

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION**

**BHOPAL**

**Sub: In the matter of petition under Sections 86(1)(e) and (f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005 seeking directions against MPPKVVCL qua its illegal and arbitrary levy of Additional surcharge on the Petitioner's 2000kVA Steam Turbine Plant and 788kVA Biogas Engine.**

**ORDER**

**(Hearing through video conferencing)**

**(Date of Order: 05<sup>th</sup> May' 2022)**

**M/s. Kasyap Sweeteners Ltd.,**

Kheda Chaitnya Gram, Mhow Neemuch Road,  
Badnawar, Distt. Dhar (MP) – 454 660

- **Petitioner**

**Vs.**

**The Managing Director**

**M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.**

GPH Compound, Pologround, Indore (MP) – 452 001

- **Respondent**

Shri Aditya K Singh, Advocate appeared on behalf of the petitioner.

Shri Shailendra Jain, Dy. Director appeared on behalf of Respondent.

The petitioner M/s. Kasyap Sweeteners Ltd filed the subject petition under Sections 86(1)(e) and 86(1)(f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005 seeking directions to the Respondent (MPPKVVCL) against levy of Additional surcharge on the Petitioner's 2000 kVA Steam turbine Plant and 788kVA Biogas Engine.

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

“1. *The Petitioner has filed this petition under Section 86 (1) (e), Section 86 (1) (f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005 seeking quashing of the communication dated 06.07.2021 issued by M.P. Paschim Kshetra Vidyut Vitran Company Limited levying additional surcharge amounting to Rs. 3,01,28,664/- (Rupees Three Crore One Lakh Twenty-Eight Thousand Six Hundred and Sixty-Four) on its captive generation power plants being 2000kVA Steam Turbine Plant and 788kVA Biogas Engine (collectively called “CGPs”).*

2. *The Petitioner is a leading corn processing company in India, with a razor-sharp focus on specialized products like sorbitol, HFCS & liquid glucose that adds greater value to Indian corn. The Petitioner is an HT consumer of the Respondent having a contract demand of 2850 kVA. To meet its power requirements the Petitioner set up on-site captive power plants of 2000kVA Steam Turbine Engine and 788kVA Biogas Engine (hereinafter collectively referred to as “CGP”).*

3. *The Petitioner initially executed an HT connection agreement with the Madhya Pradesh State Electricity Board (“MPSEB”) for supply of 1350kVA on 17.09.1999. However, since 2002 MPPKVVCL undertakes the activity of distribution and supply in the areas of Ujjain and Indore.*

4. *On 10.06.2003, the Electricity Act came into force. It was enacted, inter alia, to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for taking measures conducive to development of the electricity industry. As per the Statement of Objects and Reasons to the Electricity Act, generation is delicensed, and captive generation is freely permitted.*
5. *It is pertinent to mention here that the Electricity Act, 2003 encourages captive power generation in India. Section 9 of the Act deals with Captive Generation Plant for the purpose of carrying electricity from its captive generating plant to the destination of its own use. This Section was introduced to encourage the generation of power with the twin motive of privatisation and removal of deficiency in the power sector. Relevant portion extracted below:*
- “Section 9. (Captive generation):***
- (1) *Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*
- Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.*
- Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.*
- (2) *Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:*
- Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:*
- Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.*
6. *Section 42(1) of the Act casts a duty upon the distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in its area of supply and supply electricity in accordance with the provisions of the Act. Simultaneously, the provisions of the Act cast an obligation on the distribution licensee to supply power as and when required by any owner/occupier of any premises in its area of supply. Therefore, a distribution licensee has an obligation 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 or a captive user seeking enhancement of demand. Relevant provision of the Act is reproduced below for better understanding:*

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

**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:”*

7. *In between many supplementary agreements were executed between the Petitioner and the Respondent for multiple things. However, the fourth supplementary HT connection agreement dated 15.05.2004 was executed with the Respondent for enhanced contract demand of 1800kVA to meet the increased power requirements of the manufacturing unit of the Petitioner. The Petitioner hereby caused no burden on the distribution licensee in terms of stranded costs, since the Petitioner only enhanced its contract demand than reducing it.*
8. *It is pertinent to mention that the National Electricity Policy, 2005 supports captive generation and aims at developing power sector in the country. Clause 5 of the NEP, 2005 clearly states that energy from the captive generating units could be used to supply energy to the grid or during certain time periods. These captive generation plants could be used as available distributed generation along the grid. Relevant clause is reproduced here for the sake of better understanding:*

**“Captive Generation**

.....

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

*energy from captive power plants. The appropriate Regulatory Commission shall exercise regulatory oversight on such commercial arrangements between captive generators and licensees and determine tariffs when a licensee is the off-taker of power from captive plant."*

9. *It is since 2007 that the Petitioner started to face issues of interrupted power supply. The Petitioner wrote various letters and communications to MPKVCL, requesting continuous supply of power. Letters were written on 19.07.2007, 28.09.2007, however, of no use. The Petitioner even apprised the MPPKVCL that interrupted power supply had severe commercial impact on the manufacturing and production scale of the Petitioner and resulted in revenue loss. The MPKVCL failed to maintain continuous supply of electricity, thereby failing to fulfill its obligation to supply.*
10. *This issue of interrupted power supply kept continuing to the extent that the Petitioner was compelled to write another letter dated 27.01.2009 to the MPPKVCL i.e., the distribution licensee to provide continuous power supply, however, of no avail. The distribution licensee failed to fulfill its obligation under Section 43 of the Act.*
11. *Notably the Petitioner produces sorbitol which is categorized under 'essentials' category and the Petitioner requires 24\*7 supply of uninterrupted power for its manufacturing/production unit. However, the issue of interrupted and staggered power supply rose, owing to the failure of fulfilment of its statutory obligations, to the extent that it caused heavy revenue losses.*
12. *Consequently, given the circumstances and everyday losses due to failure of MPPKVCL to supply continuous power and its insufficient distribution system assets, the Petitioner was compelled find a solution on its own. The Petitioner was left with no other choice but to install/ set-up a separate feeder from sub-station of the distribution licensee to its own premises, thereby making huge investment when it was not even required to, had the distribution licensee fulfilled its obligations. On 28.07.2010 the Petitioner applied for a separate feeder from Kanwan 132 kV substation alongwith M/s Oasis Distilleries Limited and even communicated its willingness to bear the cost of extension of 33kV line from M/s Oasis Distilleries Limited to its manufacturing unit in Badnawar and share 50% cost of 33kV bay at Kanwan substation alongwith M/s Oasis Distilleries Limited. It is submitted that the supply of power condition was so inadequate that the Petitioner literally begged the MPPKVCL to exempt its line from power cut and provide continuous supply of power atleast till the construction of its separate feeder was not complete.*
13. *In terms of its request for separate feeder, the Petitioner made requisite payments amounting to Rs. 14,73,500/- (Rupees Fourteen lakh Seventy-three thousand and five hundred) to the account of Madhya Pradesh Power*

*Transmission Company Limited ("MPPTCL") for construction of 33kV bay at 132kV S/s Kanwan. Various communications including those dated 22.09.2010, 15.10.2010, 19.10.2010, 16.11.2010 were exchanged between the Petitioner and the Respondent, in relation to the same.*

14. *In the midst of all of this also, the Petitioner had increased power requirement and therefore, executed sixth supplementary HT connection agreement dated 14.03.2011 with the Respondent for enhanced contract demand of 1700KVA which was earlier reduced to 1380 kVA for sometime.*
15. *It is submitted that after the completion of the works for extension of 33kV line from M/s Oasis Distilleries Limited to its manufacturing unit in Badnawar, and its inspection thereof, the Petitioner was issued temporary approval by the Electrical Inspector dated 13.07.2011 for charging its 33kV line.*
16. *It is pertinent to mention here that even during the construction works of the aforesaid separate feeder for HT connection of the Petitioner, the Petitioner was constantly facing the issue of interrupted and staggered supply of power. The Petitioner had been requesting the Respondent to provide continuous supply of power however, MPPKVCL failed to fulfil its statutory obligation to supply power the Petitioner, despite the Petitioner undertaking the exercise of construction of a separate feeder of 33kV for itself and bearing the cost of construction and maintenance for the same.*
17. *To meet its power requirement and to maintain continuous supply of electricity, the Petitioner again had to find another way for itself, owing to the failure of the distribution licensee to fulfil its statutory obligation and considering its insufficient distribution assets. As a result, the Petitioner was compelled to install a 2000kVA Steam Turbine Engine which generates 1600kW of electricity. Notably, the Petitioner's in-house steam boiler runs on bio-mass (agricultural waste), therefore the source of energy utilized is non-conventional, which produces steam. This 2000kVA Steam Turbine Engine utilizes potential energy of steam and 1600kW of power is produced as a by-product. The Petitioner made huge capital investments for getting the benefit of this additional power supply. However, it is submitted that the Petitioner is hereby only using whatever energy is generated from steam in its production facilities and not depending upon it for power supply to meet its power requirements. The Petitioner's 2000kVA Steam Turbine Engine is a captive generating plant owned by the Petitioner and with 100% energy produced by it consumed by the Petitioner's production unit.*
18. *Thereafter, a permission was provided by the Electrical Inspector to energize the 2000kVA Steam Turbine Engine on 06.01.2015. It is submitted that the said 2000kVA Steam Turbine Engine is exempted from payment of electricity duty, being a power plant using non-conventional source of energy, from the date of its commissioning i.e., 01.12.2015 till 30.11.2025 in terms of the communication dated 25.01.2016 issued by the office of the Electrical*



*Inspector.*

19. *In parallel to the same, seventh supplementary HT connection agreement dated 06.01.2015 was executed with the Respondent for enhanced contract demand of 2300kVA to meet the increased power requirements of the manufacturing unit of the Petitioner. The Petitioner hereby caused no burden on the distribution licensee in terms of stranded costs, since the Petitioner only enhanced its contract demand than reducing it.*
20. *On 29.06.2015, the Petitioner executed eighth supplementary HT connection agreement for load enhancement from 2300kVA to 2700KVA. This shows that despite the installation of the 2000kVA Steam Turbine Engine, the Petitioner was essentially relying on power supply from the Respondent only, and not rather reducing its Contract Demand. The Petitioner hereby caused no burden on the distribution licensee in terms of stranded costs, since the Petitioner only enhanced its contract demand than reducing it.*
21. *On 28.01.2016, the Central Government in exercise of powers under Section 3 issued the Revised Tariff Policy. The Revised Tariff Policy intended to promote both captive generation and co-generation from renewable sources of energy. The Revised Tariff Policy also laid down the basic conditions with respect to levy of additional surcharge being i) permission for being an open access consumer ii) the distribution licensee has to conclusively demonstrate that its obligation, 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 Revised Tariff Policy provides as under:*

***“6.3 Harnessing captive generation***

***Captive generation is an important means to making competitive power available. Appropriate Commission should create an enabling environment that encourages captive power plants to be connected to the grid.***

*Such captive plants could supply surplus power through grid subject to the same regulation as applicable to generating companies. Firm supplies may be bought from captive plants by distribution licensees using the guidelines issued by the Central Government under section 63 of the Act taking into account second proviso of para 5.2 of this Policy.*

*The prices should be differentiated for peak and off-peak supply and the tariff should include variable cost of generation at actual levels and reasonable compensation for capacity charges.*

***Wheeling charges and other terms and conditions for implementation should be determined in advance by the respective State Commission, duly ensuring that the charges are reasonable and fair.***

*Grid connected captive plants could also supply power to non-captive users connected to the grid through available transmission facilities based on negotiated tariffs. Such sale of electricity would be subject to relevant regulations for open access including compliance of relevant provisions of rule 3 of the Electricity Rules, 2005.”*

**6.4 Renewable sources of energy generation including Co-generation from renewable energy sources:**

....

(iv) *Appropriate Commission may also provide for a suitable regulatory framework for encouraging such other emerging renewable energy technologies by prescribing separate technology based REC multiplier (i.e. granting higher or lower number of RECs to such emerging technologies for the same level of generation).*

*“8.5.1 National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers **who are permitted open access** should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.*

.... ....

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

*Therefore, it is understood that it is the intent and objective of the Electricity Act and the existing legal and regulatory framework that captive generation should be promoted. Further, it is understood that additional surcharge for obligation to supply becomes applicable only if its conclusively demonstrated that obligation to supply, of the licensee, continues to be stranded in terms of existing power purchase commitments or when the distribution licensee has to bear fixed cost due to existing power purchase agreement.*

22. *There was a requirement of more power considering the expansion in the manufacturing business of the Petitioner. Therefore, the Petitioner executed the ninth HT Connection agreement dated 29.06.2016 with the Respondent for enhanced load of 2850kVA. The Petitioner hereby caused no burden on the distribution licensee in terms of stranded costs, since the Petitioner only enhanced its contract demand than reducing it.*

23. Further, is pertinent to be mentioned here that the Petitioner, in its manufacturing unit, produces an effluent corn sweet liquor. In the process of cleaning the said effluent, methane is produced as a by-product from the bio-digesters. This is in gas form and contains very high calorific value of 5000Kcl/M3. Therefore, the Petitioner invested huge amount for effluent treatment plant ("**Effluent Treatment Plant**") for obtaining the valuable gas and thereafter, installed a bio-gas based power generation plant i.e. 788kVA Biogas Engine. This 788KVA Biogas Engine serves to recover the cost of expenditure for installation of Effluent Treatment Plant by setting-off the cost of additional power requirement. This essentially helps the Petitioner to meet its additional power requirements, which the distribution licensee fails to meet. The Petitioner obtained approval of the Electrical Inspector on 16.03.2017 in terms of the applicable rules and regulations. It is submitted that the said 788kVA Biogas Engine, being a renewable energy plant, is exempted from payment of electricity duty from the date of its commissioning i.e., 22.04.2017 till 21.04.2027 in terms of the communication dated 05.05.2017 issued by the office of the Electrical Inspector.
24. It is further submitted that this 788KVA Biogas Engine produces 630kWh of power at 415 volt which is consumed in operation of the Effluent Treatment Plant and other facilities. Infact, the power supplied to the 788kVA Biogas Engine is also connected to the Petitioner's own electrical system and supplied in low voltage (415V) side. Therefore, the Petitioner does not use MPPKVVCL's network, which is provided to the Petitioner at 33kV, at all to consume the power generated by its 788kVA Biogas Engine i.e. biogas power generation plant, rather the Petitioner has installed its own step down transformers and electrical system to consume electricity from its CGPs.
25. In the said background, it is important to understand that for a generating plant to be established as a captive power plant or to be granted captive status, it is required to fulfil certain conditions as per Rule 3 of the Electricity Rules, 2003.
- "3. **Requirements of Captive Generating Plant-**
- (1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-
- (a) in case of a power plant -
- (i) not less than twenty six percent of the ownership is held by the captive user(s), and
- (ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:
- Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:
- Provided further that in case of association of persons, the captive



*user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;*

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

*Explanation :-*

- (1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and*
- (2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty-six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.*

*.....*

- (2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.*

*Explanation-*

- (1) For the purpose of this rule-*
- a. "Annual Basis" shall be determined based on a financial year;*
- b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;*
- c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;*
- ....."*

26. *Considering the Petitioner generates electricity from its 100% owned on-site 2000KVA Steam Turbine Engine and 788kVA Biogas engine for 100% self - consumption only, it qualifies as a captive generation power plant in accordance with the applicable laws. Therefore, all the benefits applicable to captive generation plants should be applicable to the Petitioner's CGPs.*

27. *However, the Respondent on 16.02.2019 issued a circular bearing number MD/WZ/05/COM/HT/144 being the 'Guidelines in the matter of assessing captive status of consumer as per provisions of Electricity Act, 2003 read with Electricity Rules, 2005' ("Guidelines"). The said Guidelines provided for grant of 'captive status' (and consequently 'Captive Benefits') to the eligible consumers availing power through captive route. This included procedure prescribed for both 'captive user' status before availing supply from CGP and captive status of existing Captive Users.*
28. *To the shock of the Petitioner and against the existing legal and regulatory framework, the Respondent on 06.07.2021 issued a communication imposing an additional surcharge amounting to Rs. 3,01,28,664/-, on the CGPs of the Petitioner, for the period April, 2017 to March, 2021. As per the Demand Notice, additional surcharge is applicable on the Petitioner under Section 42 (4) of the Electricity Act, 2003.*
29. *The Demand Notice was responded to by the Petitioner vide its letter bearing no. KSL/MPPKVVCL/2021-6 dated 15.07.2021. In its response, the Petitioner explained and clarified that it does not take supply of power from any entity other than the Respondent itself, and all the electricity generated in its CGPs is utilized for self-consumption only, hence, it is not liable to pay any additional surcharge. Further, the Petitioner explained that as per Section 42 (2) of the Act, additional surcharge is not leviable on a CGP for carrying electricity to the destination of its own use (here it is on-site CGPs), therefore, additional surcharge is not leviable on the Petitioner's CGPs.*
30. *The Petitioner was compelled to make the payment of the said amount in installments spread over 75 months without any late fee surcharge or interest vide its letter dated 27.07.2021.*
31. *In the meanwhile, the Petitioner, being an existing Captive User, on 31.07.2021 submitted the documents required for obtaining parallel operation permission under the Guidelines issued in 2019, to the Respondent vide its letter bearing no. KSL/MPPKVVCL/2021-9 dated 31.07.2021. These documents included CGPs' generation certificate and ownership certificate issued by the Chartered Accountant on 27.07.2021 which clearly states that since 2017 till March 2021 the Petitioner has 100% ownership of the CGPs and has consumed 100% power generated by the same. The Petitioner also clarified that it is not an open access consumer and that it has neither been taking supply from other than distribution licensee nor giving power supply to anyone.*
32. *The Petitioner has even obtained the permission for parallel operation of its CGPs issued by the Respondent itself on 02.08.2021, thereby accepting the captive status of the Petitioner's CGPs.*
33. *However, even this solution was also not acceptable to the Respondent despite such testing times and it has rather allowed the Petitioner to make*

*the payment of additional surcharge in 48 equal installments, rather than 75 commencing first disbursement from July, 2021. This has been communicated to the Petitioner vide a letter dated 17.08.2021.*

34. *Nevertheless, the Petitioner has also submitted a letter to the MPPVVCL letters dated 26.08.2021 for both the CGPs respectively, requesting it to not impose the additional surcharge on parallel operation of the Petitioner's CGPs for the same is not applicable under the existing laws.*
35. *It is submitted that it is astonishing that the Respondent has the audacity to impose additional surcharge on the Petitioner's CGPs wherein the Petitioner was compelled to set up such CGPs owing to the failure of statutory obligation of MPKVVCL to supply continuous power.*
36. *It is submitted that the Respondent has levied the additional surcharge contrary to the provisions of the Act and the legislative intent of promoting captive use of electricity. Section 42 (4) of the Act states that:*  
*"Section 42 (Duties of distribution licensee and open access):*  
*...*  
*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...."***
- Therefore, Section 42 (4) of the Act envisages that:*
- i.) Additional Surcharge is levied on a consumer when the State Commission permits a class of consumer(s) to avail Open Access for receiving supply of electricity from a person other than its area distribution licensee.*
  - ii.) The Additional Surcharge is:*
    - (a) Payable on charges for wheeling*
    - (b) To meet the fixed cost of the distribution licensee arising out its obligation to supply electricity.*
37. *Additional Surcharge is not leviable:*
- a) On a captive user who is receiving power from its CPP since:*
    - (i) There is no element of supply/ 'sale' involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e. in terms of Rule 3 of the Electricity Rules) does not amount to "supply of electricity" as contemplated under Section 42(4).*
    - (ii) Captive user is different from a consumer receiving supply of electricity on Open Access.*
    - (iii) Even if availing Open Access, a captive user's Open Access is a right under Section 9(2) and is not subject to the State*

*Commission's discretion under Section 42(4). In other words, Section 42(4) is not applicable to captive users.*

- b) If electricity is not wheeled through a licensed network and/ or no wheeling charges have been determined for a class of consumers.*
- c) Where there is no stranding of the licensee's fixed cost in relation to his supply obligation.*

*38. In the present facts and circumstances, additional surcharge is sought to be levied by MPPKVVCL on captive consumption by the Petitioner. The Respondent has failed to understand that Additional Surcharge cannot be levied on power consumed by the Petitioner from its own CGPs. Even as per Section 42 (4), certain requirements are to be met, for levy of Additional Surcharge, which are not met in the present case.*

- i. The Petitioner is entitled to open access in terms of Section 9 (2) of the Act. Section 42 (4) is not applicable in the case of captive use.*
- ii. The Petitioner's captive use does not require wheeling of electricity using the Respondent's distribution network and hence, it is not required to pay any wheeling charges. In fact, the Petitioner is not utilizing MPPKVVCL's network at all for supply of power generated from its CGPs to its manufacturing unit for the CGPs are located on-site and power generated by them are consumed through the electrical system owned and operated by the Petitioner itself.*
- iii. The Petitioner has invested heavily in setting up the CGPs. The set-up is in a manner that the same are not connected with the MPPKVVCL's grid and no part of MPPKVVCL's network is being utilized in supply of electricity from the CGPs to the manufacturing/production unit of the Petitioner.*
- iv. There is no wheeling of electricity using MPPKVVCL's network. Therefore, there cannot be any Additional Surcharge levied as additional surcharge is a charge on wheeling of electricity.*
- v. The Petitioner has not availed any open access for the purpose of generation and consumption of power from its CGPs.*
- vi. For the period April 2017 to March, 2021, there has been no stranding of MPPKVVCL's fixed cost arising out of its obligation to supply electricity, since the Petitioner has been paying the fixed demand charges to MPPKVVCL for the contract demand maintained by the Petitioner, for its manufacturing unit, with the licensee.*

*39. It is submitted that additional surcharge can only be levied by a Distribution Licensee if there is a stranded cost which the distribution licensee has to bear out of its obligation to supply open access consumer, it is only then that a distribution licensee can claim for additional surcharge. It is submitted that the Petitioner is a captive user and not an open access customer. Therefore, any additional surcharge is not leviable on the Petitioner.*

*40. The distribution licensee has the obligation to pay fixed cost to supply and this liability under the power purchase agreement becomes burden to the distribution licensee when the power is not being purchased on account of*

*open access consumers taking power from third parties. This pre-supposes availability of excess/surplus capacity in power purchase agreements, which get stranded due to non-purchase. Unless the distribution licensee 'conclusively demonstrate' that the obligation in terms of 'existing power purchase commitments' 'has been' and 'continues to be stranded', which results in bearing unavoidable obligation of paying fixed cost, it should not be allowed to claim additional surcharge and any such claim made must be rejected.*

41. *In view of the above, it is submitted that the levy and demand for additional surcharge on the Petitioner for its CGPs is untenable and contrary to law. Hence, the Petitioner was constrained to approach this Hon'ble Commission.*

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

**a) *The distribution licensee failed to fulfill its statutory obligation to supply power***

*It is submitted that by the virtue of Section 43(1) of the Act, the distribution licensee is under the duty to supply power as and when required by any owner/occupier of any premises in its area of supply without any discrimination of any sort. This also applies to a consumer who has a captive power plant seeking additional/enhancement of demand in place of electricity which was otherwise being drawn through open access or from captive generation. However, the distribution licensee i.e., MPPKVCL in this case, failed to fulfil its obligations under the provisions of the Act.*

*Consequently, the Petitioner was compelled to install its separate feeder and then set up its own CGPs to maintain continuous supply of power to its manufacturing unit. It is a settled legal principle that a person cannot take benefit of its own wrong.*

**b) *Additional Surcharge is not leviable on captive users***

i. *It is submitted that, the power to determine and levy additional surcharge on consumers is derived from Section 42 (4) of the Electricity Act. As per Section 42 (4) additional surcharge is leviable on consumers or a class of consumers who are receiving supply of electricity from a person other than their area distribution licensee, on the charges of wheeling. Additional surcharge is levied to meet the fixed cost of the distribution licensee arising out of such licensees' obligation to supply electricity.*

ii. *On a bare reading of Section 42 of the Act, it is understood that additional surcharge is leviable on a consumer when the State Commission permits a class of consumer(s) to avail open access for receiving electricity from a person other than its area distribution licensee. Further additional surcharge is:*

- *Payable on charges of wheeling*
- *To meet the fixed cost of distribution licensee arising out of its*



*obligation to supply electricity.*

- iii. *Therefore, additional surcharge can be levied only if:*
- *The State Commission has permitted such consumer or class of consumer to receive supply of electricity on open access under Section 42 of the Act.*
  - ***Supply** of electricity to the consumer/ class of consumer on Open Access is by someone other than the local distribution licensee. The term supply is used in the context of sale of electricity.*
  - *Such consumer/ class of consumer **must be wheeling electricity** on the network of the area distribution licensee. As a result, such consumer should be paying wheeling charges to the distribution licensee.*
  - *If such wheeling charges, are applicable and are being paid by the consumer, should be unable to take care of the fixed cost liability of the area distribution licensee. The distribution licensee will be required to demonstrate that there is stranded fixed cost (arising out of the supply obligation of the licensee) which the distribution licensee is unable to recover from the Wheeling Charges levied by it, and hence, additional surcharge would have to be levied for recovery of such fixed cost.*
- iv. *It is further submitted that a captive user, as defined under Section 9 of the Electricity Act read with Rule 3 of the Electricity Rules, is a person who has set-up a power plant for generating and carrying electricity to a destination of its own use. It is submitted that a captive power plant is established in terms of Section 9 of the Electricity Act. Section 9(2) of the Electricity Act grants a captive user the right to Open Access for the purpose of carrying electricity from its captive power plant to the destination of its own use.*
- c) *On a bare reading of Section 9 (2) and Section 42 (4) of the Act, it is evident that a captive user has statutory right to open access and is not subject to the State Commission 'permitting open-access' under Section 42 (4) of the Act. Even if it is assumed that that the Petitioner consumes power from open access (which it does not), Section 42 (4) is not applicable to captive user to the extent of electricity consumed from its captive generation plant. Therefore, any levy of additional surcharge is illegal and contrary to law.*
- d) *The Petitioner's CGPs are not connected to the electrical system of the Respondent or even to the grid, the CGPs are co-located and do not require wheeling of electricity using the Respondent's infrastructure from the point of generation to the point of consumption. Therefore, applicability of additional surcharge does not arise.*

**There is no supply of electricity**

- e) *It is further submitted that additional surcharge is levied on consumers or a class of consumers who are availing supply of electricity on open access. As per Section 2 (70) of the Act, 'supply' of electricity means sale of electricity to a licensee or a consumer. Captive use does not envisage or mean supply of electricity by the captive user to itself. Therefore, there is no element of supply involved from a power generation plant set up for self-consumption.*
- f) *As per the Act, there are two types of consumers i) A **captive user**, who is permitted to carry electricity to the destination of its own use; ii) Other consumers who avail supply of electricity (either from the local distribution licensee or from any other person such as independent power plant or trading licensee) i.e., where an element of sale is involved.*
- g) *As far as Captive Users are concerned, they are further classified into two categories:*
- i. *Where the captive generating plant and the captive user is situated in the same premises or where captive users receive supply of electricity through a Dedicated Transmission Line i.e., where no wheeling of energy (on a licenced network) takes place for such captive use; and*
  - ii. *Where the captive generating plant and the users are situated at two different locations i.e., where transfer of energy takes place for captive consumption through use of grid infrastructure.*
- It is submitted that in either case, there is no element of supply involved for a Captive User.*
- h) *It is further submitted that irrespective of whether a captive power plant is on site or is wheeling electricity to its captive user, there cannot be any levy of additional surcharge so long as the captive user/ plant meets the test of Rule 3 of the Electricity Rules since there is no element of sale/ supply in either scenario. Therefore, it is submitted that, so long as a captive user meets the Ownership (26% equity shareholding with voting rights) and Consumption Requirement (51% of the aggregate electricity generated in a financial year) prescribed under Rule 3(1) of the Electricity Rules, then such a captive user is exempt from all charges/ surcharges that are ordinarily applicable to open access consumers i.e., charges that are levied pursuant to "supply" of electricity to the Open Access consumer. This includes additional surcharge as well, since, as stated hereinabove, a precondition for the levy of Additional Surcharge is "supply" of electricity to the consumer.*
- i) *It is submitted that the Petitioner has set up two onsite 2000kVA Steam Turbine Engine and 788kVA Biogas engine i.e., two CGPs for generation of power for captive use since 2015 and 2017 respectively. The petitioner owns 100% of the CGP and consumes 100% of the power generated from the same. Therefore, the Petitioner complies with the captive qualification criteria set out in Rule 3 of the Electricity Rules. The Petitioner is captive generator and consuming the electricity generated, hence, there cannot be any levy of additional surcharge on power consumed by the Petitioner from its own CGPs.*

**Additional surcharge not payable even in terms of the tariff orders for FY 2017 to FY 2021**

- j) It is submitted that even the various Retail Supply Tariff Orders for FY 2017 to FY 2021 provide for levy of additional surcharge only on open access consumers (and not captive users). The Petitioner herein is not an open access consumer in so far as its power consumption from its CGPs is concerned. Hence, additional surcharge is not applicable in this case.
- k) Even assuming but not conceding that the additional surcharge is levied on the Petitioner, it is submitted that it cannot be made applicable retrospectively.

**B. Requirements of Section 42 (4) not met in the present case**  
**There is no wheeling of electricity**

- l) It is submitted that additional surcharge is payable only if the consumer is liable to pay the charges of wheeling and not otherwise. This has been held by APTEL in its judgment dated 29.05.2006 in Appeal No. 28 of 2005 titled *Kalyani Steels Limited v. Karnataka Power Transmission Corporation Limited & Ors.*

“37. As regards the second point, as to liability of pay surcharge on transmission charges claimed by the Respondents, it is seen that Section 39 prescribes functions of State Transmission Utility and one of them being to provide non-discriminatory Open Access. Section 42(2) provides that a State Commission shall introduce Open Access. Proviso to Sub-section (2) of Section 42 enables the State Commission to allow Open Access even before elimination of cross subsidies on payment of surcharge in addition to the charges for wheeling as may be determined by the State Commission. Sub-section (4) of Section 42 provides for additional surcharge on the charges of wheeling as may be specified by the Commission. Sub-section (4) of Section 42 reads thus:

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

A plain reading of this Sub-section would show that a consumer is liable to pay additional surcharge, only if he is liable to pay charges of wheeling and not otherwise.

38. Per contra proviso to Sub-section (2) of Section 42 provides for payment of surcharge in addition to charges for wheeling as may be determined by the State Commission. Sub-section (2) of Section 42 reads thus:

....

*As seen from the first proviso of Sub-section (2) of Section 42 for open access, surcharge is to be imposed in addition to the charges for wheeling. Therefore, even if wheeling charges are not payable, the open access consumer has to pay surcharge.*

39. *Wheeling is defined in Section 2(76) and it reads thus:*

....

*On careful analysis, it is clear that liability to pay wheeling charges arises only when distribution system and associated facilities of a transmission licensee or distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62 and not when the consumer uses its dedicated lines of its own."*

- m) There is no wheeling agreement between the Petitioner and Respondent for consumption/use of energy generated from the Petitioner's onsite CGPs.*
- n) The Petitioner consumes power from its CGPs located on-site via internal dedicated electrical system which are constructed, owned, operated and maintained by the Petitioner and does not form part of the MPPKVVCL's distribution network.*
- o) The Petitioner does not utilize any part of MPPKVVCL's network for receiving the electricity generated by the CGPs. There is no wheeling of electricity either on the distribution licensee or on the transmission licensee's network for the purpose of power generation and consumption by the Petitioner from its onsite CGPs.*
- p) The Petitioner's CGPs are not connected to the grid or to the point of interconnection of the Petitioner's manufacturing unit with the MPKVVCL's grid.*
- q) The Petitioner is not an open access consumer nor is it receiving supply from any third party but for the MPKVVCL itself.*

**MPPKVVCL has no stranded capacity on account of the Petitioner's CGPs**

- r) It is submitted that additional surcharge can only be levied by a distribution licensee if there is a stranded cost which the distribution licensee has to bear out of its obligation to supply open access consumer, it is only then that a distribution licensee can claim for additional surcharge.*
- s) Considering the Petitioner has not opted for any open access nor is taking supply of electricity from any third party but for MPPKVVCL Further, the Petitioner is a captive user and is not wheeling electricity for the purpose of its captive generation and consumption, the issue of stranded capacity becomes irrelevant in terms of Section 42 (4) of the Act.*
- t) Further, the Petitioner maintains a contract demand of 2850kVA with MPPKVVCL against which it is already paying the demand/fixed charges to*

*MPKVVCL.*

- u) It is submitted that the Petitioner has been an HT consumer of the Respondent since 1999 and still continues to be the same, with its load enhanced with each passing year, which led to signing of various HT connection agreements with increased Contract Demand (current Contract Demand is 2850 KVA). Therefore, there is neither surrender of power by the Petitioner nor can there be possibility of any stranded capacity owing to the consumption of captive power by the Petitioner. Hence, there is no burden of any fixed costs that the Respondent has to incur arising out of its obligation to supply.*
- v) It is submitted that the National Tariff Policy 2005, Revised Tariff Policy, 2016 aim to promote captive generation and power generation from renewable source of energy. The Demand Notice issued goes against the intent and the aim of the specified regulatory framework.*
- w) The Revised Tariff Policy 2016 clearly state that additional surcharge becomes applicable only if it is conclusively demonstrated that the obligation of a licensee. In terms of existing power 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, there are no such costs that the Respondent has to incur, in the instant case.*

*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 prayed the following:
  - (a) Hold and declare that additional surcharge is not leviable by MPPKVVCL on the quantum of power consumed by the petitioner from its onsite CGPs i.e. 2000 kVA Steam Turbine Engine and 788 kVA Biogas plant.
  - (b) Set aside/ quash MPPKVVCL's Demand Notice dated 06.07.2021 levying additional surcharge of Rs. 3,01,28,664/- retrospectively for the power consumed by the petitioner from its two onsite CGPs for April 2017-March-2021.
4. At the motion hearing held on 23.11.2021, the petition was admitted and the petitioner was directed to serve copy of petition on the Respondent within seven days and report compliance of service to the Commission. The Respondent was directed to file reply to the subject petition within two weeks, thereafter and to serve a copy of its reply to the petitioner simultaneously. The petitioner was directed to file rejoinder on the aforesaid reply within two weeks, thereafter. The case was fixed for hearing on the 11.01.2022 however, the matter could not be heard due to vacancy of Member Law in the Commission from 09.12.2021 to 04.02.2022.
5. At the next hearing held on 15<sup>th</sup> March' 2022, the representatives who appeared for the petitioner and Respondent concluded their arguments. As requested, the parties were directed to file their written arguments within a week and the case was reserved for order.



6. Vide letter dated 27.12.2021, Respondent (MP Paschim KVVCL) broadly submitted the following in its reply to the petition:

*"1. That, broadly petitioner has challenged the billing of additional surcharge payable under Section 42(4) of the Electricity Act 2003 (The Act) on the following grounds:*

- a) Distribution Licensee failed to fulfill its statutory obligation to supply power.*
- b) Levy of 'Additional Surcharge' is not applicable in those cases where power is being drawn by a consumer from its own 'Captive Generating Plant'.*
- c) Requirement of Section 42(4) not met in the present case as captive user has right of open access under Section 9(2).*
- d) Petitioner's captive power plant is based on non conventional sources and is therefore, liable to be the promoted and protected as per the provisions of Section 86(1)(e).*
- e) As per Provisions of the Electricity Act 2003 read with the National Electricity Policy and national tariff policy captive generation is freely permitted.*
- f) MPPKVVCL has no stranded capacity on account of the Petitioner's CGPs.*

*2. 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.*

*3. Before controverting to the submissions of the petitioner, it would be appropriate to place on record the rationale behind Additional Surcharge as contemplated in Section 42(4) with the scheme of Act 2003.*

***RE: Universal Supply Obligation and Rational behind levy of additional surcharge:***

*4. The Levy of additional surcharge is provided in Section 42 (4) of the Act which reads as under:*

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

5. From bare perusal of Section 42(4), it may be seen that the State Commission is empowered to levy additional surcharge to meet the fixed cost arising out of obligation to supply. It is submitted that although the levy of additional surcharge is provided in the Section 42 (4) of the Act, Section 43(1) of the Act is foundation for levy of additional surcharge. Section 43 of the Act provides that distribution licensee (DISCOM) has a universal supply obligation (USO) and required to supply power as and when demanded by any owner /occupier of premises in its area of supply. The relevant provision of Act is reproduced as under:

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

6. The distribution licensee has a duty to supply to each and every premises in its licensed area of supply. Premises also include premises of captive consumer and there is no distinction in this regard under the statute. In other words duty to supply does not come to an end upon the consumer/owner of the premises decides to avail open access or consume power from own captive generating plant and in terms of the Statutory provision the distribution Licensee has the continued obligation to supply electricity on demand at any time.

7. Hon'ble APTEL in petition No. 1/2006 in case of **Hindalco vs WBERC** held that Discom has universal supply obligation towards every **owner or occupier of any premises** of its area of supply even if the said consumer is availing supply through captive route. The relevant extract is reproduced as under:

17. The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of Section 86(1) (a), Section 42 and Section 49 of The Electricity Act 2003 as well as by losing sight of the object behind the said provisions. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to **Sections 42 (2); (4) and Section 62 of The Act**. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area DISCOM / distribution licensee. We have already held so in Appeal No.34 of 2006 Bhusan Steel vs. W.B.E.R.C.

.....  
20. **The provisions of The Electricity Act 2003 on the other hand**

*enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Belurmah is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.*

23. *On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP.....*
24. *There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual relationship with the area distribution licensee or shall cease to be a consumer of the area DISCOM/ Licensee.....*
8. ***Petitioner itself in the petition (ref para 9) admitted that a distribution licensee has an obligation 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 or a captive user. Once Petitioner admitted the universal supply obligation in respect of captive user under Section 43 of the Act, the liability of additional surcharge under Section 42(4) cannot be denied which payable to meet the fixed cost of distribution licensee arising out of his very same obligation to supply.***
9. *It is submitted that the answering respondent who is required to meet the requirement/ demand of all consumers, **owner or occupier of any premises** 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.*

10. *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. If this fixed cost of stranded asset is not allowed to be recovered from appellants and other similar consumers consuming power from other source of supply, then in such a case such cost shall be recovered from the other consumers of the answering respondent by increasing their tariff and such other consumers will be cross subsidising the persons taking Electricity from other sources, which would be unfair, unjust and inequitable. This obviously would not have been the intention of the legislature.*
  
11. *Any immunity from recovery of Additional Surcharge also from persons who have captive generation and consumption would be contrary to the very scheme and provisions of the Act. The Act consciously provides for exemption from charges to captive generation and captive use in a limited aspect namely from payment of cross subsidy surcharge as per sections 38(2)d) – proviso; 39(2)d) – proviso; 40(1)c) – proviso; and 42(2- proviso. However when it comes to section 42(4) dealing with Additional Surcharge there is no such exclusion which makes it abundantly clear that there was no intention to exclude the same for captive generation and captive use.*
  
12. *The issue of open access and rationale behind levy of surcharge came under consideration of the Hon'ble Supreme Court in case of **Sesa Sterlite Limited v OERC & Others ( dated 25/04/2014 (2014 8 SCC 444).** The relevant part of the said judgment is reproduced as under:*
  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 of 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 nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers.** What is important is that a consumer situated in an area is bound to contribute to subsidizing a low-end consumer, if he falls in the category of subsidizing consumer. Once a cross-subsidy-surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. **A fortiori, even a licensee which purchases electricity for its own consumption either through a “dedicated transmission line” or through “open access” would be liable to pay Cross Subsidy Surcharge under the Act. Thus, Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution licensee from the loss of cross subsidy that such Distribution licensee would suffer by reason of the consumer taking supply from someone other than such Distribution licensee.***
13. *In view of the above it can be safely concluded that:*
- a) Section 42(4) providing for levy of additional surcharge is aimed to meet the adverse financial situation caused by arrangements made*



- for complying with the obligation to supply,
- b) The additional surcharge is nothing but compensation from a person who avails power other than from distribution licensee of area.
  - c) The compensatory open access charges are payable notwithstanding the fact that line of distribution licensee are being used or not.
  - d) For levy of additional surcharge, it is sufficient that power is being procured from any source other than the distribution licensee of area.
  - e) Even the captive generating plant falls within the four corner of such 'other source' and there is no restriction regarding status of such other source captive or otherwise.
14. It is submitted that Section 42(2) of the Act deals with the 'cross-subsidy surcharge' while Section 42(4) deals with 'additional surcharge'. The Act clearly provides exemption from Cross-Subsidy Surcharge to a person who has established a captive generating plant for carrying the electricity to the destination of his own use [vide fourth proviso to Section 42(2)]. However, no such exemption has been provided with respect to 'Additional Surcharge' under Section 42(4). Thus in any view of the matter, the levy of additional surcharge on the petitioner is wholly justified.

**SUBMISSIONS ON ISSUES RAISED BY PETITIONER:**

**RE: Distribution Licensee failed to fulfill its statutory obligation to supply power.**

15. It is wrong and denied that answering respondent has failed to fulfill its obligation under Section 43(1) of the Act. Further, failure to meet any obligation is not the subject matter of instant petition and petitioner was free to raised its grievance in this regard as per provision of the Act and Regulation issued there under.
16. It is noteworthy to mention that the submission regarding failure of obligation is contradictory of petitioner's own submission regarding execution of supplementary agreements from time to time to meet its power requirement. Petitioner is again contradicting itself by submitting (ref para 20) that the petitioner is only using whatever energy is generated from steam in its production facilities and not depending upon it for power supply to meet its power requirements.
17. In view of above it is submitted that petitioner cannot escape the statutory liability of additional surcharge upon consumption from other source based on such unsubstantiated, vague and unspecific allegation.

**RE: Additional surcharge is not leviabale on captive users:**

18. Petitioner has sought to create difference in the CGP and non captive generating plant with regard to levy of additional surcharge and it is the submission of the petitioner that in case of CGP both cross subsidy surcharge and additional surcharge are exempted.
19. In this regard it is stated that petitioners have filed present petition under

Section 86(1)(f):

86. Functions of State Commission.–(1) The State Commission shall discharge the following functions, namely:–

.....

(f) adjudicate upon the disputes between the licensees and **generating companies** and to refer any dispute for arbitration;

20. It may be seen that aforesaid provision only provides for the adjudication of disputes between generating companies and licensees. There is no separate provision regarding disputes between captive generating plants and licensees. It only means that as per Act generating companies includes captive generating plant. Accordingly by petitioner's own admission (by filing petition under Section 86(1)(f)) there is no difference in captive generating plants and other plants as far as levy of additional surcharge is concerned. Further, Section 2(47) of the Act defines term open access as under:

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

21. It may be seen that open access availed by any person engaged in the generation whether captive or otherwise shall be regulated by the Commission through Regulations.

22. Simlailry, MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005 2005 (here in after referred as 'OA Regulation 2005') defines the term "Open Access Customer" 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.

It may be seen that in line with the provision of the Act aforesaid Regulation does not make any differentiation in the generating company and a captive generating plant. In other words generating company includes captive generating plant.

23. In case of **A.P. Gas Power Corporation Ltd v. A.P. Electricity Regulatory Commission (AIR 2006 AP 12)** the Hon'ble Andhra Pradesh High Court held that except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant. Relevant portion of the ruling of Hon'ble Court, vide order dtd. 27/07/2005 is mentioned below-

19. A reading of Sections 9, 39, 40 and 42 of the Act would lead to the ensuing conclusion. A person or a company is entitled to set up a

power plant for his/ its exclusive use. The power generated by such captive generating plant set up by a person has to be distributed and transmitted - in a given case; by a distribution licensee or transmission licensee. **These licensees are entitled to collect transmission charges or wheeling charges as the case may be including surcharge from generating companies including from persons who set up captive generating plants but surcharge for cross-subsidy is not leviable on captive generating plant.** That is the reason why the Parliament thought it fit to define 'generating plant' set up by any person for his own use as captive generating plant separately. **Except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant.** This is further made clear by Electricity Rules, 2005. If 26 per cent of the ownership in a plant is held by captive users and 51 per cent of electricity produced is used by them, a generating plant can be treated as a captive generating plant. It only means that the electricity generated over and above 51 per cent has to be necessarily go to the grid, in which event a transmission licensee and distribution licensee come into picture. **Even in the case of distribution and transmission of 51 per cent aggregate electricity generated in a captive generating plant, is to be wheeled to the destination of captive use, the same procedures have to be followed. Merely because a captive generating plant at least to the extent of 51 per cent consumes its electricity for captive use, the State Transmission Utility or a transmission licensee or distribution licensee, cannot discriminate while discharging their duties and functions.**

24. In view of above as far as levy of open access charges is concerned, except to the extent of non-levy of surcharge for cross-subsidy, there is no distinction in law between a non captive generating plant and captive generating plant. Thus, submission of the petitioners in this regard is contrary to the provisions of the Act and accordingly liable to be rejected.

**RE: Conditions of Section 42(4) not met in the present case:**

- (a) **Whether arrangement of availing power from captive generating plant amounts to 'supply'?**

25. In this regard petitioner is relying upon the following definitions given in the Act:

2(70) —supply, in relation to electricity, **means** the sale of electricity to a licensee or consumer;”

26. Relying upon the aforesaid definition petitioner is contending that while consuming power through captive route there is no 'sale of electricity' hence additional surcharge is not payable. It is submitted that the petitioner is relying on the incomplete definition of the term 'supply' given in the Act. The

complete definition provided in the Act is reproduced as under:

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

27. It may be seen that as per Act term ‘supply’ would means sale unless context otherwise requires. If context requires otherwise the meaning of term ‘supply’ may vary in the different provisions of the Act.
28. Issue of contextual meaning of any term defined in any statute considered by the Hon’ble Supreme Court in the case of **The Vanguard Fire and General Insurance Co. Ltd vs M/s. Fraser And Ross And Another (AIR 1960 SC 971)** . The relevant part of the said judgment is reproduced as under:

“6.... It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them **and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word "insurer " in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word " insurer " as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning.**”

29. The above judgments clearly support the view that, it cannot be stated as an absolute proposition of law that the expression ‘**means**’ wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be provisions in the very same statute in which meaning of any term may be different depending upon the context.

30. *It is submitted that in the issue under consideration the context is drawl of power from any source other than the distribution licensee of area and additional surcharge is being levied to compensate the distribution licensee. It is noteworthy to mention that even while performing the duties of common carrier a distribution licensee is only concerned with the conveyance of electricity from point of injection to the point of drawl. Distribution licensee has nothing to do with the commercial arrangement (i.e sale or otherwise) between sender and receiver of the electricity. Therefore in the present context meaning of 'supply' cannot be 'sale' as given in the definition clause.*
31. *Petitioners are contending that they are using dedicated transmission line (para 17). Therefore it is necessary to refer the definition of 'dedicated transmission line' provided in the Act:*  
*2(16) –dedicated transmission lines|| means any electric **supply**-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations, or generating stations, or the load centre, as the case may be;*

*It may be seen that dedicated transmission line is nothing but a **supply** line. Therefore, while consuming power from the captive generating plant through dedicated transmission line certainly there is 'supply' of electricity by captive generating plant to the premises of the captive consumers even though 'sale of electricity' may not taking place.*

32. *With regard to meaning of term 'supply' used in the Section 42(4) kind attention of the Hon'ble Commission drawn towards the following two definitions provided in the Act:*  
*Section 2(8) "Captive generating plant" means a power plant set up by any person to **generate electricity** primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association;*

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

*From the combined reading of aforesaid two definitions it can be safely concluded that:*

- a. *A Captive generating plant **generates** electricity primarily for use of its owners.*
- b. *Electricity whenever **generates** it would be for giving **supply** to any premises. In other word, except for the purpose of **supply** there cannot be any generation of electricity.*



33. Therefore, contention of the petitioner that although they are generating electricity from captive generating plants but there is no 'supply' of electricity is contrary to the aforesaid provisions of the Act.

34. Hon'ble Supreme Court in the matter of **Civil Appeal No. 1879 of 2003 Karnataka Power Transmission Corpn. & Anr. Vs Ashok Iron Works Pvt. Ltd. (AIR 2009 SUPREME COURT 1905)** held that supply of electricity doesn't mean sale. The relevant part of the said judgment is reproduced as under:

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

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

.....

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

.....

24. Learned counsel urged that the definition 'service' is of limited nature and is limited to the providing facilities in connection with electricity. According to him, the facility is an expression which facilitates the supply of electricity to an installation and the definition of service does not cover supply of electricity. **This contention of the learned counsel is founded on erroneous assumption that supply of electricity is a sale of electricity and the use of expression 'supply' is synonym for 'sale'. We have already noticed above, which we need not repeat, that supply of electricity to a consumer by KPTC is not sale of electricity. The expression 'supply' is not synonym for 'sale'. We reiterate what has been stated by this Court in Southern Petrochemical Industries Co. Ltd. (supra) that supply does not mean sale....."**

*In view of above pronouncement of Hon'ble Supreme Court it is clear that 'supply' does not always mean sale and term 'supply' cannot be used as synonym for 'sale' as sought to be established by the petitioner.*

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

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

36. *This, Hon'ble Commission in the case of Malanpur ( P.No. 02 of 2007) termed the arrangement between captive generating plant and captive user as 'supply':*

*18. Therefore, the Commission concludes from the combined reading of **Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules**, that captive generating plant and dedicated transmission line can be constructed, maintained and operated by a person for generation of power and supply to its captive users.....*

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

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

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

38. *Aforesaid conclusion drawn by us found support from the meaning of term 'supply' given in various dictionary:*

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

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

*☐ Electrical power is supplied by underground cables.*

**Oxford Advance Dictionary**

*Supply*

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

*n.(pl. Supplied) **providing of what is required**, necessary stores and*

provision संचय, सामग्री, आवश्यक पदार्थ, रसद, अवस्यका की पूर्ति, **Water Supply**; जल आपूर्ति

Therefore in the case in hand the term supply is required to assign the same meaning which a common man understand from this term (i.e. providing electricity, to furnish electricity) and not the sale .

39. It is also noteworthy to mention that in Section 42(4) term '**receive**' is preceded by the term '**supply**'. If for the purpose of section 42(4) 'supply' only means '**sale**' then in that case legislature would have used term '**purchase**' in place of term '**receive**'. Use of term 'receive' further fortifies our conclusion that in the present context 'supply' does not mean sale.
40. That, following are the summary of some other provisions of the Act where term 'supply' would have different meaning from what is provided in the definition clause:

<u>Provisions</u>	<u>Meaning of term 'supply'</u>
24. Suspension of distribution licence and sale of utility.-(1) If at any time the Appropriate Commission is of the opinion that a distribution licensee- (a) has persistently failed to maintain uninterrupted <b>supply of electricity</b> conforming to standards regarding quality of electricity to the consumers; or .....	Here supply means make available electricity and not the sale of electricity. Distribution licensee cannot compromise quality of supply even if it is making available electricity to a captive consumer as common carrier.
56. <b>Disconnection of supply in default of payment.</b> -(1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, <b>cut off the supply of electricity</b> and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:	Here the supply means availability of electricity and not the sale. Otherwise distribution licensee cannot disconnect supply even if a captive consumer not makes payment of wheeling charges or other dues of distribution licensee.
53. <b>Provision relating to safety and electricity supply.</b> -The Authority may, in consultation with the State Government, specify	Here supply means making available

<p>suitable measures for- .....; <b>(c) prohibiting the supply</b> or transmission of electricity except by means of a system which conforms to the specification as may be specified;</p>	<p>electricity. Safety provisions are applicable notwithstanding the sale is being done or not.</p>
<p><b>Section 139. (Negligently breaking or damaging works):</b> Whoever, negligently breaks, injures, throws down or damages any material connected with the <b>supply</b> of electricity, shall be punishable with fine which may extend to ten thousand rupees.</p>	<p>Here expression supply would only mean making available electricity.</p>
<p><b>Section 140. (Penalty for intentionally injuring works ):</b> Whoever, with intent to cut off the <b>supply</b> of electricity , cuts or injures or attempts to cut or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with fine which may extend to ten thousand rupees.</p>	<p>Any other interpretation would mean that damaging the captive generating plant is not an offence because there is no sale of electricity.</p>

41. In view of above it can be safely concluded that whenever a captive generating plant make available electricity to its captive consumer it is nothing but the 'supply' even though it may not be sale.

42. In view of above petitioner is liable to pay additional surcharge to the answering respondent.

**b. 'Whether petitioner consuming power from captive generating plant is a 'consumer'?**

43. Petitioners are contending that only a consumer is liable to pay additional surcharge and not the captive user (ref 46(b)(j)). In this regard it is stated that the Act defines the term 'consumer' as under:

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

44. It may be seen that Section 2(15) have two parts:

(i) Any person who availing supply from a licensee or generating company is a consumer.

(ii) Any person whose premises is connected with the network of licensee is also a consumer.

45. In **Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015)** , Hon'ble Apex Court held as under:

37. Further, the contention of the appellants that the renewable energy purchase obligation can only be imposed upon total consumption of the distribution licensee and cannot include open access consumers or captive power consumers is also liable to be rejected **as the said contention depends on a erroneous basic assumption that open access consumers and captive power consumers are not consumers of the distribution licensees.....**The cost of purchasing renewable energy by a distribution licensee in order to fulfil its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted, **then such open access consumers or captive power consumers, despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such distribution licensee any time they want, are not required to purchase/sharing the cost for purchase of renewable power. The said situation will clearly put the regular consumers of the distribution licensee in a disadvantageous situation vis-à-vis the captive power consumers and open access consumers who apart from getting cheaper power, will also not share the costs for more expensive renewable power.**
46. Hon'ble Supreme Court in the case of *Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior v. State of M.P (AIR 1963 SC 414)* held as under:  
5.....**A producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself....."**
47. Hon'ble Andhra Pradesh High Court in *Rane Engineering Valves Ltd, Vs State of Andhra Pradesh and others (Writ Petition Nos. 6095 of 2004 Dated :19-05-2016)* held that a producer of electricity can also be a consumer and such person is playing dual role. The relevant part of the said judgment is reproduced as under:  
25.12. ....**As held in Jijajee Cotton Mills Ltd that a producer of electricity can also be a consumer. Such person is playing a dual role....."**
48. In view of above provision of the Act, petitioner is 'consumer' for the purpose of levy of additional surcharge on following counts:
- a. Petitioners are maintaining contract demand with the answering respondent and are being supplied with electricity for their own consumption accordingly.
  - b. Premises of the petitioners are connected with the works of a licensee for the purpose of receiving electricity.
  - c. Premises of the petitioner are situated in the area of supply of the answering respondent.
  - d. Captive consumers are also the consumer of the distribution licensee.



- e. *A person who has set up a captive generating plant has dual role, one as a consumer and another as a generator. As per Act additional surcharge is payable in the capacity of consumer and not as generator.*
49. *In view of above, petitioner is consumer and accordingly liable to pay additional surcharge.*
- c. ***Whether there is any element of 'Permit'/permission from State Commission exist in case of a captive consumer consuming power through open access:***
50. *That, petitioners are contending that right of open access of any person who has setup a captive generating plant is governed by the provisions of Section 9 and not by the provisions of Section 42. Hence, captive consumers are exempted from levy of open access charges i.e cross subsidy surcharge and additional surcharge.*
51. *In this regard it is stated that Section 9 comes within the Part III of the Act, which deals with the subject matter of 'Generation'. It is reiterated that the additional surcharge is not being levied on the petitioner in the capacity of generator but in the capacity of consumer. The petitioner has dual role in this regard.*
52. *The Section 9 is reproduced as under:*
9. *Captive Generation: -- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*
- Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.*
- (2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:***
- Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be;*
- Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.*
53. *It may be seen that Section 9(2) merely confers right of open access.*

However, what the 'open access' is as per scheme of the Act is not provided in the Section 9. The Scheme of open access with regard to distribution sector is provided in Section 2(47) read with Section 42 of the Act. Section 2(47) of the Act again reproduced as under for ease of reference:

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

54. As per aforesaid definition it may be seen that open access shall always be subject to regulation issued by this Hon'ble Commission. The aforesaid definition of open access cover every person engaged in the generation i.e captive or otherwise. Hence, open access under section 9(2) is also subject to Regulations of the Hon'ble Commission. Further from the perusal of proviso to Section 9(2) it may also be conclude that such right of open access is with regard to transmission open access and not with regard to distribution open access.
55. It is submitted that provisions of Section 9 are in the nature of enabling provision to set up the plant and for evacuation of power from such plant. None of these provisions are dealing with the open access charges. Thus, it can only be concluded that as far as issue of levy of open access charges is concerned, respective provisions of the Act (i.e Section 38- Central Transmission Utility, Section 39-State Transmission utility, Section 40-Transmission licensee, Section 42-Distribution licensee), are equally applicable for the captive generating plant and non captive generating plant. This, conclusion found supports from the fifth proviso to section 39 (2)(d), fifth proviso to section 39 (2)(d), fifth proviso to section 40 (c) and fourth proviso to section 42(2) of the Act vide which specific exemption has been granted to captive consumer from the levy of cross subsidy surcharge. Since, there is a specific mention of captive generating plant in Sections 38/39/40/42 of the Act, it cannot be contended by the petitioner that captive generating plants are not governed by these provisions and solely comes under Section 9. Further, in that case there was no need to provide exemption from the cross subsidy surcharge vide fourth proviso to section 42(2).
56. In view of above, it can be safely concluded that Section 9 of the Act does not provides any immunity to any person setting up a captive generating plant from the levy of any statutory charges. Accordingly, reliance upon the Section 9 to escape the liability of additional surcharge is misplaced. As such petitioner is liable to pay additional surcharge to the answering respondent.
57. 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.*

.....

58. *It may be seen that aforesaid Regulation includes in its ambit all person availing open access whether captive generating plant or other generating plants. Further open access is subject to the payment of open access charges which includes additional surcharge.*

59. *In view of above statutory provisions it may be concluded that permission does not mean that permission shall be granted to individual consumers by this Hon'ble Commission by its order on case to case basis. Permission of open access is governed by the Regulations commonly for all users of the transmission/distribution system whether captive or otherwise. Term 'permit' used in the Section 42(4) should be construe in the light of term 'regulate' used in Section 2(47). Term 'regulate' is much wider than the term 'permit'. In other words term Regulate includes in its ambit 'permission'.*

60. *In the present case, the petitioner without availing open access is receiving supply of electricity from a source (captive solar power plant) other than the distribution licensee of his area of supply. The petitioner is receiving supply of electricity from its captive solar power plant to its manufacturing unit through dedicated line. 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 2850 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.

61. In view of above submission even in case of captive user/consumer there is element of '**permission**' and this Hon'ble Commission has granted the permission as per aforesaid provisions of OA Regulations 2005. Accordingly, petitioner is liable to pay additional surcharge.
  - d. **Levy of 'Additional Surcharge' is not applicable in those cases where there is no open access/use of distribution system and no billing of wheeling charges.**
62. That, contention of the petitioner is that since wheeling charges (as no open access availed) are not being billed, additional surcharge would also not be applicable, is without any merit. In this regard 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.
63. **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.**
64. 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. Therefore, even if wheeling charges are not being billed, additional surcharge is payable.
65. Petitioner is relying upon the judgment of Hon'ble APTEL in the matter of Kalyani Steels Limited vs Karnataka Power Transmission (Petition No. 02/2005 order dated 29/03/2006). It is submitted the aforesaid judgment is not applicable in the present circumstances of the case due to following reasons:
 

**Kalayni Steel creates the distinction in the levy of cross subsidy surcharge and additional surcharge whereas in a later judgement Hon'ble Supreme Court in Sesa Sterlite supra treated the both cross subsidy surcharge and additional surcharge similarly being compensatory in nature and held as leviable irrespective of fact that network of distribution licensee used or not. Therefore, Kalayni Steel stands overruled by Hon'ble Supreme Court and no more a good law.**



*In Kalayni Steel case consumer was connected directly to CTU. The similar argument has come before Hon'ble Maharashtra Electricity Regulatory Commission in the matter of **Indorama Synthetics (India) Limited. V/s Maharashtra State Electricity Distribution Co. Ltd.( Case No. 344 of 2019)**. Vide order dated dated 31/12/2019 Hon'ble MERC held as under:*

**Issue 2:- Whether ASC is applicable to IRSL being an EHV consumer connected to InSTS?**

27. IRSL contends that it is connected directly to the 220 KV system of STU/MSETCL as a part of InSTS. Therefore, no part of distribution system and associated facilities is being used by IRSL for drawing/wheeling power through STU, from injecting point to IRSL's plant. Regulation 14.6 (b) of the DOA Regulations provides that wheeling charges shall not be applicable in case a Consumer or Generating Station is connected to the Transmission System directly. **Since IRSL is not liable to pay wheeling charges, the question of payment of ASC on wheeling charges does not arise.**

37. IRSL has further contended that in its Judgment dated 20 November, 2015 in Appeal No. 84 of 2015, the ATE has held that no wheeling charges and additional charges are payable if no part of distribution system and associated facilities of the Distribution Licensee is used and that this Judgment has been upheld by the Hon'ble Supreme Court.

**38. On this contention, the Commission is of view that context of the aforesaid Judgment passed by the ATE is different since the Open Access consumer therein had opted to source power from private generator on long term basis by obtaining Open Access from CTU and not in the Intra-State Transmission Network. Since the consumer therein had become a regional entity, it was not within the jurisdiction of the State Commission and State Commission's Regulations were not applicable for those transactions.** Same is not the case here. In the present case, IRSL continues to be connected to the State's network covered by State Commission's regulatory framework and further it is pursuing its application for CD so as to become a consumer of MSEDCL once again. As per DOA and TOA Regulations it would be binding on IRSL to pay the ASC.

66. Three judge bench of Hon'ble Apex Court in the matter of **Unicorn Industries v. Union of India [2019] 112 taxmann.com 127 (SC) (CIVIL APPEAL NOS. 9237 AND 9238 OF 2019)** vide **order dated 06/12/2019 overruled the proposition i.e if one kind of duty is exempted, other**

**kinds of duties based thereupon automatically fall.** Relevant extract of the order of Hon'ble Apex Court in the **Unicorn Industries v. Union of India**

:

"41. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. **The reason employed in SRD Nutrients (P.) Ltd. (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.**"

67. In view of above ruling of Hon'ble Supreme Court 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.
68. 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."
69. 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.
70. In view of above additional surcharge is payable even if there is no billing of wheeling charges.

71. 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 09<sup>th</sup> 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.**

72. 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 Limited v. Orissa Electricity Regulatory Commission and Others (Civil Appeal No. 5479 of 2013) 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. It is submitted that petitioners have sought to treat the cross subsidy surcharge and additional surcharge differently whereas Hon'ble Supreme Court in the aforesaid judgment clearly considered the both the surcharges as compensatory in nature. Accordingly open access or use of distribution is not a prerequisite for levy of compensatory open access charges.

73. Here, it is also noteworthy to mention that 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. In this regard kind attention is drawn towards the findings of Hon'ble UERC in the matter of **M/s Amplus Solar Power Pvt. Ltd. & another V.s Uttarakhand Power Corporation Ltd. & another (petition No. 04 of 2018).** **The relevant part is reproduced as under:**

"Accordingly, the consumer will not be liable to pay Wheeling Charges and transmission charges as the grid will not be used for supply of power from generating plant to the consumer. However,

*a continuous support from the grid will be provided for reference voltage synchronization to operate inverters. Section 2(47) of the Act defines open access as “the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;”.*

***Hence, the arrangement of taking continuous support of the grid by the generator for supplying power to the consumer is akin to sale under open access. Therefore, the consumer shall be liable to pay cross subsidy surcharge and additional surcharge, if any, as determined by the Commission from time to time. The consumer is not required to apply for open access since it is not using the lines of the licensee.”***

74. *Thus petitioner is availing continuous grid support, in the form of parallel operation of its generating plant. Accordingly, petitioner is liable to pay additional surcharge.*
75. *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.*

***RE: Petitioner’s captive power plant is based on non conventional sources and is therefore, liable to be the promoted and protected as per the provisions of Section 86(1)(e) :***

76. *It is the submission of the petitioner that its power plants are non conventional generating plants and is therefore, liable to be the promoted and protected as per the provisions of Section 86(1)(e). The eligibility of the petitioner’s plant as ‘non conventional plant’ is not the subject matter of instant petition. However, it is stated that Section 86(1)(e) does not provides any immunity from any statutory charges payable as per the different provisions of the Act.*
77. *At this juncture it would be appropriate to refer the relevant provisions with regard to the issue of Additional Surcharge under MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations ,2010 :*
- (i) Regulation 12.2 of aforesaid Regulations after 7<sup>th</sup> amendment and prior to 7<sup>th</sup> amendment is reproduced below:*
  - (a) Amended Regulation 12.2 of MPERC cogeneration Regulations,2010 provides as under:*

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

- (b) Prior to the 7<sup>th</sup> Amendment, the said regulation provided as under:  
**“12.2 Wheeling charges, Cross Subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time. Captive Consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy procured from Renewable Sources of Energy.”**

*(Emphasis Supplied)*

78. 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 but the same has been upheld by the Hon’ble High Court. Hence, the applicability of open access charges shall be as per provisions under Section 42 of the Electricity Act’ 2003.
79. In this regard it is also relevant to mention that this Hon’ble Commission recently notified Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Regulations 2021). The provisions of the Regulation 11.2(d) of the said Regulations is reproduced as under:

*The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under.*

*It may be seen that this Hon’ble Commission specifically clarified that captive consumers are liable to pay additional surcharge.*

80. Further, Regulation 5.2 of the very same Regulations 2021 provides as under with regard to the ownership of the power evacuation facilities developed by any developer of power plant:



5.2. 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).

81. It is settled legal position that Regulation once notified shall be treated as part of the Electricity Act 2003 and this Hon'ble Commission cannot ignore the provision of its own Regulations while acting as adjudicator under Section 86(1)(f). Accordingly, as per explicit provision of the Regulations issued by this Hon'ble Commission it is clear that except from the levy of cross subsidy surcharge captive consumers are liable to pay all applicable charges including additional surcharge. Further power evacuation infrastructure is the part of the distribution system.

**RE: Existence of Stranded capacity and effect of payment of fixed charges on contract demand:**

82. 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 so determined made applicable to all consumer and no exclusion provided with regard to captive consumers. Similarly, the additional surcharge has been made applicable to all consumer notwithstanding the fact that consumer may have contract demand with the distribution licensee. Accordingly, these tariff orders have attained finality in this regard. The Tariff order or computation of additional surcharge cannot be challenged in the present proceedings initiated under Section 86(1)(f) of the Act for resolution of dispute.

83. Petitioner is contending that it is maintaining contract demand hence there is no burden on the answering respondent so as to pay additional surcharge. This claim of petitioner is wholly erroneous on the following grounds:

39.1. **Fixed Cost towards generators not being recovered through Fixed charges on contract demand and being recovered through energy charges:**

39.1.1. It is submitted that fixed cost of energy is being recovered through energy charges instead of fixed charges. In this regard relevant part of the Regulation 42 to the "Madhya Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for

*Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, {2015(RG-35 (II) of 2015} reproduced as under:*

*“42. Determination of tariffs for supply to consumers*

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

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

***Emphasis supplied***

*39.1.2. It may be seen that the cost of energy supplied to consumer along with the distribution loss is being recovered through energy charges and not the fixed charges. Therefore, claim of the petitioner that fixed charges (demand charges/stand by charges) for the contract demand is taking care of its share of fixed cost of liability of the distribution licensee towards its generators is wholly erroneous.*

*39.2. **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:***

*39.2.1. 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.*

*39.2.2. It may be seen that as per tariff order fixed charges are always billed to any consumer after deducting the demand availed from any other source. Hence, fixed charges being paid by the petitioner cannot be attributed to the demand /consumption from other source of supply.*

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

*39.3.1. 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**

<b>S.No.</b>	<b>Particular</b>	<b>Amount (Rs. In Crs)</b>	<b>% of Total ARR</b>
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**

<b>S.No</b>	<b>Particular</b>	<b>Amount (Rs. In Crs)</b>	<b>% of Total ARR</b>
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%

**39.3.2.** 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%.

**39.3.3.** It is clear from the above analysis that the Fixed Charges recovery in comparison with the actual Fixed Cost of distribution licensees in the state is significantly lower. Therefore liability of additional surcharge cannot be escaped on account of payment of fixed charges on reduced contract demand.

**RE: As per Provisions of the Electricity Act 2003 read with the National Electricity Policy, national tariff policy captive generation is freely permitted.**

84. Petitioner has submitted that as per scheme of the Electricity Act 2003 captive generation is freely permitted and as per provisions of the National Electricity policy/National Tariff Policy captive generation has been promoted. Accordingly additional surcharge should not be levied on captive users.

85. In this regard it is reiterated that the additional surcharge is not being levied on the petitioner in the capacity of generator but in the capacity of consumer. The petitioner has dual role in this regard.

86. *It is submitted that similar argument by placed by the captive generators in the matter of **Hindustan Zinc supra** before Hon'ble Supreme Court. It was contended by appellant captive generating plants in that case that the Act of 2003 has totally liberalized the establishment of captive power plants and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, the Regulatory Commission had no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source. The submission of petitioner captive generating plants has recorded in the para 5 of the judgment dated 13.05.2015. The same is reproduced as under:*

5. *Learned senior counsel for the appellants contended that the impugned Regulations are ultra vires to Sections 7, 9, 86(1)(a) and (e) and 181 of the Act of 2003, and also the fundamental rights guaranteed to the appellants under Articles 14, 19(1)(g) and it is in violation of Article 265 of the Constitution of India, the National Electricity Policy, 2005 and the Tariff Policy, 2006. They have contended that the Act of 2003 has been enacted by the Parliament with a view to encourage participation of private sectors involved in generation of electricity and with that objective, generation of electricity was de-licensed and captive generation was freely promoted and in this manner the impugned Regulations are violative of the basic object and intendment with which the Act was enacted. Further, it has been asserted that the National Electricity Policy, 2005 as well as the Tariff Policy, 2006 were framed to promote production of energy and utilization thereof to the maximum extent in respect of the captive generation plants and not to compulsorily force them to lower down their production of energy by making them purchase renewable energy as per the newly framed the impugned Regulation No.9 of Regulations 2010. It was also contended by them that the Act of 2003 has totally liberalized the establishment of captive power plants and kept them out of any licensing and regulatory regime, neither any licence nor any approval from any authority is required to install a captive power plant and thus, the RERC had no jurisdiction to impose any obligation for compulsory purchase of electricity from a renewable energy source; the renewable energy source and captive generating plant are both alternative sources of energy which have to be promoted, one cannot be placed on higher or lower footing. The RERC by imposing a compulsory obligation to purchase electricity from renewable source and to pay surcharge in case of shortfall in meeting out the RE obligation as per the Regulation referred to supra has acted beyond the object sought to be achieved under the National Electricity Policy, 2005 as well as the Act of 2003.*

87. *Rejecting the submission of the captive generating plants Hon'ble Supreme Court held as under:*

*"34. The above contention is rightly repelled by the learned counsel for*

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

....

88. Further, the contention of the appellants that the renewable energy purchase obligation can only be imposed upon total consumption of the distribution licensee and cannot be imposed upon the total consumption of the distribution licensee and cannot include open access consumers or captive power consumers is also liable to be rejected as the said contention depends on a erroneous basic assumption that open access consumers and captive power consumers are not consumers of the distribution licensees. The cost of purchasing renewable energy by a distribution licensee in order to fulfil its renewable purchase obligation is passed on to the consumers of such distribution licensee, in case the contention of the appellants is accepted, then such open access consumers or captive power consumers, despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such distribution licensee any time they want, are not required to purchase/sharing the cost for purchase of renewable power. The said situation will clearly put the regular consumers of the distribution licensee in a disadvantageous situation vis-à-vis the captive power consumers and open access consumers who apart from getting cheaper power, will also not share the costs for more expensive renewable power.
89. In view of above pronouncement of Hon’ble Apex Court, it is clear that captive consumers are also the consumer of the distribution licensee and are subject to the regulatory jurisdiction of the State Commission. Accordingly captive consumer doesn’t enjoy any immunity from payment of open access charges except the cross subsidy surcharge.

**OTHER SUBMISSIONS OF ANSWERING RESPONDENT**

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

90. Hon’ble APTEL vide order dated 11.06.2006 in case of **HINDALCO Industries Limited Vs WBERC Petition No. 01/2006**, upheld the levy of additional surcharge on the electricity consumed through captive route. Para 11 of the said judgment recorded the finding of the West Bengal Electricity Regulatory Commission which had been challenged by the consumer before APTEL. The said para is reproduced as under:



11. The Commission determined the wheeling charges at 83.54 paise/kwh and the same shall be subject to appropriate annual revision. The Commission also concluded that the HINDALCO is liable to pay additional surcharge and the distribution licensee has been directed to submit a report to the Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer **from captive route** and thereafter quantum of additional surcharge payable by the open access customer shall be assessed and determined.

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

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

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

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

43. **As a result of our discussions, we record our findings as hereunder:**

.....  
 (IV) **On point 'D', we hold that the appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003.**

91. This Hon'ble Commission in the Petition No. 02/2007 (M/s. Malanpur Captive Power Limited v. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.) has considered the issue of levy of additional surcharge on the electricity consumed from own Captive Generating Plant without using the distribution system of the licensee. Hon'ble Commission has noted the submission of the petitioners in the para 3 and 4 of order dated 22.05.2007. The same is reproduced as under:

3. It has been mentioned in the Petition that the Petitioner's Project is for captive generation of power, for its current captive user shareholders namely SRF, Montage and Supreme. The other sponsor

shareholders are Wartsila India Ltd. and Compton Greaves Ltd. The installed capacity of the project is 26.19 MW but fuel tie up has been granted for 20 MW only. Out of this available capacity, the Captive Power Plant, (CPP) users are expected to consume a minimum of 13.90 MW, which translates to 69.5% of the available capacity. **SRF site being contiguous to the Petitioner's site, it is supplied power through a 6.6 KV cable connection, while supply to other CPP Users shall require 33 kV dedicated transmission line to be constructed.** The Petitioner has submitted that the Captive users of the petitioner company have contributed requisite equity throughout the development of the project and shall always maintain the minimum of 26% of shareholding; thus satisfying all the relevant statutory requirements.

4. It is also submitted that the petitioner Company is a Special Purpose Vehicle owning, operating and maintaining a generating station and has no other business or activity. **Neither distribution license under section 14 of the Act is required by the Petitioner nor cross subsidy surcharge or additional surcharges under section 42 (2) and 42(4) of the Act are payable by the petitioner to the respondents.**

Thereafter considering the provision of the Act and Electricity Rule 2005 Hon'ble Commission upheld the levy of additional surcharge in the followings terms:

17. The Commission is not in agreement with the argument of the respondent that he is entitled to recover the cross subsidy surcharge as per provisions of Section 42(2) of the Act. It is provided in the 4<sup>th</sup> proviso of Section 42(2) that such charge shall not be leviable in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use. Besides, the meaning of the words "primarily for his own use" has been made clear in Rule 3 as mentioned above. Therefore, the respondent is not entitled to recover cross subsidy surcharge under section 42(2) of the Act in this case. The petitioner is a generating plant qualified as a captive generation plant within the meaning of Rule 3 and as such no License is required to supply power from captive generating plant through dedicated transmission line to its captive users. **The Commission agrees with the respondent that as per Section 42(4) of the Act, where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply....."**
18. Therefore, the Commission concludes from the combined reading of Section 2(8), Section 2(49) and Section 9 of the Act and 3 of the Rules, that captive generating plant and dedicated transmission line can be

constructed, maintained and operated by a person for generation of power and supply to its captive users. **However, the consumers have to pay the additional surcharge on the charges of wheeling as and when specified by the Commission in this regard.**

92. In view of aforesaid judicial pronouncements petitioner is liable to pay additional surcharge on the consumption of electricity through captive route.

**RE : Other relevant judicial pronouncements in support of claim of Respondent:**

93. The similar contention of dependency of levy of additional surcharge on wheeling charges came before consideration of Hon'ble Rajasthan High Court in the matter of D.B. CIVIL WRIT PETITION NO.3160/2016 (Hindustan Zinc Limited v. The Rajasthan Electricity Regulatory Commission, Jaipur & Ors. Vide order dated 29/08/2016 rejecting the contention of the petitioners Hon'ble High Court held as under:

35. While coming to the specific regulations, learned counsel appearing on behalf, of the petitioner submits that regulation 17 provides that "a consumer availing open access and receiving supply of electricity from a person other than the Distribution Licensee of his area of supply **shall pay to the Distribution Licensee an additional surcharge, in addition to wheeling charges and** cross subsidy surcharge, to meet the fixed cost of such Distribution Licensee arising out of his obligation to supply as provided under sub-section(4) of section 42 of the Act".

36. According to this provision, the consumer availing open access and receiving supply of electricity, is subjected to an additional surcharge in addition to wheeling charges and cross subsidy surcharge. Section 42(4) of the Act of 2003 **restrict liability to pay additional surcharge on the charges of wheeling only.** The additional surcharge imposed under regulation 17, thus, is beyond the competence to levy additional surcharge under Section 42(4).

37. **The respondent Commission** defended the additional surcharge with assertion as under:-

**"11/A. That with reference to ground KK(i) and (ii), it is denied that Regulation 17(1) is ultra vires the powers of the State Commission as being beyond the scope of Section 42(4) of the Act of 2003 read with National Tariff Policy. The reasons for this have been adverted to in the preliminary submissions and are not being repeated herein in order to avoid prolixity. Without prejudice to the foregoing submissions, it is submitted that the contention of the petitioner that captive use of self-generated power through the usage of wheeling network of distribution licensee is excluded from the purview of**

*levy of additional surcharge, is totally misconceived. It is submitted that the Act of 2003 does not exempt captive generating plants from being liable to pay the additional surcharge on the charges of wheeling as would be clear from a reading of Section 42(4) thereof, which is extracted below :*

*“42. Duties of Distribution Licensees and Open Access.*

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

***It would be clear from a plain reading of the aforesaid section that there is no exemption from the levy of additional surcharge as far as captive generating plants are concerned.”***

38. *On consideration of the provisions of regulation 17 in light of Section 42(4) of the Act of 2003, we noticed that Regulation 17(2) nowhere indicates that determination of additional surcharge would be independent of the charges of wheeling. **It refers additional surcharge in addition to wheeling charges, but, the expression “additional surcharge on the charges of wheeling” does not necessarily mean that the additional surcharge to meet the fixed costs of the distribution licensees are also required to be calculated alongwith the wheeling charges or should be inextricably linked with the wheeling charges. The additional surcharge can very well be determined independently and dehors the wheeling charges. The tariff policy also nowhere indicate that the additional surcharge should be inter-linked with the wheeling charges or should be decided alongwith and inextricably linked with wheeling charges. ....”***

94. *OA Regulation, 2005 provides as under:*

**13: CHARGES FOR OPEN ACCESS**

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

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

.....

- .....
- f. **Surcharge - The Commission shall specify the cross subsidy surcharge for individual categories of consumers separately.**
  - g. **Additional Surcharge - The Commission shall determine the additional surcharge on a yearly basis.**

It may be seen that similar to Rajasthan, open access Regulation of Madhya Pradesh as well as tariff order issued by this Hon'ble Commission prescribed the levy as "**Additional Surcharge**" and not the "**Additional surcharge on charges of wheeling**".

95. Similarly, Hon'ble Haryana Electricity Regulatory Commission in the matter of *M/s Toshiba Corporation V.s Managing Director Dakshin Haryana Bijli Vitran Nigam Limited (Case No. HERC/PRO-23 of 2012)* upheld the liability of additional surcharge even if there is no use of distribution system. The relevant part of the said judgment is reproduced as under:

In view of above discussions the Commission holds that the Petitioner can supply power from its proposed generating plant to the industrial consumer **through dedicated transmission lines** considering the load center as a consumer under section 10 (2) read with section 42 (2) and shall be liable to pay the cross subsidy surcharge to the distribution licensee **and the additional surcharge as applicable under the regulations framed by the Commission.** Accordingly the issue framed at (iii) is answered in negative i.e. cross-subsidy and additional surcharge as decided by the Commission from time to time shall be payable by the Petitioner.

Having observed as above, the Commission orders as under:

i).....

ii).....

iii).....

iv) **Open access may be sought by consumers collectively or the Generator for the limited purpose of energy accounting to facilitate levy of cross - subsidy surcharge and additional surcharge.**

v).....

vi) **Cross - subsidy surcharge and additional surcharge as decided by the Commission for relevant years shall be payable by the Consumers / Generator to the distribution licensee(s) of the area.**

96. Aforesaid order of Hon'ble HERC has been challenged before Hon'ble APTEL in the matter of *Dakshin Haryana Bijli Vitran Nigam Limited, Haryana v Toshiba Corporation Through Its Smart Community Division-1, Tokyo and others (Appeal No. 254 of 2013)*. Vide order dated 29/05/2015 Hon'ble APTEL confirmed the order of the Hon'ble HERC in the following terms:

22. .... Though 'Toshiba' has clearly stated that it shall not use the



*distribution or transmission network of distribution or transmission licensee of the area of supply, but the State Commission even then had made it liable to pay cross subsidy surcharge and other additional surcharge as decided by the State Commission under the concerned Regulations to the distribution licensee, the appellant herein. **In the impugned order proper arrangement has been made to ensure that the distribution licensee, the appellant herein, would be properly compensated through the payment of cross subsidy surcharge and additional surcharge, if any, found fit by the State Commission.***

97. *The aforesaid order of Hon'ble APTEL has been challenged before Hon'ble Supreme Court in Civil Appeal No. 5318 of 2015. Vide order dated 20/07/2015 Hon'ble Apex Court dismissed the civil appeal confirming the order of the Hon'ble APTEL. The relevant part of the said order is reproduced as under:*

***We have heard senior counsel appearing for the appellant. We do not find any merit in this appeal.  
The same is, accordingly, dismissed***

98. *In view of above submission and in light of the settled position of law, OA Regulation 2005, Renewable Regulation 2010, Renewable Regulation 2021 and the judgments of the Hon'ble Supreme Court/Hon'ble APTEL/Hon'ble MPERC, petitioner is liable to pay additional surcharge . Accordingly, this Hon'ble Commission is requested to dismiss the petition and render justice.*

7. By affidavit dated 03.01.2022, Petitioner filed rejoinder to the reply filed by Respondent:

- "5. *It is submitted that the Issue of the levy of additional surcharge on captive plant is no more res integra and the Hon'ble Supreme Court in Civil Appeal Number 5074-5075 of 2019 in matter titled "**Maharashtra State Electricity Distribution Company Limited vs. M/s/ JSW Steel Limited and Ors.**" on 10.12.2021 has categorically held that captive power plants are not liable to pay additional surcharge.*

*Relevant paras of the order are reproduced hereunder:*

- "10. *In light of the above observations and findings, the issue **whether such captive users are subject to levy of additional surcharge leviable under sub-section (4) of Section 42 is required to be considered.***

11. ***Sub-section (4) of Section 42 shall be applicable only in a case 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 and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that***

***as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee / licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.***

12. The term "consumer" is defined in Section 2(15), which reads as under:-

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

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of 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. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature.

***However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive***

*users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.*

14. *Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.*
15. *In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.*

*A copy of the judgment dated 10.12.2021 is annexed herewith and marked as ANNEXURE- 1.*

6. *It is further submitted that as per Article 141 of the Constitution of India, 1950 is binding on all courts within the territory of India. Hence, it is submitted that once the charge/levy has been declared illegal, the Respondent cannot be allowed to wrongfully and unlawfully collect the same.*

*Article 141 reads as under:*

*141. Law declared by Supreme Court to be binding on all courts*

*The law declared by the Supreme Court shall be binding on all courts*

within the territory of India

7. *It is further submitted that Hon'ble Supreme Court in the case of "D. Cawasji and Co., Mysore v. State of Mysore and anr.", 1984 SCC (Supp) 490, has lucidly held that once a levy is declared illegal the State is obliged to refund the excess amount which has been wrongfully and illegal collected. Further, this principle has also been affirmed in the recent judgment of S.T. Sadiq v. State of Kerela and Ors. [(2015) 4 SCC 400].*
  8. *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."*
8. On 11.03.2022, the petitioner broadly submitted the following in its brief note of arguments:
1. *The principal issue for adjudication before this Hon'ble Commission in the instant matter is: -  
"Whether the Petitioner who is captive consumer is liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003?*
  2. *In the present petition, the Petitioner is a captive consumer and status of the Petitioner is not under challenge. The Respondent has been operating its captive power plant from the year 2015, however the Respondent has imposed additional surcharge (retrospectively) first time on 06.07.2021.*
  3. *The Respondent is placing reliance on following provision of the Electricity Act to levy additional surcharge:  
"Section 42 (4)  
**Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."***
  4. *It is submitted that the issue of levy of additional surcharge on the captive consumer is no more res-integra and the Hon'ble Supreme Court in Civil Appeal Number 5074-5075 of 2019 in matter titled "Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors." on 10.12.2021, has clearly held in an unequivocal term that additional surcharge cannot be levied on captive power plant.*

*The Hon'ble Supreme Court in the abovementioned matter had framed this specific issue (levy of additional surcharge on captive consumer) as a question of law. To find answer of this legal issue, the Hon'ble Supreme Court reviewed Section 9 and Section 42 (4) of the Electricity Act, 2003 ("Act"). Hon'ble*

Supreme Court held that Sub-section (4) of Section 42 will be applicable only on non-captive open access consumer and only such consumer will be liable to pay additional surcharge. Hon'ble Supreme Court further observed that the captive consumers are separate class from the consumer and any levy which are leviable on the consumer are not required to be levied on the Captive Consumer.

The relevant paras of the abovementioned judgment are reproduced herein below: -

"7. The short question which is posed for the consideration of this Court is: **Whether the captive consumers/captive users are liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003?**

8. While deciding the aforesaid issue/question, the relevant provisions of Electricity Act, 2003 namely Sections 9 and 42 are required to be noted/visited, which reads as under: -

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

.....

**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.**

.....

9. **On a fair reading of Section 9, it can be seen that captive generation is permitted under sub-section (1) of Section 9. As per subsection (2), every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use, but of-course subject to availability of adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be. So, the captive generation / captive use is statutorily provided / available and for which a permission of the State Commission is not required.** The submission on behalf of the appellant that the captive generation under Section 9 is subject to the regulations as per first proviso to sub-section (1) of Section 9 and that even open access for the purpose of carrying electricity from his captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be, sub-section (4) of Section 42 shall be applicable and such captive users are liable to pay



*the additional surcharge leviable under sub-section (4) of section 42, has no substance and has to be rejected outright. Construction and/or maintenance and operation of a captive generating plant and dedicated transmission lines is not subjected to any permission by the State Commission. As provided under Section 9 of the Act, 2003, any person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Merely because the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company or the open access for the purpose of carrying electricity from the captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate.*

10. *In light of the above observations and findings, the issue whether such captive users are subject to levy of additional surcharge leviable under sub-section (4) of Section 42 is required to be considered.*
11. ***Sub-section (4) of Section 42 shall be applicable only in a case 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 and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee / licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.***
12. *The term "consumer" is defined in Section 2(15), which reads as under:-  
"(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"*

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of 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. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. **However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.**
14. **Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at**

***all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.***

5. *Bare reading of above quoted paras suggests that the law as on date is that the captive consumers are not liable to make payment for additional surcharge. Since, this issue has been settled by the Hon'ble Supreme Court, this Hon'ble Commission by following the principle of stare decisis should allow the Petition and direct the Respondent to not levy the additional surcharge.*
6. *Article 141 of the Constitution of India states that the law declared by the Supreme Court will be binding on all courts within the territory of India. ("**Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparo and Another**"- AIR 2022 SC 1598)*
7. *Doctrine of "**Stare decisis**" suggest that the Courts should adhere to precedent in making their decisions.*
8. *The Constitutional Bench of Hon'ble Supreme Court in its celebrated judgment of "Waman Rao & Ors v. Union of India & Ors."(1981) 2 SCC 362, has categorically held that for the application of the rule of stare decisis, it is not necessary that the earlier decision should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. It is sufficient for invoking the rule of stare decisis that a certain decision was arrived **at on a question which arose or was argued**, no matter on what reason the decision rests or what is the basis of the decision.*

*The relevant para is being reproduced herein below: -*

39. *The doctrine of stare decisis is the basis of common law. It originated in England and was used in the colonies as the basis of their judicial decisions. According to Dias the genesis of the rule may be sought in factors peculiar to English legal history, amongst which may be singled out the absence of a Code. The Normans forbore to impose an alien code on a half-conquered realm, but sought instead to win as much wide-spread confidence as possible in their administration of law, by the application of near uniform rules. The older the decision, the greater its authority and the more truly was it accepted as stating the correct law. As the gulf of time widened, says Dias, Judges became increasingly reluctant to challenge old decisions. The learned author cites the example of Bracton and Coke who always preferred older authorities. In fact, Bracton had compiled a Notebook of some two thousand cases as material for his treatise and employed some five hundred of them.*
40. *The principle of stare decisis is also firmly rooted in American*

*Jurisprudence. It is regarded as a rule of policy which promotes predictability, certainty, uniformity and stability. The legal system, it is said, should furnish a clear guide for conduct so that people may plan their affairs with assurance against surprise. It is important to further fair and expeditious adjudication by eliminating the need to relitigate every proposition in every case. When the weight of the volume of the decisions on a point of general public importance is heavy enough, courts are inclined to abide by the rule of stare decisis, leaving it to the legislature to change long-standing precedents if it so thinks it expedient or necessary. In *Burnet v. Coronado Oil & Gas Co.* 285 U.S.393 Justice Brandeis stated that 'stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right'.*

41. *While dealing with the subject of stare decisis, Shri H.M. Seervai in his book on 'Constitutional Law of India has pointed out how important it is for judges to conform to a certain measure of discipline so that decisions of old standing are not overruled for the reason merely that another view of the matter could also be taken. The learned author has cited an Australian case in which it was said that though the court has the power to reconsider its own decisions, that should not be done upon a mere suggestion that some or all of the members of the later court may arrive at a different conclusion if the matter were res integra the learned author then refers to two cases of our Supreme Court in which the importance of adherence to precedents was stressed. Jagannadhadas J. said in the Bengal Immunity Case [1955]2SCR603 that the finality of the decisions of the Supreme Court, which is the Court of last resort, will be greatly weakened and much mischief done if we treat our own judgments, even though recent, as open to reconsideration. B.P. Sinha J. said in the same case that if the Supreme Court were to review its own previous decisions simply on the ground that another view was possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest Court of the land. In *I.T.O. Tuticorin v. T.S.D. Nadar*: [1968]88ITR252(SC), Hegde J. said in his dissenting Judgment that the Supreme Court should not overrule its decisions except under compelling circumstances. It is only when the Court is fully convinced that public interest of a substantial character would be jeopardised by a previous decision, that the Court should overrule that decision. Reconsideration of the earlier decisions, according to the learned Judge, should be confined to questions of great public importance. Legal problems should not be treated as mere subjects for mental exercise. An earlier decision may therefore be overruled only if the Court comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that if the matter were res Integra, the members of the later court may arrive at a different conclusion.*
42. *These decisions and texts are of high authority and cannot be overlooked. In fact, these decisions are themselves precedents on the binding nature of precedents.*
43. ***It is also true to say that for the application of the rule of stare***

***decisis, it is not necessary that the earlier decision or decisions of long standing should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of precedent and it will be unnecessary to take resort to the principle of stare decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare decisis.***

**RESPONSE TO RESPONDENT SUBMISSION.**

9. *The Respondent's contention that Petitioner is liable to pay additional surcharge under the said regulation is wholly irrational, arbitrary and in complete ignorance of the law laid down by the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors.*
10. *It is most respectfully submitted that the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors, has unequivocally defined the scope of operation of Section 42 sub-section (4) of Electricity Act, 2003, while examining the State Commission's power to impose additional surcharge. The Hon'ble Supreme Court categorically held that the as far as captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003 as no such permission of the State Commission is required and by operation of law namely Section 9 captive users are permitted.*
11. *Thus, where Section 42(4) of the Electricity Act, 2003 only imposes additional surcharge on the ordinary consumers, the act of the Respondent in imposing additional surcharge on the Petitioner, which is a captive generating plant, is not only illegal, perverse and arbitrary but also in deliberate ignorance of the precedent laid down by the Hon'ble Supreme Court.*
12. *It is submitted that the Respondent have erroneously relied on the Hon'ble Supreme Court Judgment of Hindustan Zinc Ltd. V. Rajasthan Electricity Regulatory Commission (Civil Appeal No. 4417 of 2015), to contradict the Judgment passed in the matter of Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors. The Respondent wholly failed to distinguished both the judgments passed by the Hon'ble Supreme Court. It is submitted that the "question of law" and "issue raised" before the Hon'ble Supreme Court in Hindustan Zinc Ltd. V. Rajasthan Electricity Regulatory Commission and in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors. was completely different, independent and unrelated. The 'question of law' before Hon'ble Supreme Court in Hindustan Zinc Ltd. is being reproduce herein below: -*



*“Whether the impugned Regulations imposing RE Obligation upon Captive Power Plants framed by the RERC in exercise of power under Section 86(1)(e) of the Act of 2003, which provides for promotion, co-generation of electricity from renewal source of energy are ultra vires the provisions of the Act or repugnant to Article 14 and 19(1)(g) of the Constitution.”*

*Therefore, Respondent’s reliance on Hindustan Zinc Judgment is wholly misconceived, erroneous reading of the judgments and attempt to mislead this Hon’ble Commission. It is submitted that specific ‘question of law’ and ‘issue raised’ before Hon’ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors, were never raised before Hon’ble Supreme Court and it was for the first time the said question of law and issues were raised and settled by the Hon’ble Supreme Court.*

13. *It is humbly submitted that judgment in the matter of Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors, cannot be said to be per incuriam on the grounds that the said judgment laid down legal position without considering the reasoning of Hindustan Zinc Judgment. It is submitted that Hon’ble Apex Court in its recent judgment of **Suganthi Suresh Kumar vs. Jagdeeshan**, (2002) 2 SCC 420, have held the following: -*
  9. *It was held that it is impermissible for a High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down legal position without considering any other point. It is only matter of discipline for the High Courts in India, it is the mandate of the constitution as provided under Article 141 that law declared by the Supreme Court shall be binding on all courts within the territory of India. That the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.*
14. *It is pertinent to mention that the issues and question of law before this Hon’ble Commission in the present matter and issues and question of law before Hon’ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors are Pari Materia. Therefore, the ratio passed by the Hon’ble Supreme Court in Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors is binding and, this Hon’ble Commission by following the principle of stare decisis should allow the Petition and direct the Respondent to not levy the additional surcharge. There is no conflict in ratio of Hindustan Zinc Judgment and JSW Judgment.*
15. *It is pertinent to note that “additional charges” on captive generating plants was not being levied anywhere except in the States of Madhya Pradesh and Maharashtra. In the state of Maharashtra, the Captive Power Producers Association filed their objections before State Commission with respect to levy of additional surcharge on such captive users. That by order dated 12.09.2018, the State Commission passed the order holding that additional surcharge is leviable under Section 42(4) of the Act, 2003 on the captive consumers/captive*

users. The said order was challenged before Hon'ble APTEL and ultimately reached to Hon'ble Supreme Court titled as Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors.

16. That Hon'ble Supreme Court in the said matter while adjudicating the impleadment application no. IA 124663/2019, 111852/2020, 117760/2020, 118515/2020 filed by different association and corporate entity held that **the points involved in the present matter has strong element of general importance having ramification over the entire industry of captive power production & consumption and, accordingly accepted the impleadment application.** It is evident from the above that the Hon'ble Supreme Court in the said matter duly recognized that the issue is not limited to the State of Maharashtra and will have ramification over the entire industry.
17. It is further submitted that this Hon'ble Commission have power to remove difficulties and power to relax under Regulation 20 of the MPERC (Terms and Conditions for Intra-State Open Access) Regulation, 2021. It is pertinent to mention that the nature of jurisdiction exercised by the Commission is regulatory in nature which carries with it the power to do all things in the interest of justice. In this connection, the Petitioner rely on the following Judgment: -
  - i. Uttar Pradesh Power Corporation Limited V. National Thermal Power Corporation Limited (2009) 6 SCC 235
  - ii. Premium Granites & Anr V. State of Tamil Nadu & Ors (1994)2 SCC 691
  - iii. Hotel & Restaurant Association V. Star India (P) Ltd (2006) 13 SCC 753
18. That it is evident from the above that if Hon'ble Commission considers that there are anomalies in existing regulation, then this Hon'ble Commission in the interest of justice, must exercise its inherent jurisdiction to remove difficulties in the Regulation.
19. In "Bharathidasan University vs. All India Council for Technical Education", (2001) 8 SCC 676, the Supreme Court held that the courts are bound to ignore the Rules or Regulations which are not in conformity with the statutory provisions. In this regard it was observed as follows: -
 

*"The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party is sufferance is a respondent to the lisor proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that Regulations*

*made under Section 23 of the Act have “constitutional” and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions (para 14)”.*

*Hon’ble Appellate Tribunal of the Electricity in matter titled “Damodar Valley Corporation Vs. Central Electricity Regulatory Commission and Ors.” (Appeal No. 271 of 2007) placing reliance on the judgment of Hon’ble Supreme Court in “Bharathidasan University vs. All India Council for Technical Education”, (2001) 8 SCC 676, ignored Regulation 21 (ii) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 being contrary to Section 40 of the DVC Act.*

20. *In light of the reason stated above, it is humbly prayed that the present Petition filed by the Petitioner be allowed and direct the Respondent to not levy the additional surcharge.”*

9. The Respondent submitted the following in its written note on 21.03.2022:

- 1 *Petitioner in its rejoinder has not specifically denied any submission of the answering respondent and merely placed the reliance upon the judgment of the Hon’ble Supreme Court dated 10.12.2021 in the matter of MSEDCL Vs. M/s. JSW Steel Limited & Ors. in Civil Appeal Nos. 5074-5075 of 2019 (JSW Case).*
2. *Since, petitioner is relying solely on the judgment in JSW case in support of relief claimed in the petition, the instant written submission is being filed only on said submission of the petitioner. 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.*
3. *It is settled legal position that Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. In this regard following observation of the Hon’ble Supreme Court in K. T. M. T. M, Abdul Kayoom and another v. Commissioner of Income Tax, Madras {AIR 1962 SUPREME COURT 680} is relevant in the instant case:*

**19. .... Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo)\* by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a**

***case falls, its broad resemblance to another case is not at all decisive.....”***

4. *The submission of the petitioner that the issue involved in the present petition is covered in its favour by the findings of the Hon’ble Supreme Court in the JSW Judgment is untenable. It is submitted that JSW Judgment has passed by Hon’ble Supreme Court is based on the following findings:*
  - a. *captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003 are not liable to pay additional surcharge (Para 14).*
  - b. *Captive generating plant are not subject to the regulatory jurisdiction of the Commission (para 9)*
  
5. *In this regard Hon’ble Supreme Court in the JSW case held as under:*  
***“14.....Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.”***
  
6. *It may be seen that as per aforesaid judgment of Hon’ble Supreme Court those captive consumer/captive user who form separate class other than the consumers defined under Section 2(15) shall not be subject to the levy of additional surcharge. In other words any person who is a consumer under Section 2(15) is liable to pay additional surcharge. The Section 2(15) of the Act provides as under:*  
***“2(15) –consumer means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”***
  
7. *It is submitted that in the instant case petitioner is maintaining contract demand and availing supply from the answering respondent. Accordingly petitioner is a consumer within the meaning of Section 2(15) of the Act. Petitioner itself admitted this fact that petitioner is consumer of answering respondent (ref para 3 page 2). The relevant part of the petition is reproduced as under:*  
***“3.....The Petitioner is an HT consumer of the respondent having contract demand of 2850 kVA.....”***  
  
***(also refer HT agreement Annexure P-14 page 95 to 100 of the petition)***
  
8. *Thus, being a consumer within the meaning of Section 2(15) of the Act petitioner is liable to pay additional surcharge to the answering respondent and JSW case has no applicability in the present circumstances of the case.*

9. Hon'ble Supreme Court in the JSW case held as under:  
 "9..... it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the Sate Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate."
10. It is submitted that in the state of Madhya Pradesh Hon'ble Madhya Pradesh Electricity Regulatory Commission (MPERC) has issued the MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005 ('OA Regulation 2005'). The relevant provisions of the said Regulations are reproduced 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*

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

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.**

11. *It may be seen that in the state of Madhya Pradesh Hon'ble MPERC grants permission of consumption from any source other than the distribution licensee of area by way of aforesaid Regulations. The requirement of such permission made applicable to the generating company as well as captive generating plant and in this regard term 'generating company' includes captive generating plant. In other words as per Regulations applicable in the state of Madhya Pradesh there is no difference in the Generating Company and Captive Generating plant. It may further be seen that as per provisions of the aforesaid Regulations such consumption from other source is subject to the payment of additional surcharge.*

12. At this juncture it would be appropriate to refer the relevant provisions of MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations, 2010 :
- (ii) Regulation 12.2 of aforesaid Regulations after 7<sup>th</sup> amendment and prior to 7<sup>th</sup> amendment is reproduced below:
- (c) Prior to the 7<sup>th</sup> Amendment, the said regulation provided as under:  
**“12.2 Wheeling charges, Cross Subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time. Captive Consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy procured from Renewable Sources of Energy.”**
- (d) 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)
13. 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 (Writ Petition No.9870/2018) was challenged before the Hon’ble High Court of MP but the same has been upheld by the Hon’ble High Court.
14. It is relevant to mention that Hon’ble MPERC recently notified the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Regulations 2021). The provisions of the Regulation 11.2(d) of the said Regulations are reproduced as under:  
**The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for**

*its use or for the use of its captive user as defined by the Act or the rules made there under.*

15. *It may be seen that aforesaid Regulations 2021 specifically provided that the captive consumers are liable to pay additional surcharge. It is settled legal position that Regulation once notified shall be treated as part of Act and order issued by the regulatory Commission should be in conformity with the Regulations.*
16. *In this regard kind attention of the of the Hon'ble Commission drawn to the pronouncement of Hon'ble Supreme Court's Constitution bench in the matter of PTC India Limited v Central Electricity Regulatory Commission, through Secy {(2010) 4 Supreme Court Cases 603}. In this judgment, Hon'ble Supreme Court held that Regulation stands on a higher pedestal vis-'-vis an Order (decision) of Regulatory Commission. The relevant part of the said judgment is reproduced as under:*
  65. *The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", **a Regulation stands on a higher pedestal vis-'-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations.** However, that would not mean that a regulation is a pre condition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). **In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act.....***
92. (i) *In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).*
- (ii) *A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.*
- (iii) **A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts** and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

- (iv) *Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.*
- (v) *If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.*
- (vi) *Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze)..... .*

*Conclusion:*

93. *For the aforesaid reasons, we answer the question raised in the reference as follows:*

*The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. **The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.***

- 17. *Though the above principles emerge in the context of regulations framed under Section 178 by the CERC, the law laid down in the judgment is applicable to the regulations framed under Section 181 by the State Electricity Regulatory Commissions. It may be seen that Hon'ble Supreme Court clearly held that Regulation making power of the Hon'ble Commission is very wide. Further, neither the MPERC Regulation's nor the Regulation making power of MPERC in this regard was under consideration of the Hon'ble Supreme Court in JSW case. Therefore JSW judgement is not applicable in the present circumstances of the case.*
- 18. *Similarly, Hon'ble Supreme Court in West Bengal Electricity Regulatory V/s. CESC (2002) 8 SCC 715 has held that even the High court exercising its power of appeal under a particular statute cannot exercise suo motu the constitutional power under Article 226 or 227 of the Constitution. The relevant part of the said judgment is reproduced as under:*
  - 50. *From the above observations of this Court in the said judgment extracted hereinabove, it is clear that even the High Court exercising its power of appeal under a particular statute cannot exercise the constitutional power under Article 226 or 227 of the Constitution. The position of course would be entirely different if the aggrieved party*

*independently challenges the provision by way of a writ petition in the High Court invoking the High Court's constitutional authority to do so. **Therefore we are of the considered opinion that the High Court sitting as an appellate court under a statute could not have exercised its writ jurisdiction for the purpose of declaring a provision of that law as invalid when there was no separate challenge by way of a writ petition.** In the instant case we notice that as a matter of fact none of the parties had challenged the validity of the Regulations, therefore the question of the High Court's suo motu exercising the writ power in a statutory appeal did not arise. For the reasons stated above we hold that the High Court could not have gone into the question of validity of the Regulations while entertaining a statutory appeal under the 1998 Act. We also hold that the Commission had the necessary statutory power to frame the Regulations conferring the right of hearing on the consumers. We also hold that the Regulations have provided for a controlled procedure for such hearing and there is no room for an indiscriminate hearing. On facts, we hold in the instant case that the Commission has not given any indiscriminate hearing to the consumers.*

19. ***Hon'ble APTEL in the STATE LOAD DESPATCH CENTRE Vs GUJARAT ELECTRICITY REGULATORY COMMISSION (APPEAL NO.33 OF 2015 Dated: 30th November, 2015)*** so long as a regulation is in the field State Commission is bound by its Regulation.

15. ....The State Commission is bound by its regulations. If the State Commission is of the opinion that there is a lacuna in the regulation it can amend it or issue a new regulation, but so long as a regulation is in the field it has to follow it and cannot get over it by any other methods.

20. *Hon'ble APTEL in Appeal No. 170 of 2010 in Madhya Pradesh Power Generation Company Ltd, Vs. Madhya Pradesh Electricity Regulatory Commission held that a subordinate legislation validly made becomes a part of the Act. It is further held by the Hon'ble APTEL that State Commission while exercising one jurisdiction cannot assume another jurisdiction. The relevant part of the said judgment is reproduced as under:*

39..... Mr. Ramachandran has taken us to a good number of decisions which we shall now consider. He has referred to Utter Pradesh Power Corporation Limited Vs. National Thermal Power Corporation of India Limited and others reported in (2009) 6 SCC 235. One important observation made at paragraph 56 of the judgment is that:

***"It is now a well settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such."***

.....

.....It is not deniable that the Commission has manifold powers, namely, administrative, supervisory, legislative and adjudicatory but each



power, according to us, must be exercised at appropriate field; **simply because a Commission has many powers, it cannot be said that while exercising one power it oversteps its limit in that power and assumes another jurisdiction.** This was what has been exactly said in *WB Electricity Regulatory Commission Vs. CERC* reported in (2002) 8 SCC 715.....”

21. Full bench of Hon’ble APTEL in the Judgment in OP No.1 of 2011 Dated: 11th Nov, 2011 observed as under:

“30. In view of the above admitted fact situation, we raised four questions to these 3 State Commissions seeking clarification.

(A).....

(B).....

(C).....

(D) Whether the State Commissions are the proper authority to declare that their Regulations are wrong, so long as those Regulations are in force?

31. There is no answer to these questions either in their affidavits or in the written submissions filed by these State Commissions. We are really surprised over the conduct of these State Commissions who now plead as against their own Regulations approved by the legislature. Another surprising feature is that these Commissions, have failed to take note of the findings given by this Tribunal in the several judgments indicating the necessity to follow their Regulations, which are binding on them.

61. It is quite strange on the part of the State Commissions to contend that they may not follow their own Regulations as they would not prevail over Section 64 of the Act and therefore, they have to keep quite without taking any steps for performing their functions. This plea is made by these Commissions even though they have got the powers to take a suo-moto action for determination of tariff by virtue of the Regulations and the policies. As indicated above, Section 64 provides for procedure to ultimately achieve the purpose which is more important. It is quite surprising to notice that the State Commissions have taken up the stand to plead before this Tribunal that their own Regulations are wrong. How can they take such a stand, so long as those Regulations approved by the legislature are in force? ....”

22. Kind attention also drawn to following dictum of Hon’ble Supreme Court in the matter of *The State of Manipur & Ors. Versus Surjakumar Okram & Ors.* (Civil Appeal Nos. 823-827 of 2022):

“23. The principles that can be deduced from the law laid down by this Court, as referred to above, are:

I. A statute which is made by a competent legislature is valid till it is declared unconstitutional by a court of law.

.....”

23. *During the course of argument petitioner submitted before Hon'ble Commission **(it may be noted that there is no pleading in this regard)** that Hon'ble Commission can relax the provision of the Regulations exercising its inherent power. In this regard kind attention of the Hon'ble Commission is drawn towards the judgment of Hon'ble Supreme Court in the matter of Gujarat Urja Vikas Nigam Limited v Solar Semiconductor Power Company (India) Private Limited and others ( Civil Appeal No. 6399 of 2016) Citation : 2017 Indlaw SC 865. The relevant part is reproduced as under:*
53. *Under Regulations 80 to 82, the inherent powers of the State Commission are saved. Under Regulation 80, which is akin to Section 151 CPC, the power of the State Commission is only intended to regulate the conduct of the Commission, that is, to regulate its own procedure. That power cannot travel beyond its own procedure so as to alter the terms and conditions of the PPA entered into between the parties to grant substantive relief to the first respondent by extending the control period of Tariff Order (2010) beyond 28.01.2012.*
54. *By a reading of Regulation 80, it is clear that inherent powers of the State Commission are saved to make such orders as may be necessary:- (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers being very wide and incapable of definition, its limits should be carefully guarded. Inherent powers preserved under Regulation 80 (which is akin to Section 151 of the Code) are with respect to the procedure to be followed by the Commission in deciding the cause before it. The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. The inherent powers are not substantive provision that confers the right upon the party to get any substantive relief. These inherent powers are not over substantive rights which a litigant possesses.*
55. *The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of process of the Court. It cannot be used to create or recognize substantive rights of the parties.*
24. *In view of above, it is submitted that in the instant case petitioner is not challenging the vires of the Regulations. It is also noteworthy to mention that this Hon'ble Commission while deciding earlier petitions on the same subject matter (Petition No. 64 of 2020) has relied upon the such Regulations. Thus, as per provisions of the Regulations prevailing in the State Of Madhya Pradesh petitioner is liable to pay additional surcharge.*
25. *Without prejudice the submission that petitioner is a consumer thus JSW case is not applicable, it is submitted that while passing the JSW Judgment, attention of the Hon'ble Supreme Court was not drawn towards the earlier binding precedent of coordinate bench, i.e., the judgment in the case of **Hindustan Zinc Ltd V. Rajasthan Electricity Regulatory Commission [2015 (12) SCC 611]**. In the Hindustan Zinc case Hon'ble Supreme Court clearly held that Captive generating plants are under regulatory jurisdiction*

of the Commission and captive consumers are also the consumer of the distribution license.

26. It is noteworthy to mention that this Hon'ble Commission while deciding earlier petitions on the same subject matter ( Petition No. 64 of 2020) has relied upon the Judgment of Hon'ble Apex Court in the Hindustan Zinc supra. A comparative chart of findings of Hon'ble Supreme Court in the both of above judgments is attached as **Annexure-R/1** for ease of reference.
27. Five judge bench of Hon'ble MP High Court in Jabalpur Bus Operators Association and others v. State {AIR 2003 MADHYA PRADESH 81} has considered the issue of precedent value of any judgment passed by a bench of the Hon'ble Supreme Court without taking note of earlier coordinate bench judgment and held as under:  
**8.....In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts.**
28. Similarly, Five judge bench of Hon'ble Supreme Court in [National Insurance Company Limited V.s Pranay Sethi and Ors. SLP (Civil) NO. 25590 of 2014 [(2017) 16 Supreme Court Cases 680] vide its order dated 31.10.2017 held as under:
  1. Perceiving cleavage of opinion between Reshma Kumari and others v. Madan Mohan and another and Rajesh and others v. Rajbir Singh and others , both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Company Limited v. Pushpa and others thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us.
  14. The aforesaid analysis in Santosh Devi (supra) may prima facie show that the two-Judge Bench has distinguished the observation made in Sarla Verma's case but on a studied scrutiny, it becomes clear that it has really expressed a different view than what has been laid down in Sarla Verma (supra). If we permit ourselves to say so, the different view has been expressed in a distinctive tone, for the two-Judge Bench had stated that it was extremely difficult to fathom any rationale for the observations made in para 24 of the judgment in Sarla Verma's case in respect of self-employed or a person on fixed salary without provision for annual increment, etc. This is a clear disagreement with the earlier view, and we have no hesitation in saying that it is Absolutely impermissible keeping in view the concept of binding precedents.
  15. Presently, we may refer to certain decisions which deal with the concept of binding precedent.

17. *In State of Bihar v. KalikaKuer alias Kalika Singh and Others ((2003) 5 SCC 448)*, it has been held:-

*“10. ... an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. ...”*

The Court has further ruled:-

*“10. ... Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.”*

27. *We are compelled to state here that in Munna Lal Jain (supra), the three- Judge Bench should have been guided by the principle stated in Reshma Kumari which has concurred with the view expressed in Sarla Devi or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari being earlier in point of time would be a binding precedent and not the decision in Rajesh.*

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

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

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

29. *In the instant case, while passing the JSW judgment, admittedly attention of the Hon’ble Supreme Court was not invited towards the earlier coordinate bench judgment in the Hindustan Zinc supra. As JSW Judgment has not taken note of the decision in Hindustan Zinc supra, which was delivered at earlier point of time, the instant petition should be decided following the finding of Hon’ble Supreme Court in the Hindustan Zinc Supra.*

30. *It is submitted that although the levy of additional surcharge is provided in the Section 42 (4) of the Act, 2003, Section 43(1) of the Act, 2003 is foundation for levy of additional surcharge. Section 43 of the Act provides that distribution licensee (DISCOM) has a universal supply obligation (USO) and required to*

supply power as and when demanded by any owner /occupier of premises in its area of supply. 28. It is noteworthy to mention that this Hon'ble Commission while deciding earlier petitions on the same subject matter ( Petition No. 64 of 2020) has relied upon the Section 42 of the Act.

31. The Levy of additional surcharge is provided in Section 42 (4) of the Act which reads as under:

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

32. From bare perusal of Section 42(4), it may be seen that the State Commission is empowered to levy additional surcharge to meet the fixed cost arising out of obligation to supply. Section 43 provides for the obligation to supply. The relevant provision of Act, 2003 is reproduced as under:

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

33. It may be seen that the distribution licensee has a duty to supply to each and every premises in its licensed area of supply. Premises also include premises of captive consumer and there is no distinction in this regard under the statute. In other words duty to supply does not come to an end upon the consumer/ owner of the premises decides to avail open access or consume power from own captive generating plant and in terms of the Statutory provision the distribution Licensee has the continued obligation to supply electricity on demand at any time.

34. The petitioner itself admitted that the respondent has universal supply obligation towards the petitioner (para 9 page 5 of the petition):

“9. ....Therefore a distribution licensee has an obligation 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 or captive user seeking enhancement of demand.....”

Since petitioner is admitting the universal supply obligation levy of additional surcharge cannot be denied.

35. In the instant case petitioner is the consumer of answering respondent and premises of the petitioner is connected with the works of the licensee. Thus, answering respondent has universal supply obligation towards the appellant. This Hon'ble APTEL in **Hindalco case (Appeal 1 of 2006)** held that a person



whose premises is connected with the network of the licensee is a consumer and Discom has universal supply obligation towards such consumers even if the said consumer is availing supply through captive route. The relevant extract is reproduced as under:

17. The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of Section 86(1) (a), Section 42 and Section 49 of The Electricity Act 2003 as well as by losing sight of the object behind the said provisions. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to **Sections 42 (2); (4) and Section 62 of The Act**. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area DISCOM / distribution licensee. We have already held so in Appeal No.34 of 2006 Bhusan Steel vs. W.B.E.R.C.

.....  
20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. **There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Belurmath is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.**

23. **On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP.....**

24. **There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual**

**relationship with the area distribution licensee or shall cease to be a consumer of the area DISCOM/ Licensee.....**

36. *In view of above, it is submitted that if there is universal supply obligation there shall always be levy of additional surcharge. In other words before deciding that levy of additional surcharge is not applicable on the petitioner declaration to this effect also required that licensee has no universal supply obligation towards the petitioner.*
37. *In view of above submission and in the present circumstances of the case petitioner is liable to pay additional surcharge. Hon'ble Commission is requested to dismiss the petition and render justice."*

**Commission's Observations and Findings**

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

- (i) The subject petition is filed under Sections 86(1)(e) and 86(1)(f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005 against levy of Additional surcharge by the Respondent on the Petitioner's 2000 kVA Steam turbine Plant and 788 kVA Biogas Engine.
- (ii) The petitioner is HT consumer of Respondent having a contract demand of 2850 kVA. The petitioner has set up on-site captive power plants of 2000 kVA Steam Turbine Engine and 788 kVA Biogas Engine.
- (iii) The petitioner initially executed an HT connection agreement with the Madhya Pradesh State Electricity Board ("MPSEB") for supply of 1350 kVA on 17.09.1999. Besides several other supplementary agreements executed between the petitioner and the Respondent, the fourth supplementary agreement dated 15.05.2004 was executed between the petitioner and Respondent for enhancement of petitioner's contract demand upto 1800 kVA. Subsequently, the petitioner reduced its contract demand to 1380 KVA and thereafter, it has again increased its contract demand to 1700 KVA by executing sixth supplementary HT connection agreement on 14.03.2011.
- (iv) As mentioned in the petition, in order to meet its power requirement and to maintain continuous supply of electricity, the petitioner installed a 2000 kVA Steam Turbine Engine. This 2000 kVA Steam Turbine Engine utilizes potential energy of steam and 1600 kW of power is produced as a by-product. The Petitioner has contended that it has made huge capital investment for getting the benefit of this additional power supply.
- (v) Further, seventh supplementary HT connection agreement was executed on 06.01.2015 between the petitioner and Respondent for enhancement of contract demand to 2300 kVA to meet the increased power requirements of the manufacturing unit of petitioner. Subsequently, on 29.06.2015, the petitioner further executed eighth supplementary HT connection agreement for load

enhancement from 2300 kVA to 2700 KVA. The Petitioner executed ninth HT Connection agreement on 29.06.2016 with the Respondent for enhancement of its contract demand to 2850 kVA.

- (vi) The petitioner installed a bio-gas based power generation plant i.e. 788 kVA Biogas Engine. This 788 KVA Biogas Engine serves to recover the cost of expenditure for installation of Effluent Treatment Plant by setting-off the cost of additional power requirement. The power supplied to 788 kVA Biogas Engine is connected to the petitioner's own electrical system.
- (vii) The petitioner generates electricity from its 100% owned on-site 2000 KVA Steam Turbine Engine and 788 kVA Biogas engine for 100% self -consumption only. It qualifies as a captive generation power plant in accordance with the applicable laws. Thus, the status of petitioner as Captive Power Plant/ User is undisputed in this matter.
- (viii) The Respondent on 06.07.2021 imposed additional surcharge on the CGPs of petitioner under Section 42 (4) of the Electricity Act, 2003 for the period April, 2017 to March, 2021.
- (ix) The petitioner has placed following reasons against levy of Additional Surcharge by Respondent on the power consumed from its CPPs in this matter:
  - (i) There is no element of supply/ 'sale' involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e. in terms of Rule 3 of the Electricity Rules) does not amount to "supply of electricity" as contemplated under Section 42(4).
  - (ii) Captive user is different from a consumer receiving supply of electricity on Open Access.
  - (iii) Even if availing Open Access, a captive user's Open Access is a right under Section 9(2) and is not subject to the State Commission's discretion under Section 42(4). In other words, Section 42(4) is not applicable to captive users.
  - (iv) If electricity is not wheeled through a licensed network and/ or no wheeling charges have been determined for a class of consumers.
  - (v) Where there is no stranding of the licensee's fixed cost in relation to his supply obligation.
  - (vi) The issue of levy of additional surcharge on the captive consumer is no more res-integra. Hon'ble Supreme Court on 10.12.2021 in Civil Appeal 5074-5075 of 2019 in matter of "Maharashtra State Electricity Distribution Co. Ltd. v. M/s. JSW Steel Limited & Ors." has clearly held that additional surcharge cannot be levied on captive power plant.

- (vii) Hon'ble Supreme Court in the aforesaid Judgment has reviewed Section 9 and Section 42 (4) of the Electricity Act, 2003 and held that Sub-section (4) of Section 42 will be applicable only on non-captive open access consumer and only such consumer will be liable to pay additional surcharge.

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

- (a) Hon'ble Supreme Court's Judgment in the matter of Sesa Sterlite v. OERC [(2014) 8 SCC 444]
- (b) Hon'ble Supreme Court's Judgment in the matter of Hindustan Zinc Ltd. v. RERC [(2015) 12 SCC 611]
- (c) Judgment dated 11.06.2006 passed by Hon'ble APTEL in Appeal No. 1 of 2006 -in the matter of Hindalco Industries Limited v. WBERC.
- (d) MPERC's Order dated 22.05.2007 in Petition No. 02 of 2007 in the matter of M/s. Malanpur Captive Power Limited, Mumbai Vs MP Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal.
- (e) MPERC Order dated 17.05.2021 in Petition No.64 of 2021 filed by Grasim Industries Ltd.

12. While citing above Orders/ Judgments, the Respondent has broadly placed the following arguments for applicability of Additional Surcharge on the power consumed by the petitioner from its CPPs in this matter:

- i. Judgment of Hon'ble Supreme Court in a similar matter of Maharashtra State Electricity Distribution Co. Ltd. V. M/s. JSW Steel Limited & Ors. [Civil Appeal No. 5074-5075 of 2019] is not applicable in the present matter since the petitioner is a consumer within the meaning of Section 2(15) of the Electricity Act 2003.
- ii. The Respondent who is required to meet the requirement/ demand of all consumers, **owner or occupier of any premises** 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 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, Respondent continue to pay fixed charges in lieu of its contracted capacity with generators.
- iii. In the above situation, the 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.
- iv. Any immunity from recovery of Additional Surcharge from such persons who have captive generation and consumption would be contrary to the very scheme and provisions of the Act. The Act consciously provides for exemption from charges to captive generation and captive use in a limited aspect namely from payment of cross subsidy

surcharge as per sections 38(2)d) – proviso; 39(2)d) – proviso; 40(1)c) – proviso; and 42(2)- proviso. However when it comes to section 42(4) dealing with Additional Surcharge, there is no such exclusion which makes it abundantly clear that there was no intention to exclude the same for captive generation and captive use.

- v. In view of provisions of the Electricity Act, petitioner is ‘consumer’ for the purpose of levy of fixed charges on following counts:
- (a) Petitioner is maintaining contract demand with Respondent and are being supplied with electricity for its own consumption.
  - (b) Premises of the petitioners are connected with the works of a licensee for the purpose of receiving electricity.
  - (c) Premises of the petitioner is situated in the area of supply of the answering respondent.
  - (d) Captive consumers are also the consumer of the distribution licensee.
  - (e) A person who has set up a captive generating plant has dual rule, one as a consumer and another as a generator. As per Act additional surcharge is payable in the capacity of consumer and not as generator.
- vi. In the instant case, petitioner is not challenging the vires of MPERC Regulations. The Commission while deciding earlier petitions on the same subject matter (Petition No. 64 of 2020) has relied upon such Regulations. Thus, as per provisions of the Regulations prevailing in the State of Madhya Pradesh petitioner is liable to pay additional surcharge.

**13.** The Commission while deciding earlier petitions (including Petition No 64 of 2020) having similar issue of levying additional surcharge on the consumption of electricity by Captive User from its Captive Generating Plant, had noted that Hon’ble Appellate Tribunal for Electricity in Judgment dated 27.03.2019 in Appeal No. 311 & 315 of 2018 in the matter of *M/s JSW Steel Ltd. & Ors. v. MERC & Anr.* held that Additional Surcharge is not leviable on Captive Users. It was further noted that the aforesaid Judgment of Hon’ble Appellate Tribunal was challenged before the Hon’ble Supreme Court by Maharashtra State Electricity Distribution Company Limited in Civil Appeal No. 5074-5075/ 2019 and the Hon’ble Apex Court had passed an interim order on 01.07.2019 in the said Civil Appeal staying the operation and implementation of the aforesaid Hon’ble Appellate Tribunal’s Judgment dated 27.03.2019.

**14.** While deciding the instant petition, the Commission has observed that Hon’ble Supreme Court has now decided the aforesaid matter and vide Judgment dated 10<sup>th</sup> December’ 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the above matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors, Hon’ble Supreme Court has held as under:

*“11. Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electivity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the*



*Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee/ licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.*

12. The term “consumer” is defined in Section 2(15), which reads as under:  
“(15) “consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of licensee, the Government or such other person, as the case may be;”
  
13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of 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. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/ or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person – distribution licensee of his area of supply. **So far as captive consumers/ captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers/ captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003.** In the case of the captive consumers, captive users, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/

*captive user, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.*

14. *Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/ invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/ or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 41(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.*
15. *In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed.....”*

***(Emphasis Supplied)***

15. In view of foregoing observations and in light of the above-mentioned Judgment of Hon'ble Supreme Court, it is held that the Additional Surcharge is not applicable on captive use by petitioner under Section 42(4) of the Electricity Act 2003 on the quantum of power consumed by petitioner from its onsite 2000 kVA Steam Turbine Engine and 788 kVA Biogas plant Captive Power Plants. With the aforesaid observations and findings, the subject petition stands disposed of.

**(Gopal Srivastava)  
Member (Law)**

**(Mukul Dhariwal)  
Member**

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