 in the case Union of India vs. Chairman, UPSEB 2012 3 SCC 329 has considered and elucidated the scope of Section 11 (a) and (g) of the Railways Act as under:-*

*"16. That apart, Sections 11 (a) and (g) of the Railways Act, 1989 clearly authorise the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorises the Railway Administration to execute all necessary works for the purpose of constructing or maintaining railways. Sub-section (a) of this Section authorises Railways to make or construct in or upon, across, under or over any lands electric supply lines.*

*17. Under sub-section (g), thereof, the Railways are authorised to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installations in connection with working of the railways. This sub-section clearly empowers Railways to erect any electric traction equipment and power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by the UPSEB as well."*

*In view of the above stipulations, the scope and powers of Indian Railways to construction and expansion of required transmission and distribution system for integrated operation of the Railways across the country cannot be disputed. Further, being a deemed distribution licensee, it is also exempted from taking any license as required under Section 14 of the Electricity Act.*

*.....*

*13.36 Having regard to the Railways Act, 1989 and further rulings of the Apex Court in its judgment dated 09.02.2012 in the case of Union of India Vs. Chairman, UPSED coupled with various notifications of the Govt. of India, it is crystal clear that Indian*

*Railways have the scope and powers for constructions, expansion and O&M of required transmission / distribution system for integrated operation of the Railways across the country. It is also not in dispute that the Indian Railways are deemed distribution licensee and do not require any license under Section 14 of the Electricity Act, 2003."*

**Implication of Section 173 of the Electricity Act, 2003 as regards obligation to supply under Section 2(17) and 2(70) of the Electricity Act, 2003**

22. *As the Railways Act, 1989 has the overriding effect and distribution of electricity by Railways for Railway Administration, the same cannot be interfered with by imposition of cross subsidy surcharge or additional surcharge.*
23. *It is submitted that the Electricity Act, 2003 itself recognizes the Railways Act, 1989 and provides for its superior application. Therefore, the Electricity Act, 2003 itself has recognized that the Railways Act, 1989 may be applicable for certain matters relating to electricity. The application of Railways Act, 1989 in electricity matters has also been held by the Hon'ble Supreme Court in **General Manager, Northern Railways represented by Union of India vs. Chairman, Uttar Pradesh State Electricity Board and Ors (Supra)** as mentioned hereinabove. Therefore, it cannot be contended that the Railways Act, 1989 cannot be considered for status of Railways as a distribution licensee.*
24. *The Petitioners have not considered the basic aspect that the Indian Railways being authorized to erect, operate and maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railways, and to maintain electric supply lines (as provided in Section 11 read with Section 2 (31) of the Railways Act, 1989), it is not open to the Petitioners to term the Indian Railways as not a distribution licensee but only a consumer.*
25. *Section 173 of the Electricity Act, 2003 saves the Railways Act, 1989 in so far as there is any inconsistency within the provisions of the two legislations. Indian Railways in terms of Section 11 and 12 of the Railways Act, 1989 is permitted to undertake supply of electricity only in relation to the Railways Administration, namely, for self or associated consumption without obtaining any license. Whereas under the Electricity Act, 2003 a distribution licensee is required to supply electricity to its consumers in terms Section 2(17) of the Electricity Act, 2003. Thus, there is inconsistency in so far as the obligation of Indian Railways to supply under the Railways Act, 1989 and Electricity Act, 2003 is concerned. Therefore, in terms of Section 173, the requirement of*

*supply under Section 2(17) of the Electricity Act, 2003 shall not have any effect in so far as distribution activity of Indian Railways is concerned.*

26. *Sections 2(17) and 2(70) of the Electricity Act, 2003 cannot have any overriding effect over the provisions of Railways Act, 1989 in terms of Section 174 of the Electricity Act, 2003. Section 174 of the Electricity Act, 2003 provides that subject to Section 173, the Electricity Act 2003 shall have overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than the Electricity Act, 2003.*

**Applicability of Cross Subsidy Surcharge and Additional Surcharge**

27. *It is submitted that Indian Railways is a distribution licensee in the state of Madhya Pradesh connected to Madhya Pradesh Power Transmission Company Limited, the State Transmission Utility and with a distinct area of operation to that of petitioners. The STU in compliance of its obligations as per section 39(2) (d)(i) of Electricity Act, 2003 has provided non-discriminatory open access to its transmission system for its use by the Indian Railways and Indian Railways has been paying the necessary transmission charges to STU accordingly. However, no charges on account of Cross Subsidy Surcharge and Additional Surcharge are being paid as the same have no relation or relevance in so far as the activities of Indian Railways as Deemed Licensee are concerned. Further such charges would result in unreasonable amounts being imposed on Railways which is contrary to the intent and spirit of open access.*
28. *In this regard, it is stated that in the state of Madhya Pradesh, Indian Railways started procuring power on open access from 22.01.2016 on inter-state open access. The open access for inter-state transfer of power was sought and was granted to Indian Railways as deemed licensee by STU based on the No-Objection certificate issued by STU. Further, the connectivity agreements have also been executed by the Indian Railways for its Traction Substations as a Deemed Distribution Licensee with State Transmission Utility. Thus, Indian Railways is neither connected to Petitioner Discoms network nor in any way uses their network/facilities for the purpose of distributing electricity to its Traction Sub stations in the state of Madhya Pradesh. It is reiterated that Indian Railways is a deemed distribution licensee and distributing electricity of its own use with a distinct area of supply than that of petitioner Discoms. Such Open Access is being sought by the Indian Railways as a distribution licensee and not as a consumer. As long there is a nexus between the maintenance of the distribution system of the Indian Railways and use of the same for the purpose of railway administration, the Indian Railways sourcing power from the generator/trader etc, i.e., other than the distribution licensee of the area, need to be treated as a distribution licensee and not as a consumer of another distribution licensee in the area.*

29. *Open Access to transmission system for a distribution licensee are to be governed as per the provisions of Sections 38 (2) (d) (i), 39 (2) (d) (i), 40 (c) (i).*

***“Section 38. (Central Transmission Utility and functions):***

*.....*

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

*....*

*(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....”*

***“Section 39. (State Transmission Utility and functions):***

*.....*

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

*....*

*(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....”*

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

*.....*

*(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  
...”*

30. *As per above, Indian Railways shall have Open Access to transmission of CTUs/STUs on payment of transmission charges as decided by respective Commissions.*



31. *The cross subsidy surcharge is leviable in terms of the provisions of Section 42(2) read with Section 38(2)(d)(ii), Section 39(2)(d)(ii) and 40(c)(ii) only when the open access is sought for the conveyance of electricity to a consumer. There is no imposition of any surcharge including cross subsidy surcharge when there is procurement of power by a Licensee/Deemed Licensee. Thus, the petitioner Discoms cannot seek to levy cross subsidy surcharge on Indian Railway being a distribution licensee in the state of Madhya Pradesh on the energy being sourced by it through Open Access.*
32. *Section 42(2) and 42(4) of the Electricity Act, 2003 dealing with Cross Subsidy and Additional Surcharge provides as under:*

***“Section 42. (Duties of distribution licensee and open access):***

.....

- (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<sup>1</sup> [such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:*

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

*Provided also that such surcharge and cross subsidies shall be progressively reduced<sup>2</sup> [\*\*\*] in the manner as may be specified by the State Commission:*

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

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

.....

- (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 maybe specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.”*
33. *Section 42(2) of Electricity Act 2003 provides for levying of cross subsidy surcharge in addition to wheeling charges on the consumer by the distribution licensee. The wheeling charges are towards the use of distribution network of Distribution licensee and cross subsidy surcharge to compensate it financially for subsidized electricity in its area of supply. Thus cross subsidy surcharge can only be in addition to wheeling charges. As submitted earlier, Indian Railways are not connected to/using petitioner’s network, have a distinct area of supply and being distribution licensee are not liable to pay either wheeling charges or cross subsidy surcharge. The fact that, petitioner has prayed for imposition of cross subsidy surcharge only, makes his argument hollow as cross subsidy charges can be levied on consumer of a distribution licensee only and Indian Railways being deemed distribution licensee in the state of MP is not liable for the same.*
34. *The Indian Railways in the present case, is availing power through Open Access from M/s. Jindal India Thermal Power Limited, RGPPL and BRBCL at its Traction Substations as a deemed distribution licensee. The Indian Railways as the distribution licensee is not supplying to any consumers of either of the State Distribution Licensees in the State of Madhya Pradesh thereby taking away their subsidizing consumers for which purpose the cross subsidy surcharge has been devised as payable. The Indian Railways is not therefore liable to pay cross subsidy surcharge to another distribution licensee.*
35. *With regard to Additional Surcharge, it is submitted that under Section 42(4) of the Electricity Act, 2003, 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. As mentioned earlier, Indian Railways are neither connected to nor using Petitioner Discoms’ network, hence the question of levying of wheeling charges or additional surcharge on wheeling charges towards the fixed cost of distribution licensee does not arise. Petitioners cannot seek imposition of charges de hors the Act.*
36. *Without prejudice to the above, Section 42 of the Electricity Act, 2003 deals with the Cross Subsidy and Additional Surcharge. Section 42 (2) specifically speaks about the Cross Subsidy Surcharge in the context of a consumer of electricity and not when the electricity is procured by a licensee. The purpose of Cross Subsidy Surcharge is to compensate the distribution licensee of the area in regard to the prevalent extent of the cross-subsidization of one category of consumers by another category. It cannot have any application in the case of a licensee. Similarly, Section 42 (4) speaks*

*about the Additional Surcharge in the context of the State Commission permitting a consumer of a class of consumer and not in the case of a distribution licensee procuring power.*

37. *Thus, Section 42(2) of Electricity Act, 2003 only provides for applicability of cross subsidy surcharge and additional surcharge on wheeling charges on consumers of distribution licensee who are seeking Open access in the area of licensee and not on other distribution licensees who are neither connected nor using their distribution network. Therefore, there can be no cross subsidy surcharge and additional surcharge applicable on the Indian Railways being a deemed distribution licensee in the state of Madhya Pradesh.*

38. *The Hon'ble Commission has notified Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 (hereinafter referred to as '**Open Access Regulations**'). Regulation 2.1 of the 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 has availed of or intends to avail of open access;*

39. *Regulation 3 of the Open Access Regulation provides as under:*

**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.*

40. *As submitted hereinabove, Indian Railways is operating in its own area of distribution under its jurisdiction and control of Indian Railways which is distinct and separate from the area of distribution / area of supply. Thus, in terms of the above, the Indian Railways being a deemed distribution licensee is an "Open Access Customer" in so far as its procuring power through Open Access as a deemed licensee in terms of the Electricity Act, 2003.*

41. *An open access customer who is eligible for open access is required to pay charges as may be determined by this Hon'ble Commission. It is submitted that even in terms of Open Access Regulations as framed by this Hon'ble Commission, only a consumer of the distribution licensee is also liable to pay wheeling charges, cross-subsidy surcharge and additional surcharge as may be determined by this Hon'ble Commission. However, Indian Railways is procuring power through open access as a licensee. Therefore, the Indian Railways is not liable to pay any charges on account of cross-subsidy surcharge or additional surcharge.*
42. *In addition to the above, a perusal of the Regulations 13.1 (f) and (g) of Open Access Regulations dealing with Cross Subsidy Surcharge and Additional Surcharge would show that the same is applicable for open access consumers only and not on the entities, such as Indian Railways, procuring power through open access as a deemed licensee. Regulations 13.1 (f) and (g) provide as under:*

**13: CHARGES FOR OPEN ACCESS**

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

.....

- 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.*

43. *Thus neither the Electricity Act, 2003 nor the Open Access Regulations as framed by this Hon'ble Commission provide for the applicability of cross subsidy surcharge and additional surcharge on a licensee, the same cannot be sought to be levied by the Petitioners.*
44. *Without prejudice to the above, the Indian Railways being a distribution licensee and procuring power as a distribution licensee, there can be no liability of cross subsidy surcharge or additional surcharge. The contention that Section 42 of the Electricity Act, 2003 does not exempt a distribution licensee from liability of cross subsidy surcharge on being granted open access is wrong. The cross subsidy surcharge is applicable on a consumer seeking open access and not on other licensees. There is no provision for applicability of cross subsidy surcharge on a licensee.*

**Judgment of Hon'ble Supreme Court in Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Ors (2014) 8 SCC 444**

45. *Reliance **placed by the Petitioners** on the decision of the Hon'ble Supreme Court in Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Ors (2014) 8 SCC 444 (attached herewith as **Annexure F**), to hold that Indian Railways is not a licensee under the Electricity Act, 2003, is misplaced. The said case was related to Special Economic Zone Act which provided for developers of Special Economic Zone as deemed licensee authorised to distribute electricity within the Special Economic Zone area and not for self consumption. Further, the provisions of Special Economic Zone Act and Railways Act are materially different in its relation to the Electricity Act, 2003. It was noted by the Hon'ble Supreme Court that Section 49 of the Special Economic Zone Act gives authority to the Central Government to declare that any provisions of a Central Act shall apply to the Special Economic Zone and in furtherance to this, Government of India had issued a notification with regard to power generation in Special Economic Zone declaring that all provisions of the Electricity Act shall be applicable to the generation, transmission and distribution of power whether stand-alone or captive power.*
46. *Unlike the overriding effect given to the Railways Act 1989 in section 173 of the Electricity Act 2003, the Special Economic Zones Act is not given such overriding effect to prevail over provisions of Electricity Act, 2003. On the other hand, the Notification under Special Economic Zone Act specifically recognized the applicability of provisions of the Electricity Act, 2003. Therefore, the Hon'ble Supreme Court considered the provisions of the Electricity Act, 2003 to hold that power must be supplied to consumers. However, the same cannot be applied to the present case. Railways Act, 1989 would prevail over the Electricity Act, 2003 as per Section 173 of the Electricity Act, 2003. Since the Indian Railways has the authority to distribute electricity under Railways Act, 1989, the same cannot be denied on the basis of provisions of the Electricity Act, 2003.*
47. *The Sesa Sterlite case {supra} in paras 46 and 47 had dealt with "own consumption" being not saved from liability to pay cross subsidy surcharge in a totally different and peculiar factual circumstances of the said case. The Hon'ble Supreme Court has not laid down "own consumption" being liable to pay cross subsidy surcharge as an absolute rule, as sought to be pleaded by the Petitioners.*
48. *The basis of the Sesa Sterlite decision is that Sesa Sterlite did not establish the Distribution system which it was mandated as the developer of the Special Economic Zone and without doing so, claimed that the cross subsidy is not payable for one of the existing units based on the status of deemed Licensee. This would be abundantly clear if the last two paras of the decision is seen which read as under:*

*"46. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, in the present case no doubt by virtue of the status of a*

*developer in the SEZ area, the appellant is also treated as deemed distribution licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Act. In order to avail further benefits under the Act, the appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. We have to keep in mind the object and scheme of the SEZ Act which envisages several units being set up in an SEZ area. This is evident from a collective reading of the various provisions of the SEZ Act viz. Sections 2(g), 2(j), 2(za), 2(zc), 3, 4, 11, 12, 13 and 15. There can be a sector specific SEZ with several units i.e. for IT, mineral based industries, etc. but instances of single unit SEZ like in the present case of the appellant may be rare. The Notification dated 3-3-2010 providing for the “developer” of SEZ being deemed as a “distribution licensee” was issued keeping in view the concept of multi-unit SEZs and will apply only to such cases in which the developer is supplying the power to multiple units in the SEZ. The said notification will not apply to a developer like the appellant who has established SEZ only for itself.*

**47.** *Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this appeal which is accordingly dismissed.*

49. *In fact the Indian Railways have established the largest rail network in the world namely the purpose for which the activities have been authorised under the Railways Act, 1989. There cannot be any dispute on this aspect that Indian Railways has not established the distribution network.*
50. *Another important aspect is para 46 of the Judgement. The Hon'ble Supreme Court has taken cognizance of single unit Special Economic Zone where the consumption will be the own consumption only but where it is multi-unit Special Economic Zones, then the situation was different.*
51. *The finding in Sesa Sterlite case is that the developer had schemed his own consumption as distribution Licensee activity without establishing the distribution network and the decision was based in such a special situation. In the case of Railways there is no such scheming to take advantage of authorisation to establish electrical network.*
52. *Independent of the above, the status of a developer of a Special Economic Zone governed by the Special Economic Zones Act, 2005 [Such as VAL SEZ] is different from the status of the Indian Railways under the Railways Act. Under the Special Economic Zones Act, 2005 there is no such plenary overriding statutory powers for Special Economic Zones as in Section 11 of the Railways*



*Act, 1989. In terms of Section 49 of the Special Economic Zones Act, 2005 the Central Government has to decide under the delegated powers on the exemptions to be granted to the Special Economic Zones from the applications of other laws. The Central Government by notification dated 03.03.2010 provided for the Deemed Licensee status by amending Section 14 of the Electricity Act, 2003 but has stipulated that in all respects the provisions of the Electricity Act, 2003 will apply. [Ref:Paras 42 and 43 of the Sesa Sterlite decision].*

53. *If the “own Consumption” aspect raised by the Petitioners is to be accepted even to the case of open access of a licensee it would lead to anomalous and absurd results. Each of the Distribution Licensee shall be liable for payment of cross subsidy surcharge for consumption at their offices and establishment also.*
54. *The Hon’ble Appellate Tribunal in paras 16 and 17 of the judgement dated 16.12.2015 in IA no. 445 of 2015 in Appeal no. 276 of 2015 has held that the decision of the Hon’ble Supreme Court in Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission and Ors (2014) 8 SCC 444 is prima facie not applicable in case of Indian Railways.*
55. *It is submitted that the Indian Railways are one of the largest rail networks in the world and are an essential part of the transport infrastructure in India and play an important role in the growth and development of the national economy as well as of the backward and underdeveloped areas of the country. The Indian Railways not only provide an affordable transport facilities to the common man but also facilitate transport of coal, minerals, steel, cement, mineral oil, food grains and fertilizer at a competitive rates. The Indian Railways are of strategic importance in the country and therefore it is essential for the Indian Railways to construct, operate and maintain the railway network in an efficient and economical manner. Any delay or hampering of the exercise of the rights by the Indian Railways would also adversely impact the transport services in the country.*
56. *The Petitioners have relied on the orders passed by the various State Commissions as regards the applicability or liability of Cross Subsidy Surcharge and additional surcharge.*
  - i. *Order dated 23.04.2019 passed by Rajasthan Electricity Regulatory Commission in Petition No. 1452 of 2019 – The said order is under challenge by Indian Railways in Appeal No.170 of 2019. The Hon’ble Appellate Tribunal vide its order dated 13.05.2019 has been pleased to stay the order passed by the Rajasthan State Commission (attached herewith as **Annexure G**).*
  - ii. *Order dated 25.02.2020 passed by Odisha Electricity Regulatory Commission in Petition No. 55 of 2016 – The said order is also under challenge in Appeal No. 114 of 2020. The Hon’ble Appellate Tribunal has concluded the hearing on interim application and has reserved its order for the same.*

- iii. *Order dated 26.06.2020 passed by Kerala State Electricity Regulatory Commission - The said order is also under challenge in DFR No. 272 of 2020. The Hon'ble Appellate Tribunal has concluded the hearing on interim application and has reserved its order for the same.*
- iv. *Order dated 17.06.2020 passed by Haryana Electricity Regulatory Commission in Petition being PRO-11 of 2017 - The said order is also under challenge in Appeal No. 133 of 2020. The Hon'ble Appellate Tribunal has concluded the hearing on interim application and has reserved its order for the same.*

57. *For the reasons mentioned hereinabove, the present petition filed by the Petitioners is liable to dismissed and Indian Railways is entitled to open access for conveyance of power at its Traction Substations in its status as Deemed Distribution Licensee, against payment of Open Access Charges without the liability to pay cross subsidy surcharge and additional surcharge.*

12. The petitioners submitted the following in their written submission on arguments:

- 1. *That Indian Railway (WCR) was HT consumer of petitioners and availing electricity from Petitioners who are three DISCOMS operating in different jurisdictions in the State of Madhya Pradesh.*
- 2. *That, w.e.f from 22/01/2016 the Indian Railways (WCR) has terminated HT agreement with petitioners and has started purchasing electricity from third party through Open Access (LTOA/STOA).*
- 3. *That consumption of electricity by Indian Railways (WCR) was billed for CSS and additional surcharge by petitioners from the year 2016 as per rate prescribed by this hon'ble commission, however railways has neither paid the bill nor raised any dispute, in these peculiar situation, whereby a statutory organization like Indian Railways has made huge default in payment of its dues, the petitioner was left with no other option rather approach this hon'ble commission for appropriate direction to resolve this deadlock.*
- 4. *The details of outstanding amount till filing of present petition is given in paragraph 11 of the petition.*
- 5. *The basic submission of petitioners are :-*
  - (a) *That WCR is operating its business in the jurisdiction of petitioners and for operation of railways they are drawing electricity through open access in the territorial jurisdiction of petitioners from third party therefore they are liable to pay statutory open access*

*charges/ surcharges levied u/s 42 of Electricity Act, 2003 r/w relevant regulation and tariff order passed by this Hon'ble Commission.*

- (b) That the electricity drawn by Indian Railway for its own use falls within the definition of "consumer" as defined u/s 2(15) r/w 2(70) of the Electricity Act 2003 as thus they have liability to pay CSS and additional Surcharge u/s 42 of Electricity Act, 2003.*
- (c) Even assuming that railway is deemed licensee under third provision of sec 14 of the Electricity Act, 2003, it only exempt them from getting license u/s 14 of the Act, however for electricity consume by them for their activity through open access will be subjected to CSS and additional surcharge u/s 42 of Electricity Act, 2003 as otherwise it will be heavy burden upon consumers of distribution licensee and will also provide an undue advantage to such open access consumer. The nature of CSS and Additional Surcharge is compensatory, as its statutory liability of distribution licensee to supply electricity to all class of consumer on their demand<sup>2</sup> and maintain efficient system for such supply. The distribution licensee like petitioners also have obligation to supply electricity at subsidize rate to weaker section of society.*
- (d) That the Electricity Act, 2003 in-order to promote healthy competition give liberty to a person/consumer to get electricity from his/her own choice, however at the same time casts a liability to compensate the distribution licensee of the area, who has two fold statutory obligation (a) to maintain efficient, co-ordinate and economical distribution system (b) to provide for mechanism of cross subsidy to ensure supply at affordable rate to weaker section of society. Admittedly railway is claiming status of "distribution licensee" (deemed) but they do not fall within the definition of "distribution licensee" as defined u/s 2(17) of the Electricity Act as neither it has consumers nor has area of "supply." Thus deemed provision provided under third proviso of section 14 of Act of 2003 will only absolve them from liability to get license and not for payment of statutory charges u/s 42 of the Act of 2003 for their own consumptions.*
- (e) That it is admitted position on record that Railways do not have any consumer and they consume all the electricity drawn by them, thus the deeming status does not put them at par with distribution licensee for the purpose of statutory charges u/s 42 of the Act of 2003.*

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<sup>2</sup> irrespective of fact whether they are actually availing said facility or not from distribution licensee of the area

(f) *That the Hon'ble Supreme Court in the matter of Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission (2014) 8 SCC 444 has held that an entity which utilized the entire quantum of electricity for its own consumption and does not have any other consumer thus cannot claim exemption from CSS and additional surcharge.*

(g) *The reasoning provided in said judgment has been followed by other State Commissions and has held that railways are liable to pay CSS and additional surcharge to respective distribution licensee.<sup>3</sup>*

6. *That the Indian Railway has filed its reply to petitioner and has broadly made following submissions:-*

(A) *Indian Railways by virtue of section 11 & 12 of The Railways Act 1989 R/w Section 14 (third Proviso) and Section 173 of the Electricity Act of 2003 are "deemed distribution licensee" therefore they do not fall within the category of consumer thus not liable to pay CSS of additional surcharge u/s 42 of the Electricity Act 2003.*

(B) *The electricity drawn by the Indian Railway is directly by generator therefore they do not come within the definition of "consumer."*

(C) *That, without being prejudice to the submissions aforesaid made, the petitioner further submits that even on merit objection filed by respondent WCR does not hold water.*

**RE: Electricity Act 2003 is not applicable on Indian Railways**

(D) *That, the first objection of the respondent Railway is that Electricity Act 2003 is not applicable to them by virtue of 11 and 12 of the Indian Railway Act, 1989 read with Section 173 of the Electricity Act, 2003. Therefore section 42 of the Electricity Act, 2003 and Rules and regulations framed therein shall not be attracted regarding supply of electricity to Indian Railways. However said argument is misconceived because of following reasons:*

(a) *It is respectfully submitted that Electricity Act, 2003 is the basic law governing Generation, Transmission, Supply and Distribution of Electricity in India whereas Railways Act, 1989 is a law governing various affairs relating to operation and maintenance of the railways tracks and railways in India. In certain areas the Electricity Act, 2003 and Railways Act may overlap each other and in such area of overlap by virtue of Section 173 of Electricity Act, 2003, Railways Act would be governing law, however for rest of the areas both Acts*

<sup>3</sup> The copy of judgments/orders are filed as Annexure P-1 to P-4 along with rejoinder to reply.

*operate in their respective field. The relevant Section 173 is reproduced as under for ease of reference:*

*"173. Inconsistency in laws*

*Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in **so far as it is inconsistent** with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989."*

*Thus, section 173 of Electricity Act has its operation only for those provisions which came in direct conflict with any provision under Indian Railway Act. In the present case the provisions of Railway Act relied upon by the Railway merely pertains to works of the Railway. Section 11 of the Railway Act provides for the erection, operation, maintenance or repairing of any electric traction equipment, power supply and distribution installation in connection with the working of the railway. Whereas Section 12 pertains to the power of Railway to alter the position of pipe, electric supply line, drain or sewer, etc. Respondent WCR failed to point out any provisions of Indian Railway Act which is in direct conflict or creating inconsistency with the provisions of open access (Section 42 and other applicable provisions) provided in the Electricity Act, 2003. Thus drawing power through open access is govern by the provisions of Electricity Act 2003 r/w rules, regulations and order made thereunder by this Hon'ble Commission.*

*(b) It is respectfully submitted that there is no provision for drawing electricity through open access in the Railways Act 1989 and in fact the entire concept and mechanism of open access has been introduced by Electricity Act, 2003. Indian Railway while making an application for open access has availed the benefit conferred by the Electricity Act, 2003, therefore they are bound by rules and regulation governing such access and also liable to pay open access charges levied under Electricity Act, 2003.*

**RE: Railway is deemed licensee and not Consumer under Electricity Act 2003:**

**(E)** *That, the second issue which has been raised by the respondent –railway is that they are not a consumer, in fact, they are deemed distribution licensee and, therefore, they are not liable to pay open access charges including cross subsidy surcharge and additional surcharge under section 42 of Electricity Act, 2003 as these charges are applicable to consumers not to distribution licensee.*

**(F)** *That, section 2(15) of the Electricity Act 2003 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;*

- (G) *That, it may be seen that to be the 'Consumer', electricity must be used for one's own use. In other word electricity should not be procured by any person for its resale. In the instant case undisputedly Railway is procuring electricity for its own use through open access directly from generating companies. Further Railway is using the grid and connected with the system of licensees for the purpose of receiving such electricity. Accordingly Railway is a 'Consumer' within the meaning of Section 2(15) of the Electricity Act.*
- (H) *That similar issue/argument have already been adjudicated by Hon'ble Supreme Court in the matter of **Sese Sterlite Limited Vs. Orissa Electricity Regulatory Commission, Civil Appeal No.5479/2013** (2014) 8 SCC 444 whereby Hon'ble Supreme Court has elaborately explained the concept of open access charge and cross subsidy surcharge and it has been held that by virtue of deemed licensee, the only exemption an entity gets is that specifically applying for license under Section 14 of the Electricity Act. In order to availing further benefits under the Electricity Act, an entity is also required to show that it is having distribution system and has number of consumers to whom it is supplying electricity. If it is not the case, then the charges (open access) are payable by them. Coming to facts of present case, even in reply filed by the respondent-Railways, only status they have claimed is of deemed distribution licensee and it is not their case that in fact they are engaged in the business of distribution and supply of electricity to the consumers. The electricity procured by them through open excess is, in fact, consumed by them and, therefore, they cannot be said to be engaged in the business of distribution and transmission of electricity, hence, even if for the sake of arguments, it is accepted that they are deemed licensee, being consumer of electricity, they cannot escape from the statutory liability/charges under Section 42 of the Electricity Act, 2003.*

**RE: Order of CERC dated 05.11.2015 in Petition No 197/MP/2015 and Order of APTEL dated 16/12/2015 in the IA No. 445/15 in Appeal No. 276 of 2015:**

- (I) *That, the Railways, has filed the petition No. 197/MP/2015 before CERC seeking following directions:*
- (a) *Direct that Indian Railways are entitled to the grant of open access for the power to be procured from the Respondents No. 8 and 9 and other generating stations or sources through*



*the Inter-State Transmission Network of the Central Transmission Utility and the Transmission Network of the Respondent States including the Respondent Nos. 4 to 7 till the facilities and network of the Indian Railways;*

*(b) Direct that Indian Railways in their capacity as an authorized entity to distribute and supply electricity in connection with its working as railways and across a number of States shall be a separate participating entity, like any other State entity in the Deviation and Settlement Mechanism notified by the Hon'ble Commission for the purposes of Scheduling and Dispatch of electricity;*

*(c) Direct that all the State Transmission Utilities and the State Load Despatch Centers (they are part of the State Transmission Companies such as Respondents No. 4 to 7) to give connectivity and to process the application for Open Access - long term or medium term or short term, as the case may be - treating the Indian Railways as an entity akin to a person who has been granted a distribution licence in their State and allow the use of the intra-State transmission facilities of such Respondents as incidental to inter--State transmission of electricity from the place of generation; and*

*(d) Pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.*

**(J)** *That, from bare perusal of the aforesaid prayer before Hon'ble CERC it may be seen that issue of payment of open access charges neither raised nor adjudicated by the CERC. Even otherwise the issue of levy of cross subsidy surcharge as well as additional surcharge comes within the sole jurisdiction of this Hon'ble Commission and only state commission of the concerning state is competent to adjudicate such issue.*

**(K)** *Aggrieved by the order of the CERC dated 05/11/2015 allowing open access to Railway, the West Bengal Electricity Distribution Company Ltd has filed the Appeal No. 276 of 2015. The issue of levy of open access charges is not the subject matter of appeal before Hon'ble APTEL and no adjudication has been done by the Hon'ble APTEL in this regard vide order dated 06/12/2015. Thus the order of Hon'ble CERC dated 05/11/2015 and Order of Hon'ble APTEL dated 16/12/2015 has no bearing on the present proceedings.*

***RE: Judgment of Hon'ble Supreme Court in the matter of Union of India v Chairman, Uttar Pradesh State Electricity Board and Others decided on 09.2.2012 (Transferred Case No. 37 and 38 of 2001) (2012) 3 SCC 329:***

- (L) *That, the aforesaid judgment of the Hon'ble Supreme Court pertains to the power of the Railway regarding laying down the transmission line. The reliance on this judgment of the Hon'ble Apex Court is misplaced due to following reasons:*
- (a) *The judgment pertains to transmission activity and not the distribution activity.*
  - (b) *Power of railway to carryout works is not the subject matter of the present proceedings. The scope of the present proceedings is limited to the nonpayment of open access charges by the Railway and this judgment doesn't deals with the issue of open access charges.*

**RE: Non use of Distribution System of Petitioners:**

- (M) *That, respondent has contended that there is no use of distribution system hence open access charges shall not payable to the distribution licensee. In this regard kind attention is drawn towards the Section 2(19) and 2(72) of the Electricity Act:*

*2(19) –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;*

*2(72) –transmission lines" means all high pressure cables and overhead lines **(not being an essential part of the distribution system of a licensee)** transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works;*

*Further Rule 4 of the Electricity Rule 2005 provides as under:*

*4. Distribution System.- The distribution system of a distribution licensee in terms of sub-section (19) of section 2 of the Act shall also include electric line, sub-station and electrical plant that are primarily maintained for the purpose of distributing electricity in the area of supply of such distribution licensee **notwithstanding that such line, sub-station or electrical plant are high pressure cables or overhead lines or associated with such high pressure cables or overhead lines; or used incidentally for the purposes of transmitting electricity for others.***

- (N) *That, from the perusal of the aforesaid statutory provisions it is clear that the even the transmission network through which a consumer consumes electricity is part of distribution system. In the instant case even if practically the Railway is connected with the STU for consuming electricity , for all statutory purpose it shall be considered that Railway is using the Distribution system of the distribution licensees. Even otherwise as per*

law down by the Hon'ble Supreme Court in Sesa Sterlite Supra for the levy of open access charges use the distribution system of the licensee is not necessary.

**RE: Practice followed by the other Regulatory Commission of the Country:**

- (O) That, without prejudice the submission that as far as State of Madhya Pradesh is concerned Tariff Orders approving open access charges towards Railway as well as demand of open access charges raised by petitioners upon the Railways has attained finality without any challenge, kind attention of the Hon'ble Commission drawn to the fact that issue of liability of Railway towards the open access charges along with status of Railway as consumer, has already been dealt by other Regulatory Commission of the Country and by elaborately explaining Regulation, it has been held that Railway fall within the definition of consumer and liable to pay cross-subsidy surcharge and other open excess surcharge.
- (P) That, Rajasthan Electricity Regulatory Commission in **Petition No.RERC 1452/2019 (Jaipur Vidyut Vitaran Nigam Limited Vs. West Central Railway)** has categorically held that the West Central Railway is liable to pay open access for cross subsidy and additional surcharge to the distribution licensee. For ready reference of this Hon'ble Commission, Copy of order passed by Rajasthan Electricity Regulatory Commission is being filed herewith as **Document-P/1.**
- (Q) That, Odisha Electricity Regulatory Commission in **Case No.55/2016 in the matter of OPTCL vs East Coast Railway & others** has dealt with similar arguments and after analyzing the provisions of Electricity Act, 2003 and the Rules along with Indian Railways Act, has held that Railway shall be treated as a consumer under Electricity Act, 2003. For ready reference of this Hon'ble Commission, Copy of order passed by Odisha Electricity Regulatory Commission is being filed herewith as **Document-P/2.**
- (R) That, in the matter of **Southern Railway Vs. Kerala Electricity Board Limited**, Kerala Electricity Regulatory Commission, Tiruvananthapuram in **Petition No.183/DE(T)/2020/KSERC** has held that railway is a consumer as defined under Section 2(15) of the Electricity Act, 2003 and, therefore, they are open access consumer and liable to pay open access charges under Section 42 of the Electricity Act. Copy of order passed by Kerala State Electricity Regulatory Commission is being filed herewith as **Document-P/3.** The same interpretation is made by the Haryana Electricity Regulatory Commission in **HERC/PRO-11/2017 in the matter of Dakshin Haryana Bijali Vitaran Nigam Limited (DHBVNL), Hisar Vs. Northern Railway, New Delhi and others.** Copy of order passed by Copy of order passed by Haryana Electricity Regulatory Commission is being filed herewith as **Document-P/4.**

- (S) *In light of these settled prepositions along with statutory provisions, relief prayed for by the petitioner is just and proper and the same may be granted to the petitioner.*

**Commission's Observations and Findings:**

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

- (i) The petitioners are Distribution Licensees operating in the State of Madhya Pradesh. The Respondent No.1 i.e., West Central Railways (WCR) on behalf of Indian Railway was HT consumer of petitioners and availing electricity from the petitioners at various locations in their areas of jurisdiction. The total contract demand of Western Central Railways with MP Discoms was 593 MW and total average per month sale of electricity to WCR was around 152 MUs with monthly billing of about Rs 96 Crore. Accordingly, the Respondent No.1 (WCR) was contributing substantial revenue to all three Discoms as a subsidizing bulk HT consumer.
- (ii) The Respondent No.1, Indian Railways (WCR) has terminated HT agreement with petitioners with effective from 22.01.2016 and has started purchasing electricity from third party through Open Access (LTOA/STOA).
- (iii) The petitioners started raising bills on the consumption of electricity by Indian Railways (WCR) for Cross Subsidy Surcharge and Additional surcharge from the year 2016 as per rate determined by the Commission in retail supply tariff orders for respective years. Accordingly, the petitioners have raised an amount of Rs. 614.28 crores and Rs. 350.05 crore towards CSS and additional Surcharge respectively for a period of FY 2015-16 upto November'2019. However, the Respondent No.1 (WCR) has not paid the bill raised by the petitioner. Hence, the petitioners have approached the Commission in this matter.

**14.** The petitioners have broadly raised the following grounds in the subject petition for applicability of open access charges on the Respondent No.1 (WCR):

- (i) The Respondent No.1 (WCR) is operating its business in geographical areas of the petitioners and the Respondent No.1 (WCR) is drawing electricity through open access in the territorial jurisdiction of petitioners from third party for operation of Railways. Therefore, they are liable to pay statutory open access charges/ surcharges levied under Section 42 of the Electricity Act, 2003 read with relevant Regulations and tariff orders issued by the Commission.

- (ii) That the electricity drawn by Indian Railway for its own use falls within the definition of “consumer” as defined under Section 2(15) read with Section 2(70) of the Electricity Act 2003. Thus, they have liability to pay CSS and additional Surcharge u/s 42 of Electricity Act, 2003.
- (iii) Even assuming that the Railway is deemed licensee under third Proviso of Section 14 of the Electricity Act, 2003, which only provides them exemption from getting license u/s 14 of the Electricity Act’2003, however for electricity consume by them for their activity through open access will be subjected to CSS and additional surcharge u/s 42 of Electricity Act, 2003 as otherwise it will be heavy burden upon consumers of distribution licensee and will also provide an undue advantage to such open access consumer. The nature of CSS and Additional Surcharge is compensatory, as its statutory liability of distribution licensee to supply electricity to all class of consumer on their demand<sup>4</sup> and maintain efficient system for such supply. The distribution licensee like petitioners also have obligation to supply electricity at subsidize rate to weaker section of society.
- (iv) That the Electricity Act, 2003 in-order to promote healthy competition give liberty to a person/consumer to get electricity from his/her own choice, however at the same time casts a liability to compensate the distribution licensee of the area, who has two fold statutory obligation (a) to maintain efficient, co-ordinate and economical distribution system (b) to provide for mechanism of cross subsidy to ensure supply at affordable rate to weaker section of society. Admittedly railway is claiming status of “distribution licensee” (deemed) but they do not fall within the definition of “distribution licensee” as defined u/s 2(17) of the Electricity Act as neither it has consumers nor has area of “supply.” Thus deemed provision provided under third proviso of section 14 of Act of 2003 will only absolve them from liability to get license and not for payment of statutory charges u/s 42 of the Act of 2003 for their own consumptions.
- (v) It is admitted position on record that the Railways do not have any consumer and they consume all the electricity drawn by them, thus the deeming status does not put them at par with distribution licensee for the purpose of statutory charges u/s 42 of the Act of 2003.
- (vi) The Hon’ble Supreme Court in the matter of **Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission (2014) 8 SCC 444** has held that an entity which utilized the entire quantum of electricity for its own consumption and does not have any other consumer thus cannot claim exemption from CSS and additional surcharge. The reasoning provided in said

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<sup>4</sup> irrespective of fact whether they are actually availing said facility or not from distribution licensee of the area

judgment has been followed by other State Commissions and has held that Railways are liable to pay CSS and additional surcharge to respective distribution licensee.

**15.** The Respondent No. 1 (WCR) while quoting the provisions under Sections 38,39.40 and 42 of the Electricity Act'2003, Indian Railways Act 1989 read with Section 173 of the Electricity Act 2003 has broadly submitted the following arguments on applicability of CSS and Additional Surcharge:

- (i) Indian Railways is a distribution licensee in the state of Madhya Pradesh connected to Madhya Pradesh Power Transmission Company Limited, the State Transmission Utility and with a distinct area of operation to that of petitioners. The STU in compliance of its obligations as per section 39(2) (d)(i) of Electricity Act, 2003 has provided non- discriminatory open access to its transmission system for its use by the Indian Railways and Indian Railways has been paying the necessary transmission charges to STU.
- (ii) However, no charges on account of Cross Subsidy Surcharge and Additional Surcharge are being paid as the same have no relation or relevance in so far as the activities of Indian Railways as Deemed Licensee are concerned. Further such charges would result in unreasonable amounts being imposed on Railways which is contrary to the intent and spirit of open access.
- (iii) As per third proviso of Section 14 of Electricity Act, 2003, Indian Railway is a deemed licensee and it specifically provides that deemed licensee shall not be required to obtain a license under this Act. CERC also vide order dated 05.11.2015 recognized Indian Railway as a deemed distribution licensee. Thus, Petitioner is undertaking distribution of electricity within its area of operation and restricted to the purposes and in connection with the working of Railways.
- (iv) It is stated that in the state of Madhya Pradesh, Indian Railways started procuring power on open access from 22.01.2016 on inter-state open access. The open access for inter-state transfer of power was sought and was granted to Indian Railways as deemed licensee by STU based on the No-Objection certificate issued by STU. Further, the connectivity agreements have also been executed by the Indian Railways for its Traction Substations as a Deemed Distribution Licensee with State Transmission Utility.
- (v) Section 173 of the Electricity Act, 2003 saves the Railways Act, 1989 in so far as there is any inconsistency within the provisions of the two legislations. Indian Railways in terms of Section 11 and 12 of the Railways Act, 1989 is permitted to undertake supply of electricity only in relation to the Railways Administration, namely, for self



or associated consumption without obtaining any license. Whereas under the Electricity Act, 2003 a distribution licensee is required to supply electricity to its consumers in terms Section 2(17) of the Electricity Act, 2003. Thus, there is inconsistency in so far as the obligation of Indian Railways to supply under the Railways Act, 1989 and Electricity Act, 2003 is concerned. Therefore, in terms of Section 173, the requirement of supply under Section 2(17) of the Electricity Act, 2003 shall not have any effect in so far as distribution activity of Indian Railways is concerned.

- (vi) Thus, the Indian Railways is neither connected to Petitioner Discoms' network nor in any way uses their network/facilities for the purpose of distributing electricity to its Traction Sub stations in the state of Madhya Pradesh. It is reiterated that Indian Railways is a deemed distribution licensee and distributing electricity of its own use with a distinct area of supply than that of petitioner Discoms. Such Open Access is being sought by the Indian Railways as a distribution licensee and not as a consumer.
- (vii) The cross subsidy surcharge is leviable in terms of the provisions of Section 42(2) read with Section 38(2)(d)(ii), Section 39(2)(d)(ii) and 40(c)(ii) only when the open access is sought for the conveyance of electricity to a consumer. There is no imposition of any surcharge including cross subsidy surcharge when there is procurement of power by a Licensee/Deemed Licensee. Thus, the petitioner Discoms cannot seek to levy cross subsidy surcharge on Indian Railway being a distribution licensee in the state of Madhya Pradesh on the energy being sourced by it through Open Access.
- (viii) Section 42(2) of Electricity Act 2003 provides for levying of cross subsidy surcharge in addition to wheeling charges on the consumer by the distribution licensee. The wheeling charges are towards the use of distribution network of Distribution licensee and cross subsidy surcharge to compensate it financially for subsidized electricity in its area of supply. Thus, cross subsidy surcharge can only be in addition to wheeling charges. Indian Railways are not connected to/using petitioner's network, have a distinct area of supply and being distribution licensee are not liable to pay either wheeling charges or cross subsidy surcharge.
- (ix) The Indian Railways in the present case, is availing power through Open Access from M/s. Jindal India Thermal Power Limited, RGPPL and BRBCL at its Traction Substations as a deemed distribution licensee. The Indian Railways as the distribution licensee is not supplying to any consumers of either of the State Distribution Licensees in the State of Madhya Pradesh thereby taking away their subsidizing consumers for which purpose the cross subsidy surcharge has been

devised as payable. The Indian Railways is not therefore liable to pay cross subsidy surcharge to another distribution licensee.

- (x) With regard to Additional Surcharge, it is submitted that under Section 42(4) of the Electricity Act, 2003, 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. As mentioned earlier, Indian Railways are neither connected to nor using Petitioner Discoms' network, hence the question of levying of wheeling charges or additional surcharge on wheeling charges towards the fixed cost of distribution licensee does not arise. Petitioners cannot seek imposition of charges de hors the Act.
- (xi) Without prejudice to the above, Section 42 of the Electricity Act, 2003 deals with the Cross Subsidy and Additional Surcharge. Section 42 (2) specifically speaks about the Cross Subsidy Surcharge in the context of a consumer of electricity and not when the electricity is procured by a licensee. The purpose of Cross Subsidy Surcharge is to compensate the distribution licensee of the area in regard to the prevalent extent of the cross-subsidization of one category of consumers by another category. It cannot have any application in the case of a licensee. Similarly, Section 42 (4) speaks about the Additional Surcharge in the context of the State Commission permitting a consumer of a class of consumer and not in the case of a distribution licensee procuring power.
- (xii) It is submitted that even in terms of Open Access Regulations as framed by this Commission, only a consumer of the distribution licensee is also liable to pay wheeling charges, cross-subsidy surcharge and additional surcharge as may be determined by this Commission. However, Indian Railways is procuring power through open access as a licensee. Therefore, the Indian Railways is not liable to pay any charges on account of cross-subsidy surcharge or additional surcharge.
- (xiii) Reliance placed by the Petitioners on the decision of the Hon'ble Supreme Court in *Sesa Sterlite Limited v. Orissa Electricity Regulatory Commission* and Ors (2014) 8 SCC 444 to hold that Indian Railways is not a licensee under the Electricity Act, 2003, is misplaced. The said case was related to Special Economic Zone Act which provided for developers of Special Economic Zone as deemed licensee authorised to distribute electricity within the Special Economic Zone area and not for self-consumption. Further, the provisions of Special Economic Zone Act and Railways Act are materially different in its relation to the Electricity Act, 2003. It was noted by the Hon'ble Supreme Court that Section 49 of the Special Economic Zone Act gives authority to

the Central Government to declare that any provisions of a Central Act shall apply to the Special Economic Zone and in furtherance to this, Government of India had issued a notification with regard to power generation in Special Economic Zone declaring that all provisions of the Electricity Act shall be applicable to the generation, transmission and distribution of power whether stand-alone or captive power.

- (xiv) Unlike the overriding effect given to the Railways Act 1989 in section 173 of the Electricity Act 2003, the Special Economic Zones Act is not given such overriding effect to prevail over provisions of Electricity Act, 2003. On the other hand, the Notification under Special Economic Zone Act specifically recognized the applicability of provisions of the Electricity Act, 2003. Therefore, the Hon'ble Supreme Court considered the provisions of the Electricity Act, 2003 to hold that power must be supplied to consumers. However, the same cannot be applied to the present case. Railways Act, 1989 would prevail over the Electricity Act, 2003 as per Section 173 of the Electricity Act, 2003. Since the Indian Railways has the authority to distribute electricity under Railways Act, 1989, the same cannot be denied on the basis of provisions of the Electricity Act, 2003.
- (xv) Neither the Electricity Act, 2003 nor the Commission's Open Access Regulations, provide for the applicability of cross subsidy surcharge and additional surcharge on a licensee, therefore, the same cannot be sought to be levied by the Petitioner.

**16.** The limited issue to be examined in the subject petition is that whether the Respondent No.1 (WCR) is liable to pay open access charges i.e., cross subsidy charges and additional charges to the petitioners for the open access availed by them. Certain undisputed facts in the subject matter are as given below:

- (i) The Respondent No.1 (WCR) is a deemed licensee and it is undertaking distribution of electricity within its area of operation restricted to the purposes and in connection with the working of Railways only.
- (ii) The Respondent No.1 (WCR) being deemed distribution licensee is not supplying to any consumers of either of the State Distribution Licensees in the State of Madhya Pradesh.
- (iii) In the present case, the Respondent No.1 (WCR) is availing power through Open Access from M/s. Jindal India Thermal Power Limited, RGPPL and BRBCL at its Traction Substations as a deemed distribution licensee.

**17.** The Respondent No.1 (WCR) contended that the Railways Act, 1989 would prevail over the Electricity Act, 2003 as per Section 173 of the Electricity Act, 2003. With regard to the aforesaid

contention of Respondent No.1, let us look into the provisions under Sections 173, 174 and 175 of the Electricity Act 2003 which provide as under:

***“Section173. (Inconsistency in laws):***

*Nothing contained in this Act or any rule or regulation made there under or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.*

***Section174. (Act to have overriding effect):***

*Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.*

***Section175. (Provisions of this Act to be in addition to and not in derogation of other laws):***

*The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”*

**18.** A reading of the aforesaid provisions conveys that the provisions of Electricity Act 2003 shall have overriding effect over provisions of other laws. However, in case of inconsistency between provisions of Electricity act 2003 and a few other laws such as Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 and the Railways Act, the provisions of the latter Act shall prevail. Therefore, in this matter, it is necessary to examine whether there is any inconsistency between provisions of the Electricity Act and Sections 11 and 12 of the Railways Act as mentioned by the Respondent No.1 (WCR) in its submission. Section 11 and 12 of the Railways Act 1989 provide as under:

***“11. Power of railway administration to execute all necessary works- Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway—***

- (a) make or construct in or upon, across, under or, over any lands, or any streets, hills, valleys, road's, railway, tramways,. or any rivers, canals, brooks, streams or other waters, or any drains, water pipes, gas-pipes, oil-pipes, sewers, electric supply lines, or .telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of railways, passages,***

*conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;*

- (b) alter the course of any rivers, brooks, streams or other water courses, for -the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;*
- (c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;*
- (d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;*
- (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead;*
- (f) erect, operate, maintain or repair any telegraph and telephone -Lines in connection with the working of the railway;*
- (g) **erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and***
- (h) do all other acts necessary for making, maintaining, altering or repairing and using the railway."*

**"12. Power to alter the position of pipe, electric supply line, drain or sewer, etc –**

*(1) A railway administration may, for the purpose of exercising the powers conferred on it by this Act, alter the position of any pipe for the supply of gas, water, oil or compressed air, or the position of any electric supply line, drain or sewer:*

*Provided that before altering the position of any such pipe, electric supply line, drain or sewer, the railway administration shall give a notice indicating the time at which the work of such alteration shall commence, to the local authority or other person having control over the pipe, electric supply line, drain or sewer.*

*(2) The railway administration shall execute the work referred to in sub-section (1) to the reasonable satisfaction of the local authority or the person receiving the notice under the proviso to sub-section (1)."*

**19.** It is observed by the above that Section 11 of the Railway Act vests power to Railways for erection, operation, maintenance or repairing of any electric traction equipment, power supply and distribution installation in connection with the Railway works. Further, Section 12 provides power to Railways to alter the position of pipe, electric supply line, drain or sewer, etc. From a reading of the aforesaid provisions in the Railways Act, it is clear that Indian Railways are authorized under law to lay down networks and execute related works for supplying electricity for their own use however, in order to wheel power over network of licensee, provision of Electricity Act 2003 would be attracted because there does not appear to be any such provision which is contained in the Railways Act. In other words, having executed works for supplying electricity for their own use, the facility of wheeling power over the network of licensee can only be availed under the provisions of Section 42 of the Electricity Act 2003. As such the aforesaid provision of the Railways Act and the Electricity Act 2003 are complimentary to each other and not inconsistent by any stretch of imagination and hence Section 173 of the Electricity Act 2003 cannot be invoked. Therefore, the matter has to be examined in light of these findings.

**20.** The petitioners have relied on the Judgment passed by Hon'ble Supreme Court in the case of Sesa Sterlite Ltd. Vs Orissa Electricity Regulatory Commission & Ors. whereas the Respondent No.1 has contended that the said Judgment does not apply to the facts of this case. Some relevant paras of the aforesaid Judgment in the matter of Sesa Sterlite Ltd. Vs Orissa ERC & Ors are reproduced below:

*“(2) Open Access and CSS*

22. *Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression open access has been defined in the Act to mean 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. The Act mandates that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee and generating company. Open access in transmission thus enables the licensees (distribution licensees and traders) and generating companies the right to use the transmission systems without any discrimination. This would facilitate sale of electricity directly to the distribution companies. This would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement.*
23. *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.*

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

*(3) CSS: Its Rationale*

25. *The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.*
26. *Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.*
27. *With this open access policy, the consumer is given a choice to take electricity from any Distribution Licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for:*

*(a) Current level of cross subsidy to be gradually phased out along with cross subsidies; and*

(b) obligation to supply.

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

21. Hon<sup>ble</sup> Supreme Court in the above judgment observed that open access in distribution means freedom to the consumer to get supply from any source of his choice other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Further, open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensees' obligation to supply.

22. Hon<sup>ble</sup> Apex court further observed that there are two aspects to the concept of surcharge one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply and the mechanism of this surcharge is meant to compensate the licensee for both these aspects.

23. Hon<sup>ble</sup> Supreme Court while summarizing the issue concluded that CSS is compensation to the distribution licensee irrespective of the fact whether its line is used or not. The consumer situated in an area is bound to contribute to subsidizing a low end consumer if it falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area, it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. Even a licensee which purchases

electricity for its own consumption either through a dedicated transmission line or through open access would be liable to pay Cross Subsidy Surcharge under the Act.

24. Therefore, in light of the above Judgment, the Commission is of the view that the Respondent No.1 (WCR) who purchases electricity for its own consumption, is liable to pay the cross subsidy surcharge to the petitioners as WCR is situated in the area of the Petitioners (Discoms) who have universal service obligation as per Section 43 of the Electricity Act, 2003 and need to be compensated to supply power to the subsidized category of consumers.

25. The Respondent No.1 (WCR) has also contended that the Railways Act, 1989 provides powers to it to erect, operate, maintain, repair etc any electric traction equipment, power supply and distribution installation in connection with the working of the Railways and third Proviso of Section 14 of the Electricity Act, 2003, also provides the status of deemed licensee to Indian Railway. Therefore, Railway as a deemed distribution licensee cannot be liable to pay cross subsidy surcharge and additional surcharge.

26. On the above issue, Hon'ble Supreme Court in the aforesaid Judgment has observed as under:

*"42. Further discussion on this aspect by the Appellate Tribunal is as under:"*

*45. Section 174 of the Electricity Act provides that the provisions of the Electricity Act shall have to overriding effect notwithstanding anything inconsistent with any other law for the time being in force or in any instrument having effect by virtue of any law other than Electricity Act. That apart, Section 175 also provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force.*

*47. The perusal of the notification dated 03.03.2010 would make it evident that the legislations intention for declaring the developer in SEZ area as deemed distribution licence, is confined only to clause-b of Section 14 of Electricity Act, which deals with the grant of license by the appropriate State Commission to any person for distribution of electricity. The said notification has not curtailed the power of State Commission so far as the applicability of other provisions is concerned. The interpretation of various relevant terms was necessary prior to grant of deemed distribution licence by the State Commission. Therefore, the State Commission rightly acted upon those provisions. As a matter of fact, by the said amendment by inserting another proviso to Section 14(b), the context has not been changed as claimed by the Appellant.*

*49. As correctly indicated by the State Commission, the definition of term distribution licensee as enumerated under Section 2(17) of Electricity Act, 2003, emphasizes upon the distribution licensee to operate and maintain a distribution system and supply of power to the consumers. Considering the definition of supply in Section 2(70), the supply here means sale of electricity to consumers. By merely being authorized to operate and maintain a distribution system as a deemed licensee, would not confer the status of*

distribution licensee to any person. The purpose of such establishment is for supply of power to consumers. Mere fact that the Appellant claims to be deemed distribution licensee is of no consequence at all since admittedly, the entire power purchased by the Appellant is for its own use and consumption and not for the purpose of distribution and supply/sale to consumers.

50. An entity which utilizes the entire quantum of electricity for its own consumption and does not have any other consumers, cannot, by such a notification, be deemed to be distribution licensee, even by a legal fiction. By virtue of the legal fiction created by the notification dated 03.03.2010, the Developer of SEZ notified under the SEZ Act, who distributes electricity can be deemed to be a distribution licensee. Thus, this legal fiction cannot go further and make a person who does not distribute electricity to the consumers as to distribution licensee. Therefore, there is no merit in the contention of the Appellant."
43. We are in agreement with the aforesaid rationale in the impugned order of the Appellate Tribunal as that is the only manner in which the two Acts can be harmoniously construed. To recapitulate briefly, in the present case no doubt by virtue of the status of a developer in the SEZ area, the Appellant is also treated as deemed Distribution Licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Act. In order to avail further benefits under the Act, the Appellant is also required to show that it is in fact having distribution system and has number of consumers to whom it is supplying the electricity. That is not the case here. For its own plant only, it is getting the electricity from Sterlite Ltd. for which it has entered into PPA. We have to keep in mind the object and scheme of SEZ Act which envisages several units being set up in a SEZ area. This is evident from a collective reading of the various provisions of the SEZ Act viz. Section 2(g)(i)(za)(zc), Section 3, 4, 11, 12, 13 and 15. There can be a Sector Specific SEZ with Several Units i.e. for IT, Mineral Based Industries etc. but instances of single unit SEZ like in the present case of the Appellant may be rare. The Notification dated 03.03.2010 providing for the Developer of SEZ being deemed as a Distribution Licensee was issued keeping in view the concept of Multi Unit SEZs and will apply only to such cases in which the Developer is supplying the power to multiple Units in the SEZ. The said Notification will not apply to a Developer like the Appellant who has established the SEZ only for itself." (emphasis supplied)
44. Having regard to the aforesaid factual and legal aspects and keeping in mind the purpose for which CSS is payable, as explained in detail in the earlier part of this judgment, we are of the view that on the facts of this case it is not possible for the Appellant to avoid payment of CSS to WESCO. We, therefore, do not find any merit in this Appeal which is accordingly dismissed." (emphasis supplied)

27. The Hon'ble Supreme Court in the said judgment observed that being authorized to operate and maintain a distribution system as a deemed licensee would not confer the status of distribution licensee to any person. The power must be supplied to consumers and since Appellant therein was consuming the power purchased for its own use and was not distributing and supplying it to consumers, it was not a distribution licensee.

28. It is observed that the Appellant in Sesa Sterlite got status of deemed distribution licensee through Special Economic Zone Act, 2005 whereas the Respondent No.1 in the present case has conferred with the power through Railways Act, 1989 to distribute electricity for its own establishments/use. and it also has the status of deemed licensee through the Electricity Act, 2003. Both are drawing electricity through open access in the area of distribution licensee and both are not the consumer of distribution licensee of their areas.

29. Admittedly, the Respondent No.1, Western Central Railway is not supplying electricity to consumers and it does not maintain distribution system for this purpose. Further, the Respondent No.1 (WCR) has no Universal Supply Obligation under Section 43 of the Electricity Act 2003. It has no consumer network hence, no distribution system for supply to the consumers. It is observed that status of the Appellant in aforesaid Sesa Sterlite case and the Respondent No.1 (WCR) in the present case is similar. Therefore, looking to the similar facts of both the case, the Judgment passed by Hon'ble Supreme Court in aforesaid case is squarely applicable in the subject matter. Moreover, similar views have been taken by the Rajasthan Electricity Regulatory Commission in a petition filed on the same issues raised in the subject matter.

30. In addition to the decision of Hon'ble Supreme Court in aforesaid Judgment in Sesa Sterlite matter, the provisions under Section 42(4) of the Electricity Act for applicability of additional surcharge are reproduced below:

***"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."***

31. 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.

**32.** It is evident from the observations in this order that the Respondent No.1 (WCR) is an Open Access Consumer having open access in terms of MPERC Open Access Regulations. It is receiving supply of electricity *from M/s. Jindal India Thermal Power Limited, RGPPL and BRBCL* through open access i.e., from a person other than the distribution licensee of his area of supply. The petitioner is also using network of Transmission Licensee for wheeling of electricity to its various establishments (Railways Traction S/s).

**33.** It is a matter of fact that upto the year 2016, the Respondent No.1 was HT consumer having 593 MW contract demand and the petitioners herein had to execute long term power purchase agreements from generators to meet demand in the State including the aforesaid bulk requirement of power by the Respondent No.1 (WCR). On receiving power by the Respondent WCR from a person other than the petitioners, the licensee has an obligation under the PPAs to pay fixed cost for that power which was being procured for Railways through long term PPAs and it is also noted that in the event of such fixed cost not being paid by Railways, the burden of fixed cost shall have to be borne by other consumers of the licensee including life line consumers. Keeping this in view, appropriate arrangement in the nature of additional surcharge has been provided in the Electricity Act 2003. Moreover, in terms of provision under sub section (1) of Section 43 of the Act, the petitioners are still required to supply power as and when required by the Respondent No.1. In view of aforesaid facts and circumstances, the Respondent No.1 (WCR) is liable to pay the additional surcharge also to the petitioners.

**34.** In view of foregoing observations and discussions, the Commission is of the view that the Respondent No.1 (WCR) is liable to pay open access charges i.e., cross subsidy surcharge and additional surcharge to the petitioners. Therefore, the Respondent No.1 (WCR) is hereby directed to pay the aforesaid open access charges to the petitioners without any further delay.

With the aforesaid observations, findings and directions, the subject petition is disposed of.

**(Shashi Bhushan Pathak)**  
**Member**

**(Mukul Dhariwal)**  
**Member**

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