MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

BHOPAL

Sub: In the matter of petition filed under Section 86 of the Electricity Act, 2003 read with Regulations 9, 45 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) (Revision-I) Regulations, 2016 seeking directions against M.P. Paschim Kshetra Vidyut Vitran Co. Ltd qua its ex-facie illegal and arbitrary levy of cross subsidy surcharge and additional surcharge on the Petitioner's 254.5 KW rooftop solar PV Plant.

ORDER

(Hearing through Video Conferencing)

(Date of Order: 24th August' 2022)

M/s. Indore Treasure Island Pvt. Ltd,
Treasure Island Mall, 11 Tukoganj,
MG Road, Indore – 452 001 (MP) - **Petitioner**

Vs

The Managing Director
MP Paschim Kshetra Vidyut Vitran Company Ltd,
Polo Ground, Indore (MP) – 452 015 - **Respondent**

Shri Aditya K Singh, Advocate, Shri Vineet Kumar, Advocate and Ms. Anukriti Jain, Advocate appeared on behalf of the petitioner.

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

The petitioner, M/s. Indore Treasure Island Pvt. Ltd, has filed this petition under section 86 of the Electricity Act, 2003 read with Regulations 9, 45 of the Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) (Revision-I) Regulations, 2016 seeking directions against M.P. Paschim Kshetra Vidyut Vitran Co. Ltd against levy of cross subsidy surcharge and additional surcharge on the Petitioner's 254.5 KW rooftop solar PV Plant.

2. In the subject petition, Petitioner broadly submitted the following:

"1. The Petitioner is HT Consumer with Connection No. H9944904000, under tariff category HV3, 3B Shopping Mall, having a contract demand of 1600KVA.

2. Respondent is a wholly owned subsidiary of Government of Madhya Pradesh incorporated under the Companies Act, 1956 in 2002, to undertake activities of distribution and retail supply for and on behalf of Madhya Pradesh State Electricity Board in the areas covered by the Commissionaires of Indore and Ujjain. Government of Madhya Pradesh also appoints its nominee in the board of the Respondent.

3. The state of Madhya Pradesh is endowed with around 300 days of clear sun. The state offers many sites having potential of more than 5.5kWh/sq.m/ per

day for installation of solar based power projects. The Government of Madhya Pradesh ("GoMP") has been promoting the setting up of renewable energy-based power plants through various policy initiatives and incentives for investors/developers. GoMP had earlier issued the Incentive Policy for encouraging generation of power in Madhya Pradesh through non-conventional energy sources in 2006. Thereafter, the GoMP also issued the 'Policy for implementation of solar based projects in Madhya Pradesh, 2012' with the objective to encourage private sector participation in setting up of solar power plants, build favorable atmosphere for setting up of solar power plants.

4. *Globally, the need for progressive substitution of fossil fuel-based generation which leads to global warming by renewable sources including solar power has been recognised and various measures have been taken. The solar power producers are renewable sources of energy, environment friendly (green power) and are envisaged to be promoted under the provisions of the Electricity Act and the National Electricity Policy and National Tariff Policy notified by the Central Government in exercise of the powers under Section 3 of the Electricity Act.*

5. *From the legislative scheme enshrined in the Electricity Act particularly sections 61(h) and 86(1)(e), it is quite clear that it is the responsibility of the Hon'ble Commission to promote generation of electricity from renewable sources of energy. Such promotional measures are envisaged in matters such as tariff, connectivity with the grid and sale to any person among others The reforms brought in through this legislation require consistency and continuity of public policy wherein one of the thrust areas is promotion of renewable energy. In this context, reference is made to (paragraphs 5.2.20, 5.12, and 5.1.22 of) the vision statement on the subject of "Non-conventional Energy Sources" in the National Electricity Policy, 2005:*

"5.2.20 Feasible potential of non-conventional energy resources, mainly small hydro, wind and bio-mass would also need to be exploited fully to create additional power generation capacity. With a view to increase the overall share of non-conventional energy sources in the electricity mix, efforts will be made to encourage private sector participation through suitable promotional measures.

5.12 COGENERATION AND NON-CONVENTIONAL ENERGY SOURCES

5.12.1 Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of

electricity based on such sources of energy. For this purpose, efforts need to be made to reduce the capital cost of projects based on nonconventional and renewable sources of energy. Cost of energy can also be reduced by promoting competition within such projects. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

5.12.2 ***The Electricity Act, 2003 provides that co-generation and generation of electricity from non-conventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee.*** *Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by the SERCs at the earliest. Progressively the share of electricity from non-conventional sources would need to be increased as prescribed by State Electricity Regulatory Commissions. Such purchase by distribution companies shall be through competitive bidding process. Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential in prices to promote these technologies."*

6. *It is relevant to note that the Government of India ("**GoI**") has committed itself to reducing green-house gas emissions. India's climate change policy is articulated, inter alia, through National Action Plan on Climate Change ("**NAPCC**") adopted on 30.06.2008 and India's Intended Nationally Determined Commitment ("**INDC**") which was submitted to the UN Framework Convention on Climate Change ("**UNFCCC**") on 02.10.2015.*

7. *The NAPCC has a domestic focus on tackling climate change issues, with special reference to increase renewable energy generation capacity in the country and changing the mix of power so that renewable energy component becomes more dominant with time. The relevant part of NAPCC are excerpted below:*

"2. Principles maintaining a high growth rate is essential for increasing living standards of the vast majority of our people and reducing their vulnerability to the impacts of climate change. In order to achieve a sustainable development path that simultaneously advances economic

and environmental objectives, the National Action Plan for Climate Change (NAPCC) will be guided by the following principles:

- *Protecting the poor and vulnerable sections of society through an inclusive and sustainable development strategy, sensitive to climate change.*
- *Achieving national growth objectives through a qualitative change in direction that enhances ecological sustainability, leading to further mitigation of greenhouse gas emissions.*
- *Devising efficient and cost-effective strategies for end use Demand Side Management.*
- *Deploying appropriate technologies for both adaptation and mitigation of greenhouse gases emissions extensively as well as at an accelerated pace.*
- *Engineering new and innovative forms of market, regulatory and voluntary mechanisms to promote sustainable development.*
- *Effecting implementation of programmes through unique linkages, including with civil society and local government institutions and through public-private partnership.*
- *Welcoming international cooperation for research, development, sharing and transfer of technologies enabled by additional funding and a global IPR regime that facilitates technology transfer to developing countries under the UNFCCC.*

…

4.2.2 GRID CONNECTED SYSTEMS

The Electricity Act, 2003 and the National Tariff Policy, 2006, provide for both the Central Electricity Regulatory Commission (CERC) and the State Electricity Regulatory Commissions (SERC) to prescribe a certain percentage of total power purchased by the grid from renewable based sources. It also prescribes that a preferential tariff may be followed for renewable based power.

The following enhancements in the regulatory/ tariffs regime may be considered to help mainstream renewable based sources in the national power system:

(i) A Dynamic Minimum Renewable Purchase Standard (DMRPS) may be set, with escalation each year till a pre-defined level is reached, at which time the requirements may be revisited. It is suggested that starting 2009-10, the national renewables standard (excluding hydropower with storage capacity in excess of daily peaking capacity or based on agriculture-based renewable sources that are used for

human food) may be set at 5% of total grids purchase, to increase by 1% each year for 10 years. SERCs may set higher percentages than this minimum at each point in time.

(ii) ***Central and state governments may set up a verification mechanism to ensure that the renewable based power is actually procured as per the applicable standard (DMRPS or SERC specified). Appropriate authorities may also issue certificates that procure renewable based power in excess of the national standard****. Such certificates may be tradeable, to enable utilities falling short to meet their renewables standard obligations. In the event of some utilities still falling short, penalties as may be allowed under the Electricity Act 2003 and rules thereunder may be considered.*

(iii) Procurement of renewable based power by the SEBs/other power utilities should, in so far as the applicable renewables standard (DMRPS or SERC specified) is concerned, be based on competitive bidding, without regard to scheduling, or the tariffs of conventional power (however determined). Further, renewable based power may, over and above the applicable renewables standard, be enabled to compete with conventional generation on equal basis (whether bid tariffs or cost-plus tariffs), without regard to scheduling (i.e. renewables based power supply above the renewables standard should be considered as displacing the marginal conventional peaking capacity). ***All else being equal, in such cases, the renewable based power should be preferred to the competing conventional power****."*

(emphasis supplied)

8. On similar lines, India's INDC is a statement of efforts to be undertaken by India to combat and arrest climate change. In the said document India has, inter alia, committed as follows:

"… ***Government of India, intends to ensure renewable installed capacity from 40% of India's total energy mix.*** *For meeting its international commitments in 2015, the present Central Government set a target for achieving renewable energy generation 175 GWs by the year 2022, this goal has been subsequently revised to 227 GWs of renewable energy capacity by 2022. The treaty obligations form a part of domestic law unless in conflict with enacted legislations and statutes. In the present case, India's treaty obligations are in conformity with the Central Government's vision under the Electricity Activity 2003 and various policies enacted thereunder. It is submitted that India being a signatory to the Paris Agreement is under an*

obligation to comply with its treaty obligations."

9. *Promotion of, and preferential treatment for, the environment friendly renewable sources of power like solar energy is, thus, the declared State policy for India it being directly connected with its national goals and commitments in relation to climate change. All the functionalities and agencies of Government of India are duty-bound to conduct themselves such that their actions are veered to sub-serve the cause espoused by the public policy rather than be in detriment thereof.*

10. *The Electricity Act was enacted by Parliament under Schedule VII List 3 Item 38 and as such, the Central Government has the ability to make policies in a subject matter over which a Central law has been enacted. Therefore, the national policies both relating to climate change and governing electricity sector will have primacy. Also, since Electricity is an Item of Schedule VII List 3, it is also a State subject and therefore, the GoP and, as such, this Hon'ble Commission also has an obligation to ensure implementation of such policies.*

11. *The study of these documents reveal that India's commitment to global community is that it shall adopt a path that is climate friendly and cleaner than the one followed hitherto by others at a corresponding level of economic development; reduce the emissions intensity of its GDP by 33 to 35 by 2030 from 2005 levels; achieve about 40% cumulative electric power installed capacity from non-fossil-fuel energy resources by 2030 with the help of technology transfer and low-cost international finance, including support from the Green Climate Fund.*

12. *In alignment with the global and national goals to promote renewable power, GoMP issued the Madhya Pradesh Policy for Decentralised Renewable Energy Systems, 2016 ("**MP DRES Policy**"). The MP DRES Policy focuses on decentralised and distributed solar PV rooftop systems, as solar rooftop PV has the greatest potential for mass replication among consumers and small independent power producers of all technologies. It states the following as reasons for the same:*
    i. *Solar PV rooftop systems are already meeting grid parity for commercial and industrial applications, and will also meet grid parity with residential consumer tariffs over the next few years;*
    ii. *Solar PV rooftop technology is robust and modular in nature with an established supply chain;*
    iii. *Banks and financial institutions are familiar with solar technology.*
    iv. *Solar technology with no substantial operation and maintenance requirements;*

v. *Solar technology is easily replicable and scalable.*

13. *The objective of the MP DRES Policy as stated in its Para 3- Objectives of the Policy are as follows:*

i. Growth of decentralised RE Systems

ii. To reduce dependence on conventional sources of energy

iii. *To provide impetus to growth of clean technology in the state of Madhya Pradesh*

iv. *To reduce distribution losses of Distribution Licensees by decentralised generation*

v. *To improve tail-end grid voltages and reduce system congestion.*

vi. ***To reduce carbon emissions****.*

vii. *To help the State achieve its RPO (Renewable Purchase Obligation).*

viii. *To develop sustainable energy solution for future and help in achieving energy security of the nation.*

ix. *To encourage job creation in the downstream RE market segment.*

x. *To help the community realise the importance of judicious use of electricity and involve them in the process of reducing dependence on conventionally produced electricity.*

14. *It is pertinent to mention here that the said MP DRES Policy was issued by the GoMP with its focus on rooftop solar PV system. The MP DRES Policy is all encompassing to incorporate various RE sources in hybrid mode also. It promotes decentralised Renewable Energy ("RE") generation systems. Para 1.9 of the MP DRES Policy, 2016 includes the following types of roof-top solar power plants within its ambit:*

i. *Grid Connected RE Systems*

  i. *Category I: On Net-Metered basis*

  ii. *Category II: Gross metering with wheeling and banking*

  iii. *Category III: For consumption within premises with no export of power ("**Category-III Rooftop Plant**")*

ii. *Off-grid RE systems*

15. *The MP DRES Policy, 2016 is applicable to all the RE beneficiaries, in whose premises off-grid or grid connected RE systems are installed upto capacity of 2 MW of RE System As per the said Policy RE System means and includes the grid connected or off-grid system to generate electricity from such source(s) which are recognised as RE sources in India. The Policy defines RE Beneficiary as the owner/ user of premises, where the RE system is installed under the Categories specified under the said Policy. This RE system can either be self-owned or third-party owned. Relevant extract is reproduced below for easy reference:*

"m. ***"Premises"*** *shall mean any land, building or structure or part thereof or combination thereof, wherein a separate meter or metering arrangement has been made by the licensee for measurement of supply of electricity, including the agricultural farms intending to use solar panels deployed for solar pumps, where an RE System is set up. As regards category 1, setting up of the RE System should be ancillary to the purpose of the Premise and should not be the primary activity of the Premise;*

n. ***"RE Beneficiary"*** *means the owner/user of premises where the RE System is installed under any of the Categories specified in para 1.9 of this policy. RE System can be either self-owned or third party owned;*

o. ***"RE Systems"*** *means the grid connected or off grid system to generate electricity from such source(s), which are recognized as RE source(s) by Ministry of New and Renewable Energy (MNRE), Government of India or any other agency, as may be notified by the Government/ Commission;"*

16. *It is stated that existing policy/applicable regulation has not imposed any duty on consumption of electricity from rooftop solar plants. The MP DRES Policy exempts the consumer from RE Systems under this Policy from cross-subsidy charges. The relevant provisions of the MP DRES Policy, 2016 is extracted below for the sake of easy reference:*

"14. ***INCENTIVES:-***

14.1.4. ***Cross Subsidy Surcharges:*** *RE Systems under this Policy shall be exempted from cross-subsidy charges, subject to relevant regulations of MPERC and amendments thereof."*

17. *It is based on the representations made and assurances provided under the MP DRES Policy, 2016 and the amendments thereunder, that the Petitioner herein was inclined to reduce its dependence on conventional power and move towards sourcing its power from renewable sources of energy. Accordingly, the Petitioner decided to consume power from roof-top power plant under Category-III of the said Policy.*

18. *At this juncture, it is imperative to explain the Category- III as provided under this Policy. As per Para 1.9 of the Policy Category-III refers to a decentralised grid connected RE System for consumption within Premises with no export of power. The said Policy is unambiguous and clear as far as the energy accounting from the solar roof-top plant set up under this Category is*

concerned and provides that in this Category, there is no energy accounting between the RE Beneficiary and the grid. The said Policy also envisages three typical cases of power flow under this Category III being:

- *Case I: In this case, the instant generation of power from RE System equals the power requirement of RE Beneficiary. Therefore, there is no requirement of power from the grid.*
- *Case II: In this case, the instant generation of power from the grid connected RE System is less than the power requirement of RE Beneficiary at the instant. Hence, additional power is required from the grid.*
- *Case III: In this case, the instant generation of power from the grid connected RE System is more than the power requirement of the RE Beneficiary at that instant. Hence, additional power so generated might flow into the grid. However, in this case the RE Beneficiary is not entitled to receive any consideration/benefit whatsoever against such export of energy into the grid. In such cases, RE Beneficiary will not be penalised for such instances.*

19. *Category-III Rooftop Plants are more beneficial for the distribution companies in comparison to Category I and Category II because in this category, consumers are compulsorily required to consume all power generated from the plant and even if any unit is exported to the grid then the Distribution Company is under no obligation to make the payment for such unit.*

20. *The Petitioner placing reliance on the policy entered into definitive agreement with Cleanmax to consume power from the plant located at its rooftop under Category III of DRES Policy.*

21. *It is on 25.04.2019 that the Rooftop Plant installed at the Petitioner's premises received the chagrining and commissioning approval from the Electrical Safety Officer.*

22. *The Petitioners were verbally questioned by the officials of MPPKVVCL regarding parallel operation of their SRTPP. Consequently, on 30.06.2021, the Petitioner intimated the MPPKVVCL that it had already applied for registration of the SRTPP installed at its premises at Madhya Pradesh Urja Vikas Nigam ("MPUVN") under Category-III. The application was submitted in the Form VC, as required under the amended decentralised policy of Madhya Pradesh issued in 2017. Further, the Petitioner submitted various other documents including CEIG Charging permission for registration of its SRTPP for parallel operation with the grid.*

23. *The Petitioner's premises were inspected by the officials of MPPKVVCL on 06.07.2021. To the shock of the Petitioner, on 07.07.2021, the MPPKVVCL issued a Notice under Para 31 of the HT agreement for disconnection of supply citing parallel operation of 254.5KWp SRTPP with the MPPKVVCL grid supply allegedly in as violation of Para 6.40 of the Madhya Pradesh Electricity Supply Code, 2013. The Petitioner was thereby advised to obtain valid written consent of the MPPKVVCL, within 15 days, for continued operation of the said SRTPP.*

24. *It is in response to the Petitioner's letter dated 30.06.2021, MPPKVVCL issued a letter bearing number MD/WZ/05/COM/HT/9241 dated 08.07.2021 whereby it acknowledged that the Petitioner applied for obtaining parallel operation of its 254.5KWp SRTPP with zero export. However, it requested the Petitioner to submit the application for grant of parallel operation in the Form RE-03 alongwith necessary documents.*

25. *Pursuantly, the Petitioner vide its letter dated 09.07.2021 reiterated and informed to MPPKVVCL that it had already applied for registration under Category- III to MPUVN, Bhopal, however, due to COVID the registration could not be completed yet. However, the Petitioner is pursuing with the concerned authority to get the Registration Number issued at the earliest and will accordingly be submitted to MPPKVVCL. Further, it informed that all other requisite documents including the CEIG charging permission have already been submitted to MPPKVVCL. Accordingly, requested to MPPKVVCL to issue registration for parallel operation of its SRTPP.*

26. *Thereafter, the MPPKVVCL issued an internal communication bearing number MD/WZ/05/COM-HT/BS/9333 dated 12.07.2021 whereby joint scrutiny and verification of feasibility at interconnection point, single line diagram at injection point was directed to be undertaken by its office.*

27. *On 24.08.2021, having been satisfied with the documents submitted by the Petitioner, the MPPKVVCL vide its letter bearing number MD/WZ/05/COM/HT/11651 issued the permission for parallel operation for the SRTPP installed at the Petitioner's premises for non-captive use, subject to certain terms and conditions.*

28. *In compliance of the terms and conditions stated therein, the Petitioner requested the MPPKVVCL to issue a demand note for testing charges of its meter etc. Thereafter, the MPPKVVCL issued a communication bearing number 502 dated 03.09.2021 seeking for payment of Rs. 2200/- as testing charges. Accordingly, the requisite payment was made by the Petitioner in compliance of the terms and conditions stated in the permission for parallel*

operation.

29. *To complete shock of the Petitioner and in flagrant violation of applicable regulations and MP DRES Policy, 2016, MPPKVVCL issued a Supplementary bill bearing number /MD/WZ/SE/HT Billing cell/612 dated 13.09.2021 demanding Rs. 16,91,662 (Rupees Sixteen lakh Ninety-One thousand Six hundred and Sixty-Two only) towards cross-subsidy and additional surcharge for the period 01.03.2019 to 01.06.2021.*

30. *Vide its communication dated 29.09.2021 the Petitioner responded to the ex-facie illegal demand of the Respondent and requested to act in compliance of the law and withdraw the arbitrary demand. Till date of the drafting of the Petition, the Petitioner has not received any demand withdrawal notice from the Respondent.*

Hence, the Petitioner is constrained to approach this Hon'ble Commission.

GROUNDS

31. *Below mentioned are the grounds on basis of which the present petition is maintainable and may be allowed:*

a) Additional Surcharge and Cross Subsidy are in form of duty and it cannot be imposed without any authorization of law

i. *It is submitted that cross-subsidy and Additional Surcharge are in form of tax which are being levied on the Petitioner. It is submitted that no tax can be levied and collected without any authority of law. In the instant case, there is no express provision which prescribes for imposition of additional surcharge and cross subsidy on rooftop plant set up under the MP DRES Policy, 2016 read with amendments thereunder.*

ii. *It is submitted that in the landmark judgement of The Bengal Immunity Company Limited v. The State of Bihar, [1955] 2 SCR 603, the Supreme Court has held that considering the principle enshrined under Article 265 of the Constitution, no tax can be levied save by the authority of law. The relevant extract of the judgement is reproduced below:*

> *"It is however clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good & valid law."*

iii. *Similarly, in Ujjam Bai v. State of Uttar Pradesh, [1963] 1 SCR 778, the Apex Court after referring to various authorities summed up the*

position with regards to the legality of the imposition of tax by an authority. The court held that no tax can be levied except by the authority of law. Further, a tax levied without the authority of law will be invalid and can be challenged before the court. The relevant paragraph of the judgement is extracted below:

"32. The result of the authorities may thus be summed up:

(1) A tax will be valid only if it is authorised by a law enacted by a competent legislature. That is Article 265.

(2) A law which is authorised as aforesaid must future be not repugnant to any of the provisions of the Constitution.

(3) A law which is made by a competent legislature and which is not otherwise invalid, is not open to attack under Article 31(1). Ramjilal's case ((1951) S.C.R. 127, 136, 137.) and Laxmanappa's case ((1951) S.C.R. 127, 136, 137.).

(4) A law which is ultra vires either because the legislature has no competence over it or it contravenes, some constitutional inhibition, has no legal existence, and any action taken thereunder will be an infringement of Article 19(1)(g) Himmatlal's case ((1954) S.C.R. 1122, 1127.) and Laxmanappa's case [1954] 26 ITR 754 (SC)."

iv. Therefore, it is submitted that the levy of cross subsidy surcharge and additional surcharge on the Petitioner by MPPKVVCL is unlawful and illegal.

b) There is no applicable law in the state of Madhya Pradesh which imposes obligation upon Category-III rooftop Plants to make payment for cross subsidy and additional surcharge

i. It is submitted that by virtue of the MP DRES Policy, 2016, the Petitioner is an RE Beneficiary is consuming power from the power generated on its rooftop. This means that the Petitioner being an owner of the land wherein a grid-connected system is set up to generate electricity from renewable energy sources is a beneficiary under the MP DRES Policy, 2016. The relevant provisions of the Policy are reproduced below:

"Para 2: Definitions:

m. "Premises" shall mean any land, building or structure or part thereof or combination thereof, wherein a separate meter or metering arrangement has been made by the licensee for measurement of supply of electricity, including the agricultural farms intending to use solar panels deployed for solar pumps, where an RE System is set up. As regards category I, setting up

of the RE System should be ancillary to the purpose of the Premise and should not be the primary activity of the Premise;

n. "RE Beneficiary" means the owner/user of Premises, where the RE System is installed under any of the Categories specified in para 1.9 of this policy. RE System can be either self-owned or third party owned;

o: "RE System" means the grid connected or off grid system to generate electricity from such source(s), which are recognized as RE source(s) by Ministry of New and Renewable Energy (MNRE), Government of India or any other agency, as may be notified by the Government/Commission;"

ii. It is submitted that this Policy is applicable to all the RE Beneficiaries in whose premises off-grid or grid-connected renewable energy system, self-owned or third-party owned is installed, upto a capacity of 2MW. Except MP DRES Policy, 2016, there is no regulation/policy applicable in the state of Madhya Pradesh which regulates operation of Category-III Roof top Plant.

iii. It is humbly submitted that imposition of duty by the Respondent is against the specific intent of the legislature/policymakers who with the intent to promote rooftop plant did not impose any duty.

iv. It is further submitted that to avoid any ambiguity on the applicability of the Cross Subsidy, MP DRES Policy, 2016 provided specific provision for non-applicability of Cross Subsidy on Category-III Rooftop Plant.

Relevant extract of the Policy is reproduced for better appreciation of the submission:

*14. **INCENTIVES: -***

*14.1.4. **Cross Subsidy Surcharges:** RE Systems under this Policy shall be exempted from cross-subsidy charges.**"***

v. It is further submitted that policymaker, with intent to avoid situation like the present controversy, expressly recorded a provision in the policy to the effect that in cases of Category-III Rooftop Plant, there will be no energy accounting between the RE Beneficiary and the grid.

vi. It is further submitted that MP DRES Policy, 2016 provides applicability of wheeling and banking charges on Category III Rooftop Plant. If the intention of legislature would have been to levy Additional Surcharge and Cross Subsidy on Category-III Rooftop Plant, they would have expressly provided enabling provision for such levy.

vii. *It is submitted that Category-III Rooftop Plant is most beneficial for health of distribution companies as it does not have to give benefit of banking or reimbursement of the surplus power, if any, as against surplus power.*

viii. *It is further submitted that even in terms of the Electricity Act, 2003 if electricity is not wheeled through a distribution licensee network then the question of imposition of additional surcharge does not arise. Further there is no stranding of the licensee's fixed cost in relation to his supply obligation.*

Imposition of cross-subsidy surcharge and additional surcharge is against the purpose and intent of Section 86 (1) (e) of the Electricity Act, 2003.

i. *It is submitted that Petitioner, in line with the national goals to achieve 40 GW of solar rooftop development by 2022 and the allotted target of 2.2GW of grid-connected roof-top solar projects in the state of Madhya Pradesh, has set up a 254.5KWp solar roof-top power plant on its premises with a third-party owner. It is further submitted that imposition of such exorbitant cross-subsidy surcharge and additional surcharge on the same is against the spirit of the promotion of renewable energy as enshrined under Section 86 (1) (e) of the Electricity Act, 2003.*

ii. *It is submitted that imposition of such charges on grid-connected solar roof-top power plants installed by the RESCO owner on the premises of a consumer will hamper the growth decentralized renewable energy systems in the country and will be detrimental in the road towards reducing the dependence on fossil fuels.*

Thus, in light of the above, this Hon'ble Commission may be pleased to allow the present petition in the terms of the relief sought by the Petitioner."

3. With the aforesaid submission, the petitioner has prayed the following:

(a) *Declare that the Distribution Licensee cannot levy and collect Additional Surcharge and Cross Subsidy from Category III Rooftop Plant set up under Madhya Pradesh Policy for Decentralised Renewable Energy System 2016;*

(b) *Set aside/ quash MPPKVVCL's Supplementary Bill dated 13.09.2021 issued on the 7,25,750 units energy generated by the 254.5 KWp Rooftop Plant, for the period 01.03.2019 to 01.06.2021*

4. The petition was admitted on 15.03.2022 and the petitioner was directed to serve a copy of subject petition to the Respondent within three days. The Respondent was directed to file its reply to the subject petition within two weeks. The petitioner was directed to submit its

rejoinder within two weeks, thereafter. The parties were directed to adhere with the aforesaid timelines for submission of their replies/ rejoinder.

5. At the next hearing held on 26.04.2022, the representative who appeared for the Respondent sought two weeks' time to file reply to the subject petition. The request of Respondent was considered and the petitioner was allowed to file rejoinder within ten days, thereafter.

6. At the hearing held on 14.06.2022, it was observed by the Commission that rejoinder sent by the petitioner was neither received by the Commission nor by the Respondent. The matter was rescheduled for arguments on 19.07.2022.

7. Arguments were concluded by both the parties at the hearing held on 19.07.2022. Both the parties were directed to file their written submissions along with copy of citations referred by them in their arguments within three days. The Petitioner and Respondent filed their written submissions on arguments on 26.07.2022 (received on 08.08.2022) and 29.07.2022, respectively.

8. Respondent (M.P. Paschim Kshetra VVCL, Indore) vide affidavit dated 06.05.2022 submitted the following reply to the petition:

"3. That, from perusal of averment made in the petition along with relief claimed, it is apparent that the primary grievance raised by the petitioner vide instant petition is with respect to the billing of additional surcharge and cross subsidy surcharge on the part of its supply availed from the 254.5 KWp's solar power generating Plant owned by the third party. That, broadly petitioner has challenged the billing on the following grounds:

a) Additional surcharge and Cross subsidy are in the form of duty and it can not be imposed without authority of law:

b) There is no applicable law in state of Madhya Pradesh which imposes obligation upon Categery-III rooftop Plants to make payment for cross subsidy and additional surcharge.

c) In terms of Electricity Act, 2003 if electricity is not wheeled through a distribution licensee network, then the question of imposition of additional surcharge does not arise.

d) There is no stranded capacity on account of the Petitioner's consumption from solar power plant owned by third party.

e) Imposition of cross-subsidy surcharge and additional surcharge is against the purpose and intent of Section 86(1)(e) of Electricity Act, 2003.

4. At the outset, the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or

inconsistent with what is stated herein, as if the same has been traversed in seriatim, save and except what has been specifically and expressly admitted hereinafter in writing. Any omission on the part of the answering respondent to deal with any specific contention or averment of the petitioner should not be construed as an admission of the same by the answering respondent. Further, all the submission made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.

PRELIMINARY SUBMISSION

5. *Before controverting to the submissions of the petitioner, it would be appropriate to place on record the rationale behind levy of Cross Subsidy Surchage (CSS) and Additional Surcharge (AS) as per Electricity Act 2003 (The Act).*

6. *As per scheme of the Act, it is the duty of the distribution licensee to develop and maintain a distribution system in his area of supply and to supply electricity to any owner or occupier of any premises on request. In other words distribution licensee is duty bound to supply any quantem of power on the application of any owner or occupier of premises of its area of supply. On the other hand as per scheme of the Act, consumer is free to avail supply from any source of his choice. Arrangement of availing supply by a consumer from any source other than the distribution licensee of area is known as 'open Access'. As per provisions of the Act a generating company may supply electricity to any licensee or may supply electricity to any consumer. Such, open access shall always be subject to the Regulations of this Hon'ble Commission.*

7. *That, while introducing concept of open access, Section 42 of Act empowers State Commission to determine the cross subsidy surcharge and additional surcharge which are to be utilized to meet the requirement of current level of cross subsidy within the area of supply of the distribution licensee and to meet the fixed cost of power purchase arising out of the obligation to supply.*

8. *That, the relevant part of the Section 42 of the Act is reproduced as under for ease of reference:*

"Section 42: Duties of Distribution licensees and Open Access:

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

(2) The State Commission shall introduce open access in such phases and

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

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

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

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

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

xxx xxxxxx.

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

Emphasis supplied

9. *From the bare perusal of the aforesaid provision it is clear that statutory exemption from payment of CSS is available only to a person who has established a* ***captive generating plant*** *for carrying the electricity to the destination of his own use. Further there is no exemption from levy of additional surcharge for any category of consumer.*

10. *That, Section 2(8) to the Act' read with Rule 3 of Electricity Rule 2005 (henceforth 'Rules 2005') lays down the requirement of a captive generating plant. The relevant part of these provisions are reproduced as under:*

Electricity Act 2003

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

generating electricity primarily for use of members of such co-operative society or association."

Electricity Rules 2005:

"3. Requirements of Captive Generating Plant.

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

(a) in case of a power plant

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

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

.....

11. It may be seen that Rule-3 of Rules 2005 specifically prescribes the conditions to be satisfied by a Power Plant to be qualified as captive generating plant. The two requirements to be satisfied by the Power Plant to qualify as a captive generating plant are as follows:

(a) Ownership i.e. holding atleast 26% of the ownership;

(b) Consumption of 51% of the units generated.

12. Therefore, a power plant will be qualified as a captive power plant only when it satisfies both the conditions. Even if any one of the conditions is not fulfilled, power plant shall not be qualified as captive generating plant and benefit provided under the Act shall not be available.

13. That, in the present case petitioner itself admitted that solar power plant under consideration is owned by a third party. Accordingly power plant is not a captive generating plant. Therefore, exemption from cross subsidy surcharge provided vide fourth proviso to Section 42(2) is not available to the petitioner. In this regard the relevent part of the petition ***{page 23 of the petition}****is reproduced as under for ease of reference:*

"Imposition of cross-subsidy surcharge and additional surcharge is against the purpose and intent of Section 86(1)(e) of the Electricity Act, 2003.

i. It is submitted that the Petitioner, in line with the national goals to achieve 40 GW of solar rooftop development by 2022 and the allotted target of 2.2 GW of grid-connected roof-top solar projects in the state of Madhya Pradesh, ***has setup a 254.5 KWp solar rooftop power plant on its premises with a third-party owner****.....*

ii. ***It is submitted that imposition of such charges on grid-connected solar roof-top power plants installed by the RESCO owner*** *on the premises of a consumer will hamper the growth decentralised renewable energy systems in the country and will be detrimental in the road towards reducing the dependence on fossil fuels."*

Emphasis supplied

14. *Similarly, petitioner in the application seeking permission of parallel operation has also confirmed the non captive status of plant. The said application is annexed as* ***Annexure-R/1****. It is also noteworthy to mention that non captive status of the plant is not under dispute in the instant petition and petitioner is not challenging the permission of parallel operation issued by the answering respondent for* ***non captive use{Annexure-P/9 at page 145 of the petition}****.*

15. *It is submitted that, while fixing the tariff of electricity, the tariff to be recovered from the subsidizing category i.e Non Industrial consumer is being fixed at a rate more than the cost of supply. On the other hand tariff to be recovered from the subsidised category i.e agriculture consumer and other weaker section of the society, is being fixed at the rate below the cost of supply. This additional tariff on the subsidizing category is referred as cross subsidy. Whenever the consumer of the subsidizing category i.e. the non industrial consumers avail supply from a source other than the distribution licensee in the area, licensee loses element of cross subsidy and the element of cross subsidy is recovered from the person who is availing supply from another source. The recovery of cross subsidy is known as cross subsidy surcharge payable by the subsidizing category i.e. Non industrial consumers to the distribution licensee. The levy of cross subsidy surcharge is for balancing the cost of supply as between the subsidizing consumers and subsidized consumers of the licensee and the said levy is used for compensating the tariff recovered from the subsidized category below the cost of supply.*

16. *Similarly, AS is being levied upon a consumer availing supply of power from a source other than the distribution licensee to meet the fixed cost of such distribution licensee arising out of its obligation to supply. It is submitted that the answering respondent who is required to meet the requirement/ demand of all consumers in its area of supply, enters into long term Power Purchase Agreements (PPA) with generators so as to ensure supply of power on request. While contracting energy through such long term PPAs, the tariff payable to the generators consists of two part viz., capacity charges and*

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

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

18. *The rationale and basis of levy of CSS and AS is no longer res-integra as the same has been settled by the Hon'ble Supreme Court in the matter of* ***Sesa Sterlite Limited v Orissa Electricity Regulatory Commission and Others ((2014) 8 SCC 444).*** *Hon'ble Supreme Court has laid down that open access surcharges are compensatory in nature and are leviable notwithstanding the fact that its distribution network is used or not. This is so because, but for consumption from other source, such consumer would have availed supply from Distribution licensee of the area and paid such charges included in its tariff. In light of the clear finding that CSS and AS is leviable whether or not network of the licensee is used or not, it is evident that physical connectivity (wheeling) to the works of the relevant Discom is not material. Only relevant factors are location of the consumer of electricity within the area of a distribution licensee and availing power from a source other than the Distribution licensee of that area. Therefore, the submission that the petitioner while consuming power from solar power plant is not using the distribution system is not relevant for applicability of open access surcharges.*

19. *The relevant extract of the Sesa Sterlite supra is reproduced as under:*

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

State Commissions are required to specify the phases and conditions of introduction of open access.

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

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

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

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

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

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

(b) obligation to supply."

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

(4) Application of the Cross-Subsidy Surcharge principle

31. *In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate 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.

32. Having regard to the aforesaid scheme, in the normal course when the appellant has entered into PPA with Sterlite, another electricity generating company, and is purchasing electricity from the said company it is liable to pay CSS to 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 licences granted to WESCO as distribution licensees.

xxx xxxxxx

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."

Emphasis supplied

20. It may be seen that any person procuring electricity for its own consumption from a person other than distribution licensee of the area shall be liable to pay open access charges. Hon'ble Supreme Court in Sesa Sterlite supra has specially dealt with the rationale behind open access surcharges (CSS and AS) and taking note of the fact that CSS and AS are being levied for the purpose of compensating the Discom of the area for loss of revenue despite continuing to be liable for its universal supply obligation, held that the even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" liable to pay such surcharges.

21. That, in the case at hand also, the petitioner is indisputably falling within the area of supply of answering respondent. Further, petitioner is a HT

consumer and maintaining the contract demand with the Discom. Instant petitioner, like Sesa Sterlight is obtaining supply from another electricity generating company. Thus, issue is squarely covered by the decision of the Hon'ble Supreme Court in Sesa Sterlite (supra).

22. *The above extracts from the Sesa Judgment puts a full stop to the contention of the petitioner and closes all avenues for any further argument to challenge the reasonableness of levy of the CSS and AS. In addition to the above, in terms of Section 43 of the Act, the Respondent DISCOM is still under obligation to supply any quantum of power as and when required by the petitioner. Accordingly, petitioner is liable to pay the additional surcharge and cross subsidy surcharge to the Respondent DISCOMs.*

SUBMISSIONS ON ISSUES RAISED BY PETITIONER:

RE: Additional surcharge and Cross subsidy is in the form of duty and it cannot be imposed without authority of law:

23. *Hon'ble Supreme Court in Sesa Sterlite supra has specifically dealt with the nature and rationale of open access surcharges (CSS and AS). Hon'ble Supreme Court specifically held that that CSS and AS are being levied for the purpose of compensating the Discom of the area for loss of revenue. It is further submitted that CSS and AS are being levied as per provisions of the Act read with Regulations/Tariff Orders issued there under on the consumption being done by the petitioner from source other than the distribution license of area. Preliminary submission in this regard is reiterated. Any submission to the contrary is wrong and denied.*

RE: In terms of Electricity Act, 2003 if electricity is not wheeled through a distribution licensee network, then the question of imposition of additional surcharge does not arise:

24. *Petitioner's contention that if electricity is not wheeled through a distribution licensee network, then the additional surcharge shall not be payable is erroneous and liable to be rejected. This Hon'ble Commission in exercise of power conferred by the Act has notified 'OA Regulation 2005' and subsequent amendment thereof. The OA Regulations, 2005 provides as under:*

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

3: ELIGIBILITY FOR OPEN ACCESS AND CONDITIONS TO BE SATISFIED

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

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

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

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

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

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

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

13: CHARGES FOR OPEN ACCESS

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

hereunder. The sample calculation are enclosed as annexure –I.

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

.....

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

……

……

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

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

……

25. It may also be seen from the above quoted provision of the OA Regulations, 2005 that wheeling charges cross subsidy surcharge and additional surcharge are three independent charges and liability of payment one charge is not dependent on the liability of another charge. It is settled legal position that the nomenclature that legislature has ascribed to any levy does not determine either the nature of the levy or its true and essential character. The legislature may choose a label for a levy. The label however will not determine or for that matter clarify the nature of the levy. The essential character of levy has to be deduced from the nature of the levy and the event upon which levy shall attract.

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

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

27. It may be seen that wheeling charges is being levied for recovery of network cost whereas additional surcharge is being levied for stranded power capacity. Accordingly nature of both levies is different and both are being levied for different purposes. It is also a settled legal position that even if one kind of duty is exempted, other kinds of duties based thereupon do not automatically fall. Therefore, even if wheeling charges are not being billed,

additional surcharge is payable.

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

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

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

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

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

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

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

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

31. *In view of above it may be concluded that for levy of compensatory open access charges, open access i.e use of the distribution system is not mandatory. Further, Hon'ble Supreme Court in* ***Sesa Sterlite supra*** *has considered the scheme of open access surcharges and held that both the cross subsidy surcharge as well as additional surcharge is compensatory in nature. Hon'ble Supreme specifically held that even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" liable to pay such surcharges. Accordingly open access or use of distribution is not a prerequisite for levy of compensatory open access charges.*

32. *In the instant case a continuous support from the grid is being provided to the petitioner in the form of parallel operation of its generating plants. Petitioner is also maintaining the contract demand. The arrangement of taking continuous support of the grid by the generator for supplying power to the consumer is a kin to sale under open access. Therefore, the consumer shall be liable to pay cross subsidy surcharge and additional surcharge.*

33. *Without prejudice the submission that use of distribution system/open access is not a prerequisite for levy of compensatory open access charges, it is submitted that as per provision of Section 2(72), 2(19) read with Rule 4 of the Electricity Rule 2005, the system between the delivery points on the transmission line/ generating station and point of connection to the installations of the consumer forms part of the distribution system notwithstanding of its voltage. Further, Regulation 7.2 of MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations, 2010 (Regulations 2010) provides that power evacuation infrastructure shall be the property of the concerned Licensee for all purposes. The said Regulation is reproduced as under:*

    7.2. *As per incentive policy for encouraging generation of power in Madhya Pradesh through Non-conventional Energy sources (solar, wind, bio-energy, etc.) issued vide notification dated 17.10.2006 by the Government Madhya Pradesh, the power evacuation will be an integral part of the project and all expenses for power evacuation facility shall be borne by the Developer. Such infrastructure laid,*

notwithstanding that cost of which has been paid for by the Developer, shall be the property of the concerned Licensee for all purposes. The Licensee shall maintain it at the cost of the Developer and shall have the right to use the same for evacuation of power from any other Developer subject to the condition that such arrangement shall not adversely affect the existing Developer(s).

28. It is also noteworthy to mention that in the present case Solar Power plant under consideration is located within the premises of the consumer. It may be seen that every consumer/Users requiring power 1 MW is permitted by this Hon'ble Commission to avail open access as per provisions under OA Regulations, 2005. Thus, the petitioner having contract demand of 1600 KVA falls within the class of consumer to whom open access is permitted. Further, it is provided in Section 42(4), such a consumer or class of consumers who is/are permitted to avail open access by the State Commission to receive supply of electricity from a person other than the distribution licensee of his area of supply, shall be liable to pay an additional surcharge, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. Therefore petitioner is liable to pay additional surcharge.

RE: Existence of Stranded Capacity:

34. That, petitioner is claiming that there is no stranded capacity in the instant case. In this regard it is submitted that this Hon'ble Commission while determining the additional surcharge in the Retail Supply Tariff Orders issued from time to time has duly considered the stranding capacity and fixed cost being paid by distribution licensee on that account. The additional surcharge and cross subsidy surcharge determined in the retail supply tariff order has made applicable to all consumer and no exclusion provided with regard to the consumer registered underMadhya Pradesh Policy for Decentralised Renewable Energy System, 2016 . Accordingly, these tariff orders have attained finality in this regard. The Tariff order or computation of surcharges cannot be challenged in the present proceedings.

35. Further, petitioner is also liable to pay additional surcharge on the following grounds:

35.1. <u>Fixed Cost towards generators not being recovered through Fixed charges on contract demand and being recovered through energy charges:</u>

35.1.1. *It is submitted that fixed cost of energy is being recovered through energy charges instead of fixed charges. In this regard relevant part ofthe*

Regulation 42 to the "Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, {2015(RG-35 (II) of 2015} reproduced as under:

"42. Determination of tariffs for supply to consumers

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

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

Emphasis supplied

35.1.2. *It may be seen that the cost of energy supplied to consumer along with the distribution loss is being recovered through energy charges and not the fixed charges.*

35.2. Fixed charges on contract demand are being recovered for the supply being availed from distribution licensee and not for the consumption from other source of supply:

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

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

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

35.3. Fixed charges on contract demand are not sufficient to recover the fixed cost of the Distribution Licensees:

35.3.1. *The following is structure of the fixed cost and variable cost being incurred by distribution licensees of State as per Tariff Order 2019-20 (ref table 7*

read with table 44 of the Tariff order 2019-20) issued by this Hon'ble Commission:

PROPORTION OF FIXED COST AS PER TARIFF ORDER 2019-20			
S.No.	***Particular***	***Amount (Rs. In Crs)***	***% of Total ARR***
1	*Total ARR for FY 2019-20*	*36671.06*	*100.00%*
2	*Variable cost (Variable cost of power purchase net of sale of surplus power)*	*11317.91*	*30.86%*
3	*Fixed cost [(1)-(2)]*	*25353.15*	*69.14%*
PROPORTION OF FIXED CHARGES ACTUALLY BILLED DURING FY 2019-20 FOR WHOLE STATE			
S.No.	***Particular***	***Amount (Rs. In Crs)***	***% of Total ARR***
1	*Revenue from Sale of Power billed account of fixed Charges and energy charges*	*35888.45*	*100.00%*
2	*Energy charges (Variable Charges)*	*30163.42*	*84.05%*
3	*Fixed charges (Demand charges)*	*5725.03*	*15.95%*

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

35.3.3. *It is clear from the above analysis that the Fixed Charges recovery in comparison with the actual Fixed Cost of distribution licensees in the state is significantly lower.*

RE: Imposition of cross-subsidy surcharge and additional surcharge is against the purpose and intent of Section 86(1)(e) of the Electricity Act 2003:

36. *It is the submission of the petitioner that power plant under consideration is a non conventional generating plant and is therefore, liable to be promoted and protected as per the provisions of Section 86(1)(e). In this regard, it is submitted that Section 86(1)(e) does not provides any immunity from any statutory charges payable as per various provisions of the Act. As already stated that Act provides exemption only from cross subsidy surcharge that too only to the captive generating plant. Therefore it is incorrect to contend that levy of CSS and AS is against the spirit of Act to promote renewable source of energy.*

37. *That, MPERC Co-generation Regulations 2010 adequately take care of the*

aspect of promotion of renewable energy. It may be seen that RPO (Renewal Purchase Obligation) which is determined by the State Commission in exercise of powers conferred under Section 86(1)(e) is 17% of the total electricity consumed by answering respondent in FY 2021-22 as against 0.80% in 2010-11.

38. *That, when the statute clearly specifies the manner for promotion of Renewable Energy, petitioner should not have termed the levy as illegal, in the guise of promotion of renewable energy.*

39. *At this juncture it would be appropriate to refer the relevant provisions with regard to the issue of open access Surcharge under Regulations, 2010:*

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

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

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

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

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

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

RE: There is no applicable law in the state of Madhya Pradesh which imposes obligation upon Category-III rooftop plants to make payment for cross subsidy and additional surcharge:

41. It is wrong and denied that there is no statutory provision for levy of open access surcharges on the consumption by the petitioner from the non captive generating plant. As stated earlier that vide seventh amendment to MPERC Co-generation Regulations, 2010 the exemption from payment of open access charges provided to Captive and Open Access Consumers availing power renewable sources prior to the said amendment has been withdrawn. Thus post seventh amendment consumer availing supply from renewable source of energy is also liable to make payment of open access surcharge at the rate approved by the this Hon'ble Commission in the retail supply tariff order issued from time to time.

*42. Petitioner's reliance on Madhya Pradesh Policy for Decentralised Renewable Energy System, 2016 (**'MP DRES Policy"**) is misplaced. It also observed that petitioner has submitted the application for registration under MP DRES Policy 2016 in Jan 21 only whereas plant is operating since March 2019. Petitioner has also not produced certificate of the registration. Notwithstanding the status of said registration it is submitted that it is settled legal position that in case of inconsistency between provisions of the policy and Regulation/order of the this Hon'ble Commission later would prevail. Clause 14.1.4 of the MP DRES Policy 2016 on which heavy reliance is placed by the petitioner specifically provides that the exemption from cross subsidy shall be subject to the Regulations of MPERC and amendment thereof. The said provision is reproduced as under for ease of reference:*

14. Incentive

*14.1.4 Cross Subsidy Surcharge: RE Systems under this policy shall be exempted from cross subsidy surcharges **subject to relevant regulations of MPERC and amendment thereof"***

43. Further, Clause 4.5 of the very same MP DRES Policy 2016 specifically recongnised the supremacy of the Regulations/order issued by this Hon'ble Commission. The said clause is reproduced as under:

4. POLICY AND REGULATORY FRAMEWORK

4.5 This policy sets the roadmap for growth of decentralized RE Systems in the state. The Regulations, specifically pertaining to the Net Metering, might be further liberlised, so as to enable growth of RE projects in accordance with the target set by Government of India. However, in case of any decrepency between the provision of this policy and the Regulations of the Commission at present or in future,

<u>the provisions of the orders/regulations of the Commission shall prevail.</u>

RE: Prayer of Interim Relief:

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

45. In this regard, attention is drawn to the observation of Hon'ble Apex Court in the Matter of United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110:

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation."

46. It is also submitted that supplementary demand under consideration is already been paid by the petitioner thus any prayer of interim relief does not survives.

47. In view of above submission and in light of the settled position of law, OA Regulation 2005, Renewable Regulation 2010, the judgments of the Hon'ble Supreme Court/Hon'ble APTEL it is submitted that petitioner is not entitled for any relief interim or otherwise and petitioner is liable to pay CSS and AS. Accordingly, this Hon'ble Commission is requested to dismiss the petition and render justice."

9. Petitioner vide affidavit dated 13.06.2022 submitted its rejoinder as follows:

"2. It is submitted that any omission on the part of the Petitioner to deal with any specific contention or averment of the Respondent should not be construed as an admission of the same by Petitioner. The Petitioner reiterates the contents of the Petition and the same may be read as part and parcel of this Rejoinder, which is not being reproduced herein for the sake of brevity. Further, all the submissions made herein are without prejudice to

one another and are to be treated in alternate to one another in case of conflict or contradiction.

3. *At the outset, it is respectfully submitted that the submissions/ averments made by the Respondent in its Reply are denied for being unsustainable, unjustifiable and devoid of merits. It is also humbly submitted that the same are founded on a misconstrued reading and understanding of the extant provisions of the applicable law and the judicial pronouncements. It is further submitted that by virtue of the said Reply, MPPKVVCL has made all efforts (albeit incorrectly) to illegally extort money from the Petitioner without any basis of the law.*

4. *It is unfortunate to note that despite being aware of the applicable law, this Hon'ble Commission is being burdened with adjudication of issues arising out of illegal issuance of demand notice/supplementary bill by the MPPKVVCL. It is submitted that by virtue of its Reply, MPPKVVCL has inter alia, submitted that:*

   i. *That the Petitioner's power plant is not a captive generating plant, therefore exemption from cross-subsidy surcharge provided vide fourth proviso to Section 42 (2) is not available to the Petitioner.*
   ii. *That whenever any person takes electricity from any source other than distribution licensee of area, the answering respondent continue to pay fixed charges in lieu of its contracted capacity with generators, in which case the MPPKVVCL is saddled with stranded cost on account of its universal obligation to supply.*
   iii. *For CSS and AS to be levied, the only two conditions are location of the consumer within the area of distribution licensee and availing power from a source other than distribution licensee. Therefore, Petitioner is liable to pay Additional Surcharge, whether or not it is connected to network of distribution licensee.*

   Following are the ground specific response to the submissions made by the Petitioner:

   i. *<u>Additional surcharge and CSS are in the form of duty and it cannot be imposed without authority of law</u>*
      - *CSS and AS are being levied under the provisions of the Act and tariff orders.*
   ii. *<u>If electricity is not wheeled through a distribution network, then question of imposition of additional surcharge does not arise</u>*
      - *As per the Open Access Regulations wheeling charge, CSS and AS are three independent charges and liability of payment of one charge is not dependent on liability of another charge. AS*

is payable even if there is no separate billing of wheeling charges as purpose of levy of AS is different and there is no exemption in this regard.

- *For levy of open access charges, use of distribution infrastructure is not a prerequisite for levy of compensatory open access.*
- *In the present case, the arrangement of taking continuous support of the grid by the generator for supplying power to the consumer is akin to sale under open access.*
- *The CSS and AS determined in the tariff order are made applicable to all consumers and no exclusion exists with regard to consumer registered under MP DRES Policy, 2016.*
- *The cost of energy supplied to consumer alongwith the distribution loss is being recovered through energy charges and not the fixed charges. Fixed charges on contract demand are not sufficient to recover the fixed cost of the Distribution licensees.*

iii. Imposition of CSS and AS is against the purpose and intent of Section 86 (1) (e) of the Act

- *As per the seventh amendment to MPERC Co-generation Regulations, 2010 exemption provided from payment of CSS and AS has been withdrawn. Hence, Consumer availing supply from renewable source of energy is liable to pay applicable open access charges including CSS and AS.*

iv. There is no applicable law in the state of MP which imposes obligation upon category-III rooftop plants to make payment for CSS and AS

- *Reliance on MP DRES Policy is misplaced. In case of inconsistency between the provisions of policy and Regulation of this Commission, the Regulation will prevail.*

5. It is submitted that MPPKVVCL by virtue of its Reply has inter alia raised the abovementioned issues. Through the present Rejoinder, the Petitioner is making its submissions on the above said issues in detail and without any para wise Rejoinder. The Petitioner herein craves leave of this Hon'ble Commission to make para-wise submissions as may be required during the course of the present proceedings including such other submissions as this Hon'ble Commission may deem fit in this regard.

A. Preliminary objection

6. Bare reading of the Reply reflects that the Respondent has failed to understand submissions of the Petitioner. The Respondent has devoted half

of its submissions in establishing that the Petitioner is not a captive power plant and hence, it is not exempted from open access charges. The Petitioner is humbly submitting that it is not the case of the Petitioner that it is a captive power plant and hence, it is exempted from open access charges.

7. *It is the contention of the Respondent that the Petitioner's power plant is not a captive generating plant, therefore exemption from cross-subsidy surcharge provided vide fourth proviso to Section 42 (2) is not available to the Petitioner. It has further contended that whenever any person takes electricity from any source other than distribution licensee of area, the answering respondent continue to pay fixed charges in lieu of its contracted capacity with generators, in which case the MPPKVVCL is saddled with stranded cost on account of its universal obligation to supply. It is humbly submitted that the contention of the MPPKVVCL is completely unfounded and without any basis. It has failed to understand that the Petitioner's Roof Top Plant falls under Category- III MP DRES Policy, 2016 wherein there is no mention whatsoever regarding imposition of any such charge on the Petitioner. Rather, the MP DRES Policy, 2016, in clear and express terms exempts the RE Beneficiaries under the policy from payment of any cross-subsidy surcharge, while providing other incentives as well.*

8. *The Petitioner is not claiming to be a captive power plant in order to seek exemption rather, the Petitioner's Roof Top plant is exempted from payment of such charges by virtue of absence of any law governing the same. The Petitioner's Roof Top Plant falls under Category III which basically means that though the plant of the Petitioner is connected to the grid, it has nothing to do with the energy accounting nor with the commercial arrangement to such effect.*

B. MP DRES Policy, 2016 has the force of law which governs the Roof-top power plants set-up under the same and are neither under net-metering arrangement nor under gross-metering arrangement

9. *The Madhya Pradesh Solar Policy, 2012 under clause 5(b), Section I. intended to promote decentralised solar energy generation on a large scale.*

   "b) Decentralized and off-grid solar projects: ***The GoMP will promote decentralized*** *and off-grid solar applications,* ***including hybrid systems as per guidelines issued by MNRE****."*

10. *In furtherance thereof, MP DRES Policy, 2016 envisaged to attract RE projects on rooftops and in premises through various incentives. Para 1.9 of the said policy, inter alia, included the following types of roof-top solar power plants:*

i. *Grid connected RE system*
   a. *Category I: On Net-Metered basis*
   b. *Category II: Gross metering with wheeling and banking*
   c. *Category III: For consumption within premises with no export of power ("**Category-III Rooftop Plant**")*

Para 14 of the MP DRES Policy, 2016 exempts the RE Beneficiary RE Systems from cross-subsidy charges. Other incentives available to all the RE Systems installed under this policy include availability of open access, facility of wheeling and banking. Relevant extract of the said policy is being reproduced for ease of reference:

> *"14. INCENTIVES:*
> *14.1 Incentives applicable to all RE systems installed under any of the ways defined in para 1.9 of this policy are as follows:*
> *14.1.1 Open Access: Facility of open access will be available to all RE Systems, in terms of Sub-clause (i) of Clause 3.3 of the Madhya Pradesh Electricity Regulatory Commission (Terms and conditions for intra-state open access in Madhya Pradesh) Regulations, 2005, as amended thereafter.*
> *14.1.2 Wheeling charges: Facility of wheeling will be available to all RE Systems, as per wheeling charges specified by MPERC. For above, wheeling charges, GoMP will provide a grant of four precent (4%) in terms of energy injected and the balance, if any, shall be borne by the RE beneficiary.*
> *14.1.3 Banking: Banking shall be permitted in accordance with MPERC (Cogeneration and generation of electricity from renewable sources of energy) Regulations, 2010 and amendments thereof.*
> *14.1.4 **Cross Subsidy Surcharges:** RE Systems under this Policy shall be exempted from cross-subsidy charges, subject to relevant regulations of MPERC and amendments thereof."*

11. *The Petitioner herein was inclined to reduce its dependence on conventional power and move towards sourcing its power from renewable sources of energy. It is based on the representations made and assurances provided under the MP DRES Policy, 2016 and the amendments thereunder that the Petitioner set up its grid connected roof-top PV power plant under Category-III of the Policy. The Petitioner being a RE beneficiary having its RE system owned by third party, under Category-III i.e. for consumption within the premises with no export of power entered into definitive agreement with Cleanmax to consume power from a 254.5kWp rooftop power plant.*

12. *It is humbly submitted that it is the MP DRES Policy, 2016 which effectively*

governs the setting up and treatment of Category III rooftop power plants in Madhya Pradesh. There is no other law which recognises this category or setup. It is settled law that the policies made by government authorities are statutory in nature which keeps them at par with the status of 'Law'. In the present case, MP DRES Policy, 2016 has been published in the official gazette by the Government of Madhya Pradesh and has the effect of law.

13. *The Supreme Court, in State of Tamil Nadu and Anr. vs. National South Indian River Interlinking Agriculturist Association, Civil Appeal No. 6764 of 2021 has discussed that a policy is nothing but the reasoning and object that guides the decision of the authority. Statutes, notifications, ordinances or government orders are means for the implementation of the policy of the State.*

14. *The Supreme Court has explained as to what is law and what is policy and that when policy can be law in the case of Gulf Goans Hotels Company Limited vs. United of India &Ors. (2014) 10 SCC 673. In this case the Hon'ble Supreme Court relied upon its earlier judgment in Bennett Coleman and Co. v. Union of India (1972) 2 SCC 788 which held that a policy is not enforceable unless it has acquired the force of law:*

> *"93. What is termed "policy" can become justiciable when it exhibits itself in the shape of even purported "law". According to Article 13(3)(a) of the Constitution, "law" includes "any Ordinance, order, bye-law, rule, Regulation, notification, custom or usage having in the territory of India the force of law". So long as policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected to do under it. But, it cannot bind citizens unless the impugned policy is shown to have acquired the force of law."*

15. *The Hon'ble Supreme Court in the Gulf Goans case, while deciding whether "impugned guideline passed by the State Government has a force of law" and "when Government Policy may acquire the force of law" have held that specific purpose and mandate, due authentication and promulgation, notification for making it public are some of the essential ingredients for a policy to acquire the force of law. The relevant excerpts are reproduced herein below:*

> ***16.*** *It may, therefore, be understood that a Govt. policy may acquire the "force of 'law'" if it conforms to a certain form possessed by other laws in force and encapsulates a mandate and discloses a specific purpose. It is from the aforesaid prescription that the guidelines relied upon by the Union of India in this case, will have to be*

examined to determine whether the same satisfies the minimum elements of law.

22. *It is also essential that what is claimed to be a law must be notified or made public in order to bind the citizen. In Harla v. State of Rajasthan AIR 1951 SC 467 while dealing with the vires of the Jaipur Opium Act, which was enacted by a resolution passed by the Council of Ministers, though never published in the Gazette, this Court had observed:*

> *Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. [Para 10]*

24. *It will not be necessary to notice the long line of decisions reiterating the aforesaid view. So far as the mode of publication is concerned, it has been consistently held by this Court that such mode must be as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognized official channel, namely, the official gazette (B.K. Srivastava v. State of Karnataka) (1987) 1 SCC 658.*

16. *It is humbly submitted that the MP DRES Policy, 2016 has been issued with the specific purpose of promoting decentralised RE systems and has been authenticated and made public by way of notification of the same in the Official Gazette of Madhya Pradesh. Therefore, it is submitted that the aforesaid policy has acquired the force of law.*

17. *Moreover, the issue of scope of judicial interference in policy matters is no longer res integra as it is settled law that the Court would not ordinarily interfere with the policy decision of the executive unless the same can be faulted on the grounds of malafide, unreasonableness, arbitrariness or unfairness, in which case the policy would render itself to be declared*

unconstitutional. This view was given by the Apex Court in Ugar Sugar Works Ltd. Vs Delhi Administration &Ors. (2001) 3 SCC 635.In the present matter, the exemption granted to the Petitioner by the MP DRES Policy, 2016 is not arbitrary or unreasonable in nature, therefore, the said policy has the force of law.

C. Doctrine of legitimate expectation

18. The doctrine of legitimate expectations is founded on the principles of fairness in government dealings. It comes into play if a public body leads an individual to believe that they will be a recipient of a substantive benefit. It is a settled law that in case a promise has induced a legitimate expectation of a benefit which is substantive, not simply procedural, even the courts cannot take away benefit without weighing the requirement of fairness against any overriding interest relied upon for the change of policy.

19. The Hon'ble Supreme Court, in its judgment in National Buildings Construction Corporation vs. S. Raghunathan(1998) 7 SCC 66(NBCC case) has held that government is expected to honour the statements of its policy. The policy statements cannot be disregarded unfairly or applied selectively. The relevant excerpts from the judgment are produced below:

> *18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights.* ***But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel.***
>
> ***(emphasis supplied)***

20. The Petitioner altered its position based on the assurances given under the MP DRES Policy, 2016. Considering the special category of Category-III and the incentives provided under the policy, the Petitioner made investments in terms of financial capital, human resource, equipment and raw material etc, for setting of Roof Top Plant. The Petitioner's decision is adding on to the growth and development of RE sector, which was the intended objective of the MP DRES Policy, 2016.

21. *It is another settled principle of law that the doctrine of legitimate expectation imposes a duty on the public authority to act fairly. For instance, the Supreme Court in Navjyoti Coop. Group Housing Society v. Union of India, (1992) 4 SCC 477 has held that the doctrine of legitimate expectation imposes a duty on the public authority to act fairly by taking into consideration all relevant factors relating to such expectation:*

> *"16.* ***It may be indicated here that the doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to such 'legitimate expectation'.*** *Within the conspectus of fair dealing in case of 'legitimate expectation', the reasonable opportunities to make representation by the parties likely to be affected by any change of consistent past policy, come in. We, have not been shown any compelling reasons taken into consideration by the Central Government to make a departure from the existing policy of allotment with reference to seniority in registration by introducing a new guideline. On the contrary, Mr Jaitley the learned counsel has submitted that the DDA and/or Central Government do not intend to challenge the decision of the High Court and the impugned memorandum of January 20, 1990 has since been withdrawn. We therefore feel that in the facts of the case it was only desirable that before introducing or implementing any change in the guideline for allotment, an opportunity to make representations against the proposed change in the guideline should have been given to the registered Group Housing Societies, if necessary, by way of a public notice."*
>
> ***(Emphasis supplied)***

22. *It is humbly submitted that denial of the legitimate expectation, i.e. exemption provided to the Category-III Roof Top Plant, will result in in denial of a right/ benefit that is guaranteed under the MP DRES Policy, 2016 and will attract Article 14 of the Constitution of India. This relationship between Article 14 and the doctrine of legitimate expectation has been explained by the Hon'ble Supreme Court in Food Corporation of India vs. Kamdhenu Cattle Feed Industries(1990) 170 CLR 1 stating that while making a decision due weight must be given to legitimate persons likely to be affected by the decision, otherwise unfairness in exercise of power will amount to an abuse of power. Relevant excerpt is quoted below:*

> *"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered*

discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. ***To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness.*** *Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.*

8. ***The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law.*** *Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."*

(emphasis supplied)

23. In view of the same, it is humbly submitted that the additional surcharge and cross subsidy charges cannot be imposed on the Petitioner by the MPPKVVCL.

D. What cannot be done directly, cannot be done indirectly.

24. It is humbly submitted that the MP DRES Policy, 2016 does not provide for imposition of cross-subsidy surcharge and additional surcharge on the Category- III rooftop plants rather exempt the RE Systems established under the same from payment of such charges. Except MP DRES Policy, 2016, there is no regulation/policy applicable in the state of Madhya Pradesh which regulates operation of Category-III Roof Top Plant.

25. It is a settled principle of law that what cannot be done directly, is not permissible to be done obliquely. Any authority cannot be permitted to evade a law by 'shift or contrivance'. Reliance is placed on the judgments passed by the Supreme Court in Jagbir Singh vs. Ranbir Singh AIR 1979 SC 381 and M.C. Mehta vs. Kamal Nath 2000 6 SCC 213.

26. The MP DRES Policy, 2016, which governs the setting up of roof-top solar plants in Madhya Pradesh has clearly laid out the applicable laws for the energy accounting, interconnection and the incentives.

Clause 8 'Energy Accounting and Commercial Arrangements for RE Systems' of the policy states:

i. Arrangement for Category-I (on a net-metered basis)- Provisions for energy accounting and commercial arrangements of Net Metered RE Systems have to be as per MPERC (Grid Connected Net Metering) Regulations, 2015.

ii. Arrangement for Category-II (on a gross-metering basis)- The policy provides that the RE Beneficiary under this Category shall have the right to avail facility of open access in terms of the MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005. Energy banking provision of the RE Systems will be in accordance with MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010 (MP Cogeneration Regulation). Metering equipment shall be installed at the premises of the RE Beneficiary in accordance with the provisions of M.P. Electricity Supply Code, 2013 and CEA Regulations for metering at the cost of RE Beneficiary itself.

iii. Category- III – No regulations specified

Clause 10 'Standards of interconnection, operation and maintenance of Grid Connected RE System' of the MP DRES Policy, 2016 states:

i. The connectivity of Category-1 shall be governed by the provisions of applicable codes/ regulations of MPERC, CEA (Measures relating to safety and electric supply) Regulation 2010, Indian Electricity Rules, 1956 and subsequent amendments thereto.

ii. *The connectivity of Category- II and Category-III RE systems shall be as per MP Cogeneration Regulation.*

Clause 14 'Incentives' states that the incentives applicable to RE Systems installed under any of the ways are:

i. *Open Access- Facility of open access will be available in terms of sub-clause (i) of Clause 3.3 of MP Open Access Regulations, 2005.*
ii. *Wheeling charges- Facility of wheeling will be available to RE systems as per wheeling charges specified by MPERC.*
iii. *Banking – it shall be permitted in accordance with MP Cogeneration Regulations.*
iv. *Cross-subsidy surcharge- it shall be exempted for RE Systems under this policy.*
v. *Clause 14.2 specifically states that net-metered RE Systems under this policy shall be exempted from banking and wheeling charges, subject to MPERC (Grid Connected Net Metering) Regulation, 2015. It further clarifies that this exemption is not available to Category II, Category-III and off-grid systems.*

In view of the above, it is humbly submitted that the MP DRES Policy, 2016 has expressly stated and clarified which regulation is applicable to which category regarding every aspect. However, it has not mentioned any such regulation that is applicable on the Category-III for the purposes of CSS and/or AS. Therefore, it is submitted that the demand for CSS and AS raised by the MPKVVCL is illegal and unlawful.

E. Category- III is a unique case and net-metering regulations or any other regulations are not applicable

27. *Category III is a unique category created to promote decentralised roof-top solar PV power plants. Category- III power plants do not require any energy accounting or commercial arrangements with the Discom for the purposes of metering. Category-III power plants are neither set up under the net-metering nor under the gross-metering operation mode. The said policy is unambiguous and clear as far as the energy accounting from the solar roof-top plant set up under this Category is concerned and provides that in this Category, there is no energy accounting between the RE Beneficiary and the grid. The said policy also envisages three typical cases of power flow under Category III being:*

- *Case I: In this case, the instant generation of power from RE System equals the power requirement of RE Beneficiary. Therefore, there is no requirement of power from the grid.*
- *Case II: In this case, the instant generation of power from the grid*

connected RE System is less than the power requirement of RE Beneficiary at the instant. Hence, additional power is required from the grid.

- *Case III: In this case, the instant generation of power from the grid connected RE System is more than the power requirement of the RE Beneficiary at that instant. Hence, additional power so generated might flow into the grid. However, in this case the RE Beneficiary is not entitled to receive any consideration/benefit whatsoever against such export of energy into the grid. In such cases, RE Beneficiary will not be penalised for such instances.*

Hence, the Madhya Pradesh Electricity Regulatory Commission (Grid connected Net Metering) Regulations, 2015 (MP Net-metering Regulations, 2015) and the amendments thereunder, have no role to play in this case.

28. *Further it is important to mention that the MP DRES Policy, 2016 is applicable to all the RE beneficiaries in whose premises off-grid or grid-connected renewable energy system, self-owned or third-party owned is installed, up to a capacity of 2MW. However, except MP DRES Policy, 2016, there is no regulation applicable in the state of Madhya Pradesh which regulates operation of Category-III Rooftop Plant.*

29. *It is pertinent to mention that the Petitioner has availed the facility of open access as per Clause 14 of the said policy. The said clause clarifies that facility of open access will be available to all RE Systems, in terms of Sub-Clause (i) of Clause 3.3 of Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 (**Open Access Regulation, 2005**), as amended in October, 2006. That the terms of Sub-Clause (i) of Clause 3.3 of Open Access Regulation, 2005, unequivocally and in clear terms says that non-conventional energy generators and users shall be provided with open access with immediate effect, and they shall be governed by the existing policy of State Government. Relevant extract of the Open Access Regulation, 2005 is being reproduced herein below: -*

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

(i) For Non- Conventional Energy Sources:

*"The non-conventional energy generators and users shall be provided with open access with immediate effect and they **shall be governed by the existing policy of State Government**. The non-conventional energy generators shall be provided access to the transmission and sub-transmission system in the same manner as had been provided to*

them by the erstwhile integrated Madhya Pradesh State Electricity Board in accordance with State Government Policy in this regard on the same terms and conditions."

30. *Therefore, it is evident from the above that Open Access Consumers are governed by the Policy of State Government and except MP DRES Policy there is no regulation/ policy applicable in the state of Madhya Pradesh which regulates operation of Category-III Rooftop Plant.*

F. Rooftop solar projects were exempted even before the Madhya Pradesh Policy for Decentralized Renewable Energy Systems, 2016

31. *It is pertinent to mention that till the date of issuance of MP DRES Policy, 2016 the connectivity of rooftop solar PV plants was regulated by MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 (**MP Cogeneration Regulation 2010**). It is submitted that as per the aforesaid regulation, an open access consumer is a person who has availed open access either under the CERC (Open Access in Inter-State Transmission) Regulations, 2008 (as amended) or under MPERC (Terms and conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005. Regulation 7 of the said regulation provides that the generation from roof-top solar PV sources plants may be allowed connectivity at Low Voltage or 11/33kV as considered technically suitable by the Distribution Licensee (Discom). The then Regulation 12.2 of the said regulations incentivised Captive consumers and Open Access Consumers sourcing power from renewable sources of energy by exempting the same from wheeling charges, cross-subsidy surcharge and applicable surcharge on wheeling charge.*

Relevant provisions are extracted below for reference:

*"2. **Definitions**:*

(xii) 'Open Access Consumer' means a person who has availed open access either under CERC (Open Access in Inter-State Transmission) Regulations, 2008 (as amended) or under MPERC (Terms and conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 and shall include Short-term Transmission/ Distribution Consumers also as defined in any other Regulations specified by CERC/ MPERC from time to time;

7. Connectivity and Metering

7.1 The Generation and Co-generation from Renewable Sources Co-generation] B, except Rooftop Solar PV and Bio-gas Sources, shall be connected to the State Grid at a Voltage level of 132/33/11 kV based

on technical suitability determined by the Licensee. ***For Roof-top Solar PV sources and bio-gas Plants, connectivity may be allowed at Low Voltage or 11/33 kV as considered technically suitable by the Distribution Licensee.***

12. ***Banking***

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

Therefore, it is submitted that prior to the issuance of the MP DRES Policy, 2016, open access consumers were exempted from payment of any cross-subsidy surcharge and applicable surcharge on wheeling charges. However, in this case MP DRES Policy, 2016 further laid the law regarding the decentralised RE system. Further, it created Category-III, being exempted from payment of Cross subsidy surcharge, was only introduced by the MP DRES Policy, 2016 and did not exist earlier.

Rejoinder to the issue wise reply of the Respondent

Additional Surcharge (AS) and Cross Subsidy (CSS) is in the form of duty and it cannot be imposed without authority of law

32. The MPPKVVCL, while placing reliance on the Sesa Sterlite judgment has contended that CSS and AS is applicable on the Petitioner, for it is not a captive power plant and is an open access consumer. It is submitted that the Respondent's reliance on the Sesa Sterlite judgment for imposition CSS and AS is erroneous as it has completely failed to understand the separate category created by the MP DRES Policy, 2016 which does not provide for imposition of any charges. The category is created and governed by the MP DRES Policy, 2016 solely for there is no other legislation, law existing in the State of Madhya Pradesh to govern the same. In the present matter the Petitioner has availed the facility of open access, however, has been exempted from paying CSS and AS on account of exemption provided under MP DRES Policy, 2016. Therefore, Respondent's reliance on Sesa Sterlite Judgment is wholly misconceived, erroneous and an attempt to mislead this Hon'ble Commission.

33. Even otherwise, the Respondent has completely failed to understand the concept of additional surcharge. The additional surcharge becomes applicable only if it is conclusively demonstrated that the obligation of the licensee, in terms of existing power purchase commitments, has been and

continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, in this case, the MPPKVVCL has failed to demonstrate that it is bearing any additional fixed costs arising out of its obligation to supply. Therefore, imposition of additional surcharge is completely unfounded and illegal.

34. *It is the contention of the Respondent that, considering a continuous support from the grid is provided to the Petitioner in the form of parallel operation of its generating plants, such arrangement of continuous support by the generator for supplying power to the generator is akin to sale under open access. Therefore, the Petitioner is liable to pay CSS and AS. It is humbly submitted that such contention of the Respondent is denied and is devoid of merits. The detailed submissions are made at Para- E of this Rejoinder. Further, the Petitioner, in terms of the MP DRES Policy, 2016 and its amendment, has already obtained the permission for parallel operation with the grid which is annexed as ANNEXURE- P4 of the Petition.*

35. *It is the contention of the Respondent that the Hon'ble Commission vide its Retail Supply Tariff Order, has duly considered the stranded capacity and fixed cost by the distribution licensee on that account and has not provided any exemption to consumer registered under the MP DRES Policy, 2016. It has further contended the following to submit that the Petitioner is liable to pay AS.*

   i. *Fixed cost towards generators not being recovered through fixed charges on contract demand and being recovered through energy charges.*
   ii. *Fixed charges on contract demand are being recovered for the supply being availed from distribution licensee and not for consumption from other sources of supply.*
   iii. *Fixed charges on contract demand are not sufficient to recover the fixed cost of the distribution licensees.*

   It is humbly submitted that the submissions made at Para E, F of this Rejoinder are reiterated and are not being reproduced for the sake of brevity.

Imposition of CSS and AS is against the purpose and intent of Section 86 (1) (e) of the Act

36. *The Respondent has contended that the Section 86 (1) (e) does not provide any immunity from statutory charges. It is humbly submitted that Section 86 (1) (e) of the Act intends to promote co-generation and generation of electricity from renewable sources of energy. It is submitted that imposition*

of such charges on grid-connected solar roof-top power plants installed by the RESCO owner on the premises of a consumer will hamper the growth decentralized renewable energy systems in the country and will be detrimental in the road towards reducing the dependence on fossil fuels.

37. *It further contends that the intention of the Section 86 (1) (e) is safeguarded by the Renewable Purchase Obligations (RPO) determined by the State Commission. It is humbly submitted that, had it been the case that mere fixation of RPO would have sufficed for achieving the RE Targets of India, the Central and State Governments would not have been required to come up with so many schemes and incentives for additional growth of renewable energy, decentralised generation schemes and the like.*

38. *It is the contention of the Respondent that the exemption from payment of open access charges which was provided to captive and open access consumers was withdrawn by the 7th amendment to the MPERC (Cogeneration and generation of electricity from Renewable sources of energy) (Revision-1) Regulations, 2010 passed on 15.11.2017. It is humbly submitted that the Respondent is not acknowledging the MP DRES Policy, 2016 which has the force of law, does not provide for any regulation which is applicable to Category-III with respect to CSS and AS. Therefore, any exemption which was applicable to Open Access consumers under the MP Cogeneration Regulations, which may now have been withdrawn by an amendment, is not applicable to the Petitioner's Roof Top Plant.*

There is no applicable law in the state of Madhya Pradesh which imposes obligation upon Category- III roof top plants to make payment for CSS and AS.

39. *It is contended that the MP DRES Policy, 2016 in Clause 14.1.4 and Clause 4.5 recognises the supremacy of the Regulations/ order issued by this Hon'ble Commission. It is humbly submitted that Clause 4.5 clarifies that in case of discrepancy between the policy provisions and the provisions of the orders/ regulations of the Commission, the provisions of the orders/ regulations shall prevail. It is humbly submitted that there is no discrepancy which exists pertaining to Category-III Roof Top Plant. The said policy is quite clear regarding applicability of laws on each category. Submissions made at Para E and F of this Rejoinder are reiterated and not repeated for the sake of brevity.*

40. *For the reasons stated above, it is humbly prayed that the present Petition filed by the Petitioner be allowed and this Hon'ble Commission may be pleased to pass orders which it may deem necessary and proper in the interest of justice."*

Commission's Observations and Findings:

10. The Commission has observed the following from the contents of petition and the submissions of both parties in this matter:

(i) The Petitioner is HT Consumer of the Respondent Distribution Company under tariff schedule HV-3 having a contract demand of 1600 KVA.

(ii) The Petitioner decided to consume power from Roof-top solar power plant under Category-III of Madhya Pradesh Policy for Decentralized Renewable Energy System 2016 (**MP DRES Policy, 2016**). Therefore, the petitioner entered into a definitive agreement with M/s Cleanmax Enviro Energy Solutions Ltd. to consume power from the plant located at its rooftop under Category III of MP DRES Policy. As per the installation and commissioning certificate of M/s Cleanmax Enviro Energy Solutions Ltd annexed at page No. 136 of the subject petition, Roof top Solar system of 254.4 KWp capacity was installed and commissioned on 31.12.2018 at petitioner's premises. On 25.04.2019, the aforesaid Rooftop Solar plant was granted charging and commissioning approval from the competent authority.

(iii) On 30.06.2021, petitioner informed Respondent (MPPKVVCL) that it has already applied to Madhya Pradesh Urja Vikas Nigam ("MPUVN") for registration of above Solar Roof Top Solar Power Plant (SRTPP) under Category-III of MP DRES Policy, 2016. Further, the petitioner submitted various other documents including the Charging permission for registration of its SRTPP for parallel operation with the grid.

(iv) Respondent (MPPKVVCL) inspected the petitioner's premises on 06.07.2021 and Respondent (MPPKVVCL) on 07.07.2021, while citing parallel operation of petitioner's 254.5KWp SRTPP with the MPPKVVCL grid had issued a notice to petitioner under Para 31 of the HT agreement for disconnection of supply being the same in violation of Para 6.40 of the Madhya Pradesh Electricity Supply Code, 2013. The petitioner was advised to obtain valid written consent of the Respondent within 15 days for continued operation of the said SRTPP.

(v) Subsequently, the petitioner applied for obtaining parallel operation of its 254.5KWp SRTPP with zero export. However, Respondent asked the petitioner to submit an application for grant of parallel operation in prescribed Form RE-03 alongwith necessary documents.

(vi) Pursuant to above, petitioner vide its letter dated 09.07.2021 informed Respondent Discom that it had already applied for registration under Category-III of MP DRES Policy 2016 to MPUVN, Bhopal, however, due to COVID the

registration could not be completed yet. Further, the petitioner while informing that it has submitted all requisite documents requested the Respondent (MPPKVVCL) to issue registration for parallel operation of its SRTPP.

(vii) On 24.08.2021, Respondent MPPKVVCL vide its letter No. MD/WZ/05/COM/HT/11651 issued the permission for parallel operation for the SRTPP installed at the Petitioner's premises for non-captive use subject to certain terms and conditions.

(viii) Subsequently, Respondent MPPKVVCL issued a supplementary bill to Respondent demanding Rs. 16,91,662 (Rupees Sixteen lakh Ninety-One thousand Six hundred and Sixty-Two only) towards cross-subsidy and additional surcharge for the period 01/03/2019 to 01/06/2021.

(ix) Vide its communication dated 29/09/2021, the Petitioner requested the Respondent to withdraw its demand. Respondent has not withdrawn the aforesaid demand hence, the petitioner has approached the Commission with this petition.

(x) The Petitioner has challenged the aforesaid billing by Respondent towards cross-subsidy and additional surcharge on the following grounds:

(a) Additional Surcharge (AS) and Cross Subsidy Surcharge (CSS) are in the form of duty and it cannot be imposed without authority of law;

(b) There is no applicable law in state of Madhya Pradesh which imposes obligation upon Category-III rooftop Plants to make payment for cross subsidy and additional surcharge;

(c) In terms of Electricity Act, 2003 if electricity is not wheeled through a distribution licensee network, then the question of imposition of additional surcharge does not arise;

(d) There is no stranded capacity on account of the Petitioner's consumption from solar power plant owned by third party; and

(e) Imposition of cross-subsidy surcharge and additional surcharge is against the purpose and intent of Section 86(1) (e) of Electricity Act, 2003.

(xi) In light of the issues raised by the Petitioner and response of Respondent on all such issues, let us look into the relevant provisions under the Electricity Act 2003:

Section 42 of the Electricity Act, 2003 provides as under:

*"**Section 42: Duties of Distribution licensees and Open Access**-*

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his

area of supply and to supply electricity in accordance with the provisions contained in this Act.

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

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

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

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

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

….".

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

(xii) From fourth proviso to Section 42(2)of the Act, it is clear that exemption from payment of Cross Subsidy Surcharge is available only to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. Similar condition is applicable for levy of additional surcharge also.

As noted from the petitioner's submissions, it is an undisputed fact that the Petitioner does not have Captive Status in respect of Roof Top Solar plant and it

has not challenged permission of parallel operation issued by Respondent for non- captive use. Submission of petitioner at **page 23 of the petition** is reproduced as under:

33.....

> ***"Imposition of cross-subsidy surcharge and additional surcharge is against the purpose and intent of Section 86(1)(e) of the Electricity Act, 2003.***
>
> *i. It is submitted that the Petitioner, in line with the national goals to achieve 40 GW of solar rooftop development by 2022 and the allotted target of 2.2 GW of grid-connected roof-top solar projects in the state of Madhya Pradesh,* ***has setup a 254.5 KWp solar rooftop power plant on its premises with a third-party owner.....***
>
> *ii.* ***It is submitted that imposition of such charges on grid-connected solar roof-top power plants installed by the RESCO owner*** *on the premises of a consumer will hamper the growth decentralised renewable energy systems in the country and will be detrimental in the road towards reducing the dependence on fossil fuels."*
>
> *22. The Petitioner placing reliance on the policy entered into definitive agreement with Cleanmax to consume power from the plant* ***located at its rooftop under Category III of DRES Policy."***

Hence, in view of provisions under Section 42 of the Electricity Act 2003 and the above facts, the petitioner cannot be exempted from Cross Subsidy Surcharge imposed by the Respondent.

(xiii) Further, the Petitioner has submitted that prior to the issuance of MP DRES Policy, 2016 the connectivity of rooftop solar PV plants was regulated by MP Cogeneration Regulations, 2010. At this juncture, it is relevant to go though Regulation 12.2 of MPERC cogeneration Regulations, 2010 that deals with the levy of Cross Subsidy Surcharge and Additional Surcharge. As the said Regulation 12.2 was later on amended vide 7th amendment, both the original and amended provisions are reproduced as under:

Regulation 12.2 after amendment and prior to amendment is reproduced below:

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

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

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

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

(Emphasis Supplied)

(xiv) It is explicitly clear from the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 that the exemption from payment of open access charges provided to Captive and Open Access Consumers prior to the said amendment was withdrawn and it was provided in the seventh amendment that the open access charges if any, under Section 42 of the Electricity Act' 2003 shall be applicable in terms of retail supply tariff order issued by the Commission.

(xv) The petitioner is receiving supply of electricity from a person (rooftop solar PV power plant) other than the distribution licensee of his area of supply. For applicability of additional surcharge, let us look into the provisions under Section 43 of the Electricity Act' 2003 which provides as under:

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

(xvi) As per above provision under sub section (1) of Section 43 of the Act, the Distribution Licensee is required to supply power as and when required by the any owner/ occupier of any premises in its area of supply. This means that the distribution licensee is always having an obligation under Section 43 of the Electricity Act' 2003 to provide supply of electricity to owner or occupier of any premises without any discrimination whether it is a new consumer or an existing consumer seeking additional/ enhancement of demand in place of electricity which was otherwise being drawn from any person other than Licensee. In view of aforesaid provision, the distribution licensee is required to fulfill its obligation to supply electricity to a consumer, being petitioner in this case. Besides the licensee is also required to pay fixed cost for procurement of power through long term PPAs which have to be signed to meet such obligations. Therefore, additional surcharge shall be levied on petitioner as per Section 42(4) of the

Electricity Act 2003.

(xvii) The Petitioner has heavily relied on MP DRES Policy 2016 for exemption from Cross subsidy and Additional surcharge. As per Para 1.9 of the MP DRES Policy 2016, Category-III under which the case of petitioner falls in this matter, refers to a decentralized grid connected RE System for consumption within Premises with no export of power. Category III provides as under:

- Case III: In this case, the instant generation of power from the grid connected RE System is more than the power requirement of the RE Beneficiary at that instant. Hence, additional power so generated might flow into the grid. However, in this case the RE Beneficiary is not entitled to receive any consideration/benefit whatsoever against such export of energy into the grid. In such cases, RE Beneficiary will not be penalised for such instances.

(xviii) MP DRES Policy, 2016, in clear and express terms exempts the RE Beneficiaries under the policy from payment of any cross-subsidy surcharge, while providing other incentives as well. It is noted that Clause 14.1.4 of the MP DRES Policy 2016 specifically provides that the exemption from cross subsidy shall be subject to the Regulations of MPERC and amendment thereof. The said provision of MP DRES Policy 2016 is reproduced as under:

14. Incentive

14.1.4 Cross Subsidy Surcharge: RE Systems under this policy shall be exempted from cross subsidy surcharges ***subject to relevant regulations of MPERC and amendment thereof****".*

Clause 4.5 of the very same MP DRES Policy 2016 specifically recongnised the supremacy of the Regulations/order issued by the Commission. The said clause is reproduced as under:

4. POLICY AND REGULATORY FRAMEWORK

4.5 This policy sets the roadmap for growth of decentralized RE Systems in the state. The Regulations, specifically pertaining to the Net Metering, might be further liberlised, so as to enable growth of RE projects in accordance with the target set by Government of India. However, in case of any discrepancy between the provision of this policy and the Regulations of the Commission at present or in future, ***the provisions of the orders/regulations of the Commission shall prevail****.*

(Emphasis Supplied)

It is evident from above clause 4.5 of the MP DRES Policy, 2016 that in case of any inconsistency between the provisions of policy and Regulation of this

Commission, the provision under Regulation will prevail. Hence, CSS and AS shall be levied on the Petitioner's rooftop solar plant.

(xix) In view of all foregoing observations and examination of facts and circumstances in the matter and in light of provisions under MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision I) Regulation, 2010 as amended read with provisions under Section 42 of the Electricity Act, 2003 and MP DRES Policy 2016, the Commission finds no merit in the contention of the Petitioner and Cross Subsidy Surcharge and Additional Surcharge is therefore, leviable on the Petitioner. With the aforesaid observations and findings, the prayer in subject petition is not allowed and the subject petition along with interim application stand disposed of.

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