MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

BHOPAL

Sub: In the matter of petition under Section 86(1)(f), 129, 142 and other applicable provisions of the Electricity Act, 2003 against unlawful and erroneous levy of Additional Surcharge; Cross Subsidy Surcharge and Wheeling Charges, on the petitioners.

Petition No. 17 of 2019

ORDER

(Date of Order: 10th January' 2020)

(1) M/s. Ascent Hydro Projects Ltd.,
6, Shiv Vastu Tejpal Scheme,
Road No. 5, Ville Parle (East), Mumbai – 400 057

(2) M/s. VE Commercial Vehicles Ltd.,
Plot No. 102, Sector-1, Pithampur,
Distt.-Dhar (M.P.) – 454 775

(3) M/s. Piramal Enterprises Ltd.
67-70, Sector II, Pithampur,
Distt.-Dhar (M.P.) – 454 775

- Petitioners

Vs.

(1) The Managing Director
M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Compound, Polo Ground, Indore (MP)

(2) The Managing Director
M.P. Power Transmission Co. Ltd.,
Shakti Bhawan, Rampur, Jabalpur – 482008

(3) The Managing Director
M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur – 482 008 (M.P)

(4) The Managing Director
M.P. Power Management Company Ltd.,
Shakti Bhawan, Rampur, Jabalpur – 482008

(5) Government of Madhya Pradesh
Through its Principal Secretary
Energy Department
Mantralaya, Vallabh Bhawan, Bhopal (M.P.)

(6) New and Renewable Energy Department
Government of Madhya Pradesh
Vallabh Bhawan, Bhopal

Respondents

Shri Arijit Maitra, Advocate, Shri Shyam Vaidya, MD, Shri Vsva Rao and Shri Munish Rai, Advisor

appeared on behalf of the petitioners.

Shri Shailendra Jain Dy. Director, appeared on behalf of Respondent No. 1, MPPKVVCL, Indore

Shri Anand Kumar Dubey, EE, Shri Abhinav Anand, AE, Shri Vincent D'souza, SE appeared on behalf of Respondent No. 2, MPPTCL, Jabalpur

Shri Deepak Chandela, DGM, Shri Devaditya Dubey, Manager, Shri Sunil Tripathi, Manager and Shri Vikram Bhaskar appeared on behalf of Respondent No.3, MPPKVVCL, Jabalpur

Shri Aashish Bernard, Advocate and Shri R.K. Thukral, AGM appeared on behalf of Respondent No. 4, MPPMCL, Jabalpur

Shri Rakesh, Consultant and Shri R.R. Tripathi, EE appeared on behalf of Respondent No. 6, NRED, Bhopal.

2. The Petitioner No. 1 is a Company incorporated under the provisions of Companies Act, 1956. It is an electricity Generating Company within the meaning of Section 2(28) of the Electricity Act' 2003.

3. The Petitioners No. 2 and 3 are Procurers/ recipients of electricity from Petitioner No. 1 for their use in the industrial activities. The facilities of Petitioner No. 2 and 3 are within the licensed area of Respondent No. 1. The Petitioners No. 2 and 3 are also HT consumers of Respondent No. 1.

4. The subject petition is filed by above petitioners being aggrieved on account of levy of the following charges on the Petitioner No. 2 and 3:

(a) Cross subsidy surcharge in contravention of the Electricity (Removal of Difficulties), Second Order, 2005,

(b) Additional surcharge in violation of the Tariff Policy notified by the Central Government u/s 3 of the 2003 Act; and

(c) Wheeling charges.

It has also been stated in the subject petition that all above charges are in contravention of this Commission's orders dated 14.09.2004, 19.10.2004, 04.08.2007, and in breach of the Power Purchase Agreement dated 26.07.1999, which has incorporated in itself the terms of the "Scheme of incentives of the Govt. of Madhya Pradesh' dated 26.09.1994.

5. The petitioner has broadly submitted the following in the subject petition:

"(i). That the Petitioner No. 1 has set up its (2X1100 kw) Electricity Generating Project called as the "Birsinghpur Mini Hydel Power Project" at Village Mangthar, Distt.

Umaria, Madhya Pradesh deriving strength from and in pursuance to the Policy of the Government of Madhya Pradesh dated 26.9.1994.

(ii) That in pursuance of the above 1994 Policy, the Petitioner No. 1 decided to establish the Mini Hydel Project at Birsinghpur in the State of Madhya Pradesh with a capacity of 2 x 1100 KW. Madhya Pradesh Electricity Board, consequent to the 1994 Policy signed the PPA with Petitioner No. 1 on 26.7.1999 in regard to the purchase of power, wheeling, captive use, third party sale and setting up of the Birsinghpur Mini Hydel Project on the terms and conditions contained in the said agreement. The 1994 Policy was incorporated as a part of the said 1999 PPA.

A copy of the 1999 PPA entered into between the Petitioner No. 1 and the Madhya Pradesh Electricity Board is attached hereto and marked as Annexure 7.

(iii) That by Order dated 20.6.2002, the Government of Madhya Pradesh accorded permission to Petitioner No. 1 under Section 18A of the Electricity (Supply) Act, 1948 for establishment and operation of 2 x 1100 KW Birsinghpur Mini Hydel Project in accordance with the above 1999 PPA.

A copy of the Order dated 20.6.2002 given by the Government of Madhya Pradesh is attached hereto and marked as Annexure 8

Simultaneously, MPEB also gave permission u/s 44 of the Electricity Supply Act, 1948 on 02.11.1999 confirming all the same conditions.

A copy of the letter dated 02.11.1999 is annexed hereto and marked as Annexure 9.

(iv) That, the Petitioner no. 1 proceeded with the establishment of the Mini Hydel Power Project of 2X1100 KW each, made substantial investments altering its position and the hydro project achieved commercial operation in July, 2006. Since then the Petitioner No 1 has been generating and supplying electricity to third parties in accordance with the 1994 Policy and 1999 PPA entered into with the Madhya Pradesh Electricity Board.

(v) That the Petitioner No. 1 has been conveying/transmitting the electricity generated from the place of generation at Village Mangthar, Distt. Umaria which is in the Poorva Kshetra, the licensed area of Respondent No 3 through the Transmission network of Respondent No 2 to the place of the end use consumers. For such conveyance of power the Respondent No 1 had been adjusting the applicable 2% in energy units in terms of the above 1994 Policy and the 1999 PPA, at all times during the period from the date

of the commercial operation of the Mini Hydel Project of the Petitioner No. 1 and to the extent of third party sale effected in terms of the 1994 Policy.

(vi) That, as at present the Petitioner No. 1 has been selling electricity generated to its Procurers who are Petitioner Nos. 2 and 3 herein, for use in their respective facilities, both situated in the Paschim Kshetra area within the licensed area of Respondent No 1 . Accordingly, the power generated by the Petitioner No 1 is being conveyed to such facilities. The only charges/consideration forthe use of the transmission and distribution system of the MPEB is the adjustment of 2% in energy units as provided in the 1994. Policy, 1999 PPA and the Hon'ble Commission's Orders.

(vii) That the Impugned Bills levying wheeling charges, cross subsidy charges and additional surcharge on the electricity sale from as the Mini Hydel Power Project of the Petitioner no. 1 are in contravention of the Second Order, 2005, Tariff Policy, Hon'ble Commission's orders dated 14.9.2004, 19.10.2004, 4.8.2007, and in breach of the 1999 PPA, which has incorporated in itself the terms of the 1994 Policy, since the Petitioner No. 1 was liable to pay only 2% by adjustment in energy units. Copies of the Impugned Bills are annexed hereto and marked as Annexure 10.

(viii) That the Impugned Bills are also otherwise arbitrary, capricious and contrary to the consistent course adopted since the beginning till 17.11.2017 that is the date of notification of the Seventh Amendment. It is submitted that the Respondent Licensee is mis-utilizing the Seventh Amendment to raise the Impugned Bills.

(ix) Without prejudice to the aforegoing submissions, and in the alternative, it is submitted that the Seventh Amendment cannot in law authorize the Respondent Licensee to raise the Impugned Bills as the same would be in contravention of the Second Order, 2005, Tariff Policy, Hon'ble Commission's orders dated 14.9.2004, 19.10.2004, 4.8.2007, and in breach of the 1999 PPA, which has incorporated in itself the terms of the 1994 Policy. It is submitted that in the event the Hon'ble Commission were to take the view that the Seventh Amendment is in sub-silentio regarding the charging of wheeling charges, cross subsidy charges and additional surcharge on the Mini Hydel Power Project of the Petitioner no. 1, who are otherwise protected as aforesaid, the Hon'ble Commission may kindly amend the Seventh Amendment or pass necessary orders under its powers to remove difficulty and exempt the open access charges on the Petitioners and / or issue clarifications clarifying the exemption on the Petitioners from the levy of the aforesaid open access charges……………

(x) *That, a bare perusal of the clauses of the agreement reveal that everywhere in the contract, there is a reference and adherence to the1994 Policy. After the enactment of the 2003 Act which came into force on 10.6.2003, the Commission is undertaking its functions in terms of the provisions of the 2003 Act read with the applicable provisions of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 to the extent that the State Act of 2000 is not inconsistent with the provisions of the 2003 Act. In this regard, the Petitioner No. 1 crave reference to the provisions of Section 185 of the 2003 Act which reads as under:-*

> *"Section 185. (Repeal and saving): --- (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.*
>
> *(2) Notwithstanding such repeal, -*
>
> *(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act."*

(xi) *That Section 61 the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 Inter alia provided as under:*

> *"61. ...*
>
> *(3)All actions taken by any person or authority including the Board under the Indian Electricity Act, 1910 (No. 9 of 1910) or the Electricity (Supply) Act, 1948 (No.54 of 1948) prior to the commencement of this Act shall be valid and enforceable notwithstanding the modifications to the said Acts made by this Act."*

(xii) *The decision already taken by the Government of Madhya Pradesh vide the 1994 Policy and the 1999 PPA entered into by the Madhya Pradesh Electricity Board with the Petitioner No 1 are saved by the said section 61 of the Madhya Pradesh Vidyut Sudhar Adiniyam, 2000 and Section 185(2)(a) of the 2003 Act.*

(xiii) *That consistent with the above and at all times, after the constitution of the Commission, the Regulations notified and Orders passed by the Hon'ble Commission from time to time had duly recognised the rights of the Petitioners herein under*

the1994 Policy and the provisions of the 1999 PPA in regard to the all-inclusive charges for the use of transmission and distribution system of the Board being restricted to 2% adjustment in energy units, as specified in the said 1994 Policy and PPA. At no point of time till 16.11.2017 the Distribution Licensee in the State claimed any additional wheeling charges, cross subsidy charges or additional surcharge from the Petitioner No. 1 or from the Procurers of electricity from Petitioner No. 1 such as the Petitioners No. 2 and 3.

(xiv) That the 1994 Policy, PPA, Hon'ble Commission's orders dated 14.9.2004, 19.10.2004, 4.8.2007, confirmed the all-inclusive charges for the use of transmission and distribution system of the Board being restricted to 2% adjustment in energy units.

(xv) That after the enactment of the 2003 Act and on 8.6.2005 the Central Government issued Second Order, 2005. In terms of the above, if the sale of electricity by the Petitioner No. 1 to third party is authorised under the 1994 Policy issued by the Government of Madhya Pradesh and further in terms of the 1999 PPA entered into between the Petitioner no. 1 and the erstwhile Madhya Pradesh Electricity Board, both prior to the enactment and coming into force of the 2003 Act, there shall be no liability to pay charges exceeding 2% adjustment in energy units for the use of the transmission and distribution system of the MPEB. Second Order, 2005 order exempts surcharge under Section 42(2) of the 2003 Act on the electricity being sold by generating companies with consent of the competent government under Section 43(A)(1(c) of the Electricity (Supply) Act, 1948 (repealed Act.) There is an inconsistency between the Impugned Bills and the Second Order, 2005. The Second Order, 2005 order has been made in exercise of power conferred by Section 183 of the 2003 Act.

(xvi) That the above Second Order, 2005 dated 8.6.2005 is a part of the 2003 Act enacted by the Parliament. The Second Order, 2005 has also been laid before the Parliament. The Respondent Licensee is not entitled to levy charges exceeding 2% adjustment in energy units for the use of the transmission and distribution system of the MPEB or cross subsidy surcharge or additional surcharge contrary to the provisions of the Order, 2005 as well as the1994 Policy. Further, the Petitioner no. 1 has acted relying on the1994 Policy and the 1999 PPA and had duly altered its position. The 1999 PPA is valid for a period of 30 years and during the said period the Petitioner No. 1 is entitled to the benefits provided under the1994 Policy. The Respondent Licensee has no power to modify such entitlement provided under the PPA or under the Government of Madhya Pradesh Policy during the duration of the PPA.

(xvii) That, the M. P. Paschim. Kshetra V. V. Co. Ltd. (respondent no. 1) has issued bills to the petitioner no. 2 and 3. These bills run contrary to the 1994 Policy as also the agreement between the parties.

(xviii) That, in the facts and circumstances mentioned above, the Impugned Bills for the payment of increased wheeling charges, cross subsidy charges and additional surcharge as applicable to the power generated and supplied from the Petitioner No. 1's project in place of 2% charges specified in the1994 Policy and the 1999 PPA is arbitrary, capricious, ultra vires the provisions of the 2003 Act and is liable to be set aside.

(xix) The Government of Madhya Pradesh, New and Renewable Energy Department, issued a written advice dated 24.7.2018 to the Hon'ble Commission to exempt open access charges on all renewable energy projects in the State of Madhya Pradesh.

(xx) A copy of the aforesaid letter of Government of Madhya Pradesh, New and Renewable Energy Department dated 24.7.2018 is annexed hereto and marked as ***Annexure – 18.****"*

6. With the above submissions, the petitioner has prayed the following:

a. Take action against the Respondent licenses, inter alia, under Section 129 r/w. Section 142 of the 2003 Act, for securing compliance of the aforesaid orders and/or for ordering penalty for contravention of the Hon'ble Commission's Orders dated 14.9.2004, 19.10.2004 and 4.8.2007;

b. Declare that the impugned bills have been raised in breach of the 1999 PPA to the extent of levy of wheeling charge exceeding 2% adjustment in units of energy for use of the transmission and distribution system;

c. Declare that the impugned bills are contrary to the Second Order, 2005 to the extent of levy of cross subsidy surcharge;

d. Declare that the impugned bills are unlawful in the absence of conclusive proof of stranding of the Respondent Licensees' existing power purchase commitments, to the extent of levy of Additional Surcharge;

e. Quash the energy bills dated 28.12.2017 to 05.02.2019 (i.e. impugned bills) to the extent of the illegal levy of Additional Surcharge; Cross Subsidy Surcharge and Wheeling Charges exceeding 2%;

f. Direct the Respondent Distribution Licensee No. 1 to withdraw the impugned bills and not to take any coercive action against the Petitioner;

g. In the alternative and without prejudice to prayer clauses (a) to (f) above, clarify that the Seventh Amendment Regulations are not applicable to the Petitioners herein and/or review the said Regulations and pass appropriate orders to remove the difficulty in implementing the provisions of the said Regulations;

h. In the alternative and without prejudice to prayer clauses (a) to (f) above, alter, modify or amend the Seventh Amendment Regulations to exempt the Petitioners herein from applicability thereof;

i. Pass an order removing the difficulty, if any, in implementing the Seventh Amendment Regulations qua the Petitioners;

j. Stay the Impugned Bills and future Bills till the final disposal of the present Petition and restrain the Respondent Licensees from taking any coercive action against the Petitioners herein; and

k. Pass any other order or further orders that this Hon'ble Commission may deem fit and proper in the circumstances of the case.

7. The subject petition was admitted on 23rd April''2019. The copy of petition was served to all Respondents by the petitioners and the respondents were asked to file their reply to the subject petition by 20th May'2019. The Respondents submitted their reply to the subject petition as under:

(i) **Government of M.P, Energy Department (Respondent No.5)**: Vide letter No. 4059/2019/XIII?2566 dated 21st May'2019, Government of M.P, Energy Department submitted that all the policy related issues of new and renewable energy sources including those regarding Hydro Electric Scheme (up to 10 MW) are being dealt by the New & Renewable Energy Department, GoMP, since 2010. It was further stated by Respondent No.5 that the Energy Department, GoMP has no locus standi in the subject petition thus, the New and Renewable Energy Department may be added as respondent in this matter in place of Energy Department.

(ii) **M.P. Power Transmission Co. Ltd (Respondent No.2)**: MPPTCL by affidavit dated 20th May'2019 filed its reply broadly mentioning that MPPTCL is not dealing with the issues raised in the subject petition as it has not raised any demand/invoice to the petitioner. The petitioner is not seeking any relief from Respondent No.2.

(iii) **M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd, Indore(Respondent No.1)**: By affidavit dated 21st May'2019, Respondent No. 1 (M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd, Indore) in its

preliminary objection submitted that all agreements related to power purchase executed by erstwhile MPEB/MPSEB including the PPA under consideration has been assigned to MP Power Management Co. Ltd Jabalpur (MPPMCL).Therefore, MPPMCL being the necessary party needs to be impleaded in the subject petition for proper adjudication of dispute.

(iv) **M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd, Jabalpur (Respondent No.3)**: By affidavit dated 25th May'2019, Respondent No. 3 (M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd, Jabalpur) also requested to implead MP Power Management Co. Ltd Jabalpur (MPPMCL) in the subject petition for proper adjudication of dispute.

8. The petitioner by affidavit dated 27.05.2019 filed its rejoinder to the preliminary objection raised by Respondent No.1 with respect to non- joinder of necessary party. In the aforesaid rejoinder, the petitioner has denied the necessity of impleading MP Power Management Co. Ltd Jabalpur (MPPMCL) for adjudication of dispute in the subject petition. The petitioner filed an application under Section 94(2) of the Electricity Act' 2003 seeking interim order/directions against the impugned bills. The aforesaid application (IA No. 1 of 2019) was disposed of by this Commission.

9. Vide Commission's order dated 31st May' 2019, the petitioner was directed to take appropriate steps to file an amended Memo of Parties adding M.P. Power Management Co. Ltd., Jabalpur and New and Renewable Energy Department, GoMP the Respondents in the matter.

10. During the hearing held on 30.07.2019, the Commission observed the following:

(i) By Affidavit dated 12th July'2019, a common reply to the subject petition was filed by Respondent No.1, Respondent No. 3 and Respondent No.4.

(ii) By Affidavit dated 27.07.2019, a common rejoinder was filed by the petitioners to the aforesaid reply filed by Respondent No. 1, 3 and 4.

(iii) Ld. Counsel on behalf of Respondent No.4 stated that he needs some time to file its response on the above rejoinder filed by the petitioners.

(iv) Ld. Counsel on behalf of Respondent No.4 raised some objections on the maintainability of the subject petition in form of current petition and dual nature of the subject petition i.e. whether the subject petition is for complaint under Section 142 of the Electricity Act'2003 or dispute between the generator and licensees under Section 86(1)(f) of the Electricity Act'2003. Ld. Counsel of Respondent No.4 stated that he could not raise the

aforesaid objection in past hearing as he was asked to argue to the IA filed by the petitioners in the subject petition.

11. During the hearing held on 3rd September' 2019, the Commission observed the following:

(i) Vide letter dated 16.08.2019, Respondent No.4 (MPPMCL) filed its written note/submission raising objections on the maintainability of the subject petition in the form of current petition and dual nature of the subject petition.

(ii) Vide letter dated 27.08.2019, the petitioner No.1 also filed its reply/submission to the aforesaid written note/submission filed by Respondent No. 4 on non-maintainability of the subject petition.

(iii) Office of the Commissioner, New and Renewable Energy, GoMP vide its letter No. 355 dated 03.09.2019 sought some time to file their reply in the subject matter.

12. Subsequently, New and Renewable Energy Department, GoMP submitted its written submission mentioning the following:

"It is to be noted that the Petitioner has executed the PPA for 30 years with MPEB in 1999, under the ambit of 1994 scheme notified by GoMP. The petitioner has been exempted from application of Additional Surcharge & Cross Subsidy Surcharge till the issue of 7th Amendment to MPERC- Cogeneration and Generation from Renewable Energy Sources of Energy Regulation 2010 issued in 2017. As per the amendment issued, CSS & ACS is being applied on the power generated from said project being sold through open access.

Though we submit that application of such charges is under the purview of the State Commission, we are of the opinion that application of such charges, especially on project commissioned before the introduction of the said amendment to the regulations, is detrimental to the health of the sector. Further, such charges drastically impact the viability of small projects (< 5 MW) such as that of the Petitioner's (2X1100 KW).

We would like to highlight that a representation seeking exemption on levy of open charges on purchase of power through RE sources has already been submitted from our end to MPERC vide letter dtd 24/07/2018. In summary, we reiterate our request to exempt such charges for renewable energy projects to ensure viability and attractiveness of the sector"

13. Having heard the counsel of the parties on 17.09.2019 and after going through their written submissions on the issue of maintainability of the subject petition, the Commission vide order dated 25th October' 2019, decided that the prayer for seeking action against Respondents under Section 142 of the Electricity Act, 2003 in the subject petition is irrelevant until the dispute referred in the subject

petition with regard to applicability of the Seventh Amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 in petitioner's case is adjudicated by the Commission. In the said order, the Commission held that the subject petition shall only be adjudicated by this Commission under Section 86(1)(f) of the Electricity Act, 2003 on the merits of the case.

14. The arguments were concluded by Ld. Counsel of both the parties on 19th November' 2019. The reply of Respondent No. 1, 3 and 4 to the subject petition and the rejoinder filed by the petitioner on the aforesaid reply commonly filed by Respondent No. 1, 3 and 4 are as under:

A. **Common reply filed by Respondent No. 1, 3 and 4:** The Respondent No. 1, 3 and 4 broadly submitted the following:

1. *That, it is undisputed fact that the petitioner No 1 M/s Ascent Hydro Projects Limited had set up a (2X1100 KW) power project namely "Brisingpur Mini Hydel Power Project" at Village Mangthar, Dist. Umaria, Madhya Pradesh. In this regard a PPA has been executed between erstwhile MP Electricity Board (herein after referred as 'Board') and M/s Ascent Hydro Projects Limited (herein after referred as 'generating company') on dated 26/07/1999. Generating company has obtained statutory approvals as required under Section 18A and 44 of the Electricity (Supply) Act 1948 from the Government and Board respectively.*

2. *That the PPA dated 26/07/1999 interalia makes arrangement for sale of energy to third party HT consumers by wheeling through Board System. The said power project had started commercial operation in July 2006.*

3. *That, vide 7th Amendment to the MPERC (Co- Generation and Generation of Electricity from Renewable Sources of Energy) (Revision- I) Regulations, 2010 (hereinafter referred as 'Regulation of 2010') amended on 17/11/2017, this Hon'ble Commission has revoked exemption granted to open access charges/Cross Subsidy Surcharges on the consumers purchasing electricity from renewal source of electricity through open access.*

4. *That after amendment in Regulation of 2010 the answering respondent started levy of statutory charges u/s 42 of Electricity Act, 2003 upon the consumers of petitioner no. 1 who are purchasing electricity after availing open access from distribution network of answering respondents.*

5. *That, the petitioners have filed present petition primarily on the ground that because of the policy framed and notified by the government of Madhya Pradesh on 26/09/1994 (Annexure P/11) read with their PPA (Annexure P/7) along with Electricity (Removal of Difficulties) Second Order dated 08/06/2005 (Annexure P/17). The impugned amendment i.e. 7th Amendment to Regulations of 2010, notified on 17/11/2017 would not be applicable to them. Petitioners have also placed reliance upon the order dated 14/09/2004 passed by the Hon'ble Commission in the petition no. 83/2007 (Annexure P/3 and P/4) and order dated 4/08/2007 in Petition No. 33 of 2007 (Annexure P/15).*

6. *That, from perusal of averment made in the present petition as well as in the writ petition* ***(WP No 727/2018)*** *filed before Hon'ble High Court along with relief claimed, it is apparent that the petitioners are not challenging the competence of commission regarding levy of open access charges i.e vires of said amendment, however, petitioners are claiming that because of their peculiar status, they are seeking exemption of its application upon them.*

7. *That the main dispute in the present petition is that after amendment made in Regulation of 2010, exemption provided to petitioners from payment of open access charges (Additional surcharge, Cross Subsidy Surcharge and wheeling charges) on the power supplied from Brisingpur Mini Hydel Power Project to third party consumers (petitioner No 2 and 3) has been taken away. It is the case of the petitioner that the aforesaid power project has setup as per 'Scheme of incentive for generation of power through non conventional energy source (mini micro hydel, solar, wind, bio-energy e.t.c.) in Madhya Pradesh' notified by the Government of Madhya Pradesh on dated 26 Sep 1994 and incentive as per aforesaid policy forms part of the PPA dated. 26/07/1999 therefore petitioner is entitled to enjoy similar exemptions as being availed before aforesaid amendment.*

8. *That, petitioners have challenged the levy of the open access charges citing violation of the followings:*
   - A. *Second Electricity [Removal of Difficulties] second Order, 2005 dated 08/06/2005.*
   - B. *Scheme of incentive for generation of power through non conventional energy source (mini micro hydel, solar, wind, bio-energy e.t.c.) in Madhya Pradesh' dated 26 Sep 1994*
   - C. *Order of the Hon'ble Commission dated 14/09/2004 in the Petition No. 83/2004.*
   - D. *Order of the Hon'ble Commission dated 4/08/2007 in the Petition No. 37/2007.*

E. Power Purchase Agreement (PPA) dated 26/07/1999.

F. National Tariff Policy issued by Central Government

G. 2nd Amendment to MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005

H. MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) 2010

I. MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) 2008

The answering respondent response to the objection is as under:-

A. Second Electricity [Removal of Difficulties] second Order, 2005

9. That, petitioners have contended that they are entitled for the exemption given under the Second Electricity [Removal of Difficulties] second Order, 2005 and despite the 7th amendment in the regulation of 2010 they are not liable to pay cross subsidy surcharge. However, the argument advanced by the petitioner seems to be fallacious and misconceived because of following reason.

10. That, the concept of cross subsidy has been elaborately dealt by Hon'ble Supreme Court in the matter of SESA STERLITE LTD. V. ORISSA ELECTRICITY REGULATORY COMMISSION AND OTHERS (2014) 8 SCC 444 and has observed as under :-

This extract is taken from Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission, (2014) 8 SCC 444 : 2014 SCC OnLine SC 389 at page 456

"(2) Open access and Cross-Subsidy Surcharge (CSS)

23. *Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression "open access" has been defined in the Act to mean:*

> *"the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the appropriate Commission".*

24. *The Act mandates that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its transmission system to every licensee and generating company. Open access in transmission thus enables the licensees (distribution licensees and traders) and generating companies the right to use the transmission systems without any discrimination. This would facilitate*

sale of electricity directly to the distribution companies. This would generate competition amongst the sellers and help reduce, gradually, the cost of generation/procurement.

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

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

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

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

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

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

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

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

(b) *obligation to supply."*

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

compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee."

11. *That a plain reading of section 42 of the Electricity Act 2003 would make it clear that cross subsidy surcharge (hereinafter referred as CSS) is a "statutory surcharge" and recoverable from all "open access consumer" except upon a person, who is seeking open access, for carrying electricity for his own use, from his captive generating plant (i.e. a Captive User). It is admitted position on record that neither section 42 nor any other provision of Electricity Act 2003 exempt levy of CSS/open access charges on the consumers availing open access from any source of "renewable sources of energy".*

12. *That, the petitioners have placed reliance on the second Electricity [Removal of Difficulties] second Order, 2005 dated 08/06/2005 (here in after referred as 'removal of difficulty order') for claiming exemption from cross subsidy surcharge. This order is issued by the government exercising power conferred by Section 183 of the Electricity Act' 2003. In this regard it is submitted that exemption granted in this order is a conditional one and available only if the conditions mentioned therein are satisfied. The relevant operating part of the said order is reproduced as under:*

"2. Exemption from payment of surcharge on the sale or supply of electricity.-
No surcharge would be required to be paid, in terms of sub-section (2) of section 42 of the Act on the electricity ***<u>being sold</u> by the generating companies with consent of the competent government under clause (c) of sub-section (1) of section 43A of the Electricity Act, 1948 (now repealed by the Act),*** *and on the electricity being supplied by the distribution licensee on the authorization by the State Government under section 27 of the Indian Electricity Act, 1910 (now repealed by the Act), till the current validity of such consent or authorizations."*

From the perusal of the aforesaid portion of the order it is clearly emerges that aforesaid order provides the exemption only from the levy of cross subsidy surcharge and there is no mention about the exemption from other open access charges i.e wheeling charges, additional surcharge. Further the exemption from cross subsidy surcharge available only when following two conditions:

i) *Electricity actually being sold by the generating company under the repealed law at the time of enactment of new Act i.e Electricity Act 2003.*

ii) Such sale should be with the consent of competent government as per section 43A(1)(c) of Electricity (Supply) Act 1948.

It is stated that as per submission made by the petitioner themselves in the petition[1] , it is undisputed fact that generation of electricity commenced at the Birsinghpur Mini Hydel Project in the month of July 2006. Thus it is admitted position on record that on 08/06/2005 neither petitioners have started their generation nor they were selling electricity to any third party with permission of State Government thus removal of difficulty order which creates and exception to a Statutory provision and supposed to be applied only in exceptional situation was not applicable upon petitioner. It is also noteworthy to mention that since generating company has started supply of power after enactment of Electricity Act 2003 no such permission under section 43A(1)(c) was necessary to obtain for sale to third party consumers. Petitioners have also not produced any such permission obtained under section 43A(1)(c) of Electricity (Supply) Act 1948. It is further submitted that the charges are being levied on the Petitioners by virtue of the regulations which are held to be valid and enforceable and therefore the Removal of Difficulties Order as relied on by the Petitioner shall be of no avail to the Petitioner.

13. That, in the preamble of the Removal of Difficulty Order the central government has recorded the reasons for providing such exemption. The relevant part is reproduced as under:

> *And whereas generating companies were allowed to enter into a contract for sale of electricity with any other person with the consent of the competent governments under the provisions of clause (c) of sub-section (1) of section 43A of the Electricity (Supply) Act, 1948 (repealed by the Act), and **sale of electricity by such companies was not subject to payment of any surcharge under that repealed law;***
>
> *...........*
>
> ***And whereas in case of electricity being sold or supplied under permissions from competent government or authorizations of the State Government, as the case may be, under the said repealed laws, there was no element of cross subsidy and, therefore, there was no requirement of any surcharge for the same;***

From the perusal of foregoing reason assigned by the Central Government it is clear that exemption is given under this removal of difficulty order because power was already being supplied to the third party consumer at the time of commencement of the Electricity Act 2003, hence there was no element of cross subsidy on such quantum of

power. As such, this consumption other than from distribution licensee doesn't need any compensation in the form of cross subsidy surcharge. However in the present case supply of power to the third party consumers has commenced only in the month of July 2006 thus it would be liable for statutory charges.

14. *That, the petitioners have placed reliance upon the judgment of the Hon'ble APTEL dated 16/10/2006 in the Appeal No. 210 of 2006, 112 of 2006* ***(Annexure-P/19)****. The relevant part of said judgment is reproduced as under:*

    23) The sanction of the State Government which sanction under Section 28(1) of The Indian Electricity Act, 1910 viewed from the different angle in our view would also include a consent in terms of Section 43A(1)(c) of The Electricity (Supply) Act, 1948 as it is clear from the orders referred above. In other words the appellant who had the consent of the State Government to sell power to third parties, is entitled to invoke the Electricity (Removal of Difficulties) Second Order, 2005. The appellant satisfied the conditions prescribed under Section 2 of the said Removal Order, which would mean that the appellant during the currency of the authorization and consent, is not required to apply for open access nor it is required to pay surcharge in terms of Proviso to Sub Section (2) of Section 42 of The Electricity Act, 2003 ***as it is a generating company which has been factually selling power with the consent of the competent Government under Section 43A(1)(c) of The Electricity Act, 1948 before the commencement of The Electricity Act, 2003 as well as on the date of commencement of the said Act.***

    In view of perusal of the aforesaid part of the judgment of Hon'ble APTEL it is clear that the said judgment is not applicable in the present case due to following reason:

    i. In that case generating company was actually selling power before the commencement of the Electricity Act 2003 as well as on the date of commencement of the said Act.

    ii. In that case generating company was supplying power under permission of state government under section 28 (1) of the Indian Electricity Act 1910 which is also dealing with the supply of electricity to the public with the consent of state government. Copy the relevant part of the Indian Electricity Act 1910 enclosed as ***Annexure-R/2.***

15. *That, in the present case power supply has commenced only in the month of July 2006 much after enactment of Electricity Act under which there is no requirement of any permission from government for supplying power under open access. Therefore since*

conditions mentioned in the removal of difficulty order are not being fulfilled by the petitioner benefit of exemption cannot be given on the basis of said order.

16. *That, statutory exemption from payment of CSS is available only to captive generators (subject to satisfaction of conditions) and petitioners, were enjoying exemption from payment of CSS/Open Access Charges only because MPERC vide impugned regulation framed in exercise of its power conferred u/s 86 (1)(e) R/w 181 (2)(zp) had conferred such benefit upon consumer drawing power through open access from renewable electricity generators.*

17. *That it is submitted that exemption enjoyed by petitioners was an act of MPERC and it is settled proposition of law that exemption or concession is a right that can be taken away under the very power in exercise of which it was granted. Since MPERC is the authority which had conferred said concession/relaxation it has full jurisdiction and authority to withdraw it.*

18. *That the answering respondents further submits that petitioner being recipient of a concession has no legally enforceable right against licensee or authority to demand grant of any exemption or continue to grant concession in payment of Open Access Charge/CSS.*

19. *That under Section 42 of Electricity Act open access consumer like petitioners are under statutory obligation to pay CSS/open access charge and exemption was a freedom granted to a class of open access consumer from discharge of said obligation. However under statute it was always open for authority, granting such freedom, to reconsider the matter and curtail or withdraw the exemption.*

20. *That, in the present case in the month of July 2006 the generation and third party sale of power commenced from the power plant of the generating company. As such it certainly results in the loss of cross subsidy included in the tariff and adversely affects the finances of the respondent licensee, which requires compensation in the form of cross subsidy surcharge.*

21. *That, the validity of the 7th amendment to regulation of 2010 has been challenged by some consumers/generators before Hon'ble High Court of Madhya Pradesh in petition No. 9870 of 2018* ***(Annexure R/3****). Hon'ble High Court while upholding the validity of amendment held as under:*

    "52-Section 42 and 86 nowhere provides for exemption from payment of surcharge and Cross Subsidy Surcharge. On the contrary, proviso to Section 86 (1) (a) of the

Electricity Act, 2003 makes it mandatory upon the State Commission to determine the wheeling charge and surcharge (Cross Subsidy Surcharge) in case of permission of Open Access. In fact it does not authorize the Commission to grant any exemption from a statutory fee / surcharge, which is otherwise payable under the Act and by no stretch of imagination Open Access Surcharge (Cross Subsidy Surcharge) can be exempted in exercise of power conferred under Section 86 (1) (e) of the Electricity Act, 2003."

From the perusal of the aforesaid ruling of Hon'ble High Court it is clear that respondents are entitled to recover the all applicable open access cross including cross subsidy surcharge from petitioners.

22. That, failing to fulfil the conditions mentioned in the Removal of Difficulties Order, the amended regulation of 2010 is equally applicable to the petitioners and no exemption in this regard can be given to the petitioners.

B. Scheme of incentive for generation of power through non conventional energy source (mini micro hydel, solar, wind, bio-energy e.t.c.) in Madhya Pradesh' dated 26 Sep 1994:

23. That, with regard to aforesaid policy of government it is stated that it is now a settled legal position that provision of policy can not restrict or override statutory power given to Regulatory Commission being a Regulator as well as a quasi judicial adjudicatory body. As stated earlier the Government of Madhya Pradesh had opted to notify the establishment of the State Regulatory Commission, and applied the provisions of the Electricity Regulatory Commission Act 1998 to the State of M.P. The notification in this regard was issued in the State Gazette dated 20/8/98. The appointment of the Chairman and Members of the Commission was further notified in the State Gazette dated 30/1/1999. Thereafter Madhya Pradesh Vidyut Shudhar adhinyam was enacted by the State Of MP. w.e.f 10/06/2003 Central Government has enacted the Electricity Act 2003. All three statutes included a provision relating to policy directive to regulatory commission.

24. In view of above statutory provisions, at first the 1994 incentive policy cannot be said a policy directive/direction to commission in terms of aforesaid statutory provision secondly even the directive issued under these provisions merely play a role of guiding factor and cannot adversely affect the power of determination of tariff vested to the Regulatory Commission by the statute.

25. *That, the exclusive jurisdiction of Regulatory Commission is recognised in the 'Incentive Policy for the Development of Small Hydro Power Projects in Madhya Pradesh, 2006' the relevant extract of the same is reproduced as under*

THE REGULATORY FRAMEWORK

The Electricity Act 2003 has been promulgated and has come into application from June 2003. Under the provisions of the Act, any agency is free to set up generating plants for production of power and the producer of the energy is vested with a right to Open Access to the transmission facilities.

The Madhya Pradesh Electricity Regulatory Commission (MPERC) has been functioning since 1999 and orders/regulations passed by this commission from time to time are applicable to the provision of this policy. Similarly policies enacted by GoI from time to time regarding energy sector will also be applicable to the provision of this policy. In case of any inconsistency between the provision of this policy and orders/regulations issued by MPERC, the orders/regulations of MPERC shall prevail.

PART C: INCENTIVES

4. *MPPTCL or concerned State Distribution Company shall facilitate wheeling of power in case of a Third Party Sale at such rates as may be decided by the MPERC. The State Government shall extend a subsidy @ 4% towards such wheeling charges* ***as per existing policy*** *only in case of third party sale within the State of MP.*

It is submitted that like above policy of 2006 all polices issued by the government after establishment of MP Electricity Regulatory Commission specifically recognised the supremacy of the order/regulation of the Commission. Only because it is not mentioned in the incentive policy of 1994 as it is issued before the establishment of the Commission supremacy of the order/regulation of commission cannot be denied. It may be seen that above mentioned clause 4) part c of the policy of 2006 has clearly clarified the scope of current policy (policy of 1994) of government by mentioning that State Government shall extend a subsidy @ 4% towards wheeling charges ***as per existing policy****. Therefore after constitution of MERC even the existing policy is restricted to provide subsidy at the rate of 4% and actual wheeling charges shall be determined by the Hon'ble MPERC. This subsidy is still being provided to the petitioners as per policy. Therefore all applicable open access charges determined by the Commission in the tariff order issued from time to time read with 7th amendment to Regulation of 2010, shall be equally applicable to petitioner notwithstanding anything contrary mentioned in the policy of the state government.*

The copy of the said policy is enclosed as Annexure-R/4.

C. Order of the Hon'ble Commission dated 14/09/2004 in the Petition No. 83/2004:

26. That, with regard to order dated 14/09/2004, it is submitted that this order was passed by the Hon'ble Commission based on prevailing circumstance and statutory provision at the time of passing of order. It is noteworthy to mention that matter of levy of wheeling charges or any other open access charge was not directly and substantially in issue in the petition no 83 of 2004 and this petition was filed merely for seeking exemption from obtaining the licensee to supply power to the third party consumers. Hon'ble Commission vide order dated 14/09/2004 has granted the exemption subject to certain condition. The relevant part of the said order reproduced as under:

"5. The Petitioner also submits that the Respondent MPSEB did not have any objection to the petitioner supplying power to third party consumers as confirmed in its submission dated 12.09.04. ***The petitioner further submits that payment of any additional wheeling charges or surcharge was not an issue in respect of the current petition no. 83/2004 of the petitioner wherein exemption U/s 16 of MPVSA 2000 has been sought.*** *It is therefore, requested by the petitioner for exemption from license U/s 16 of MPVSA, 2000 be considered by the Hon'ble Commission keeping in view that the matter is governed by the PPA executed with MPSEB and GoMP policy restricting the quantum of wheeling charges and no other charges either by the petitioner or the third party consumer is payable.*

6. Having considered the facts and circumstances of this case Commission appreciates that in view of GoMP policy, no surcharge and additional charge ***is presently payable*** *by the wheeled consumer for third party sale to Respondent........................*
This order will also be subject to the following other conditions.

i) ....

ii) The supply and sale of power shall be governed by the policy of the state government ***and other provision of law to be made applicable from time to time*** *and also as per terms and conditions of PPA executed by the petitioner with the MPSEB.*

iii) ***The petitioner shall comply with the provisions of*** *Madhya Pradesh Vidyut Sudhar Adhinyam 2000, and other laws applicable,* ***the Regulation of the Commission,*** *Technical codes, Standard of performance or any other guidelines issued by the Commission from time to time.*

iv) ....

v) ....

From the bare perusal of the aforesaid extract of the order of the Hon'ble Commission it is clear that, petitioner itself in the said petition conceded before Hon'ble Commission that the payment of any additional wheeling charges or surcharge is not an issue in respect of the current petition no. 83/2004, wherein exemption U/s 16 of MPVSA 2000 has been sought. Further Hon'ble Commission in that petition merely observed that no surcharge and additional surcharge is presently payable because till that date no open access regulation was issued by the Commission and no surcharge/additional surcharge was determined by the Commission.

27. *That, Hon'ble Commission vide notification No…1431 .MPERC/2005 Bhopal dated 16, June'2005 has notified MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 (here in after referred as regulation of 2005). Relevant clause 4.3 of the said regulation is reproduced as under:*

> *4.3 The existing consumers or generating companies* ***including the non conventional energy sources availing open access under agreements or government policy on the date of coming into force of these regulations*** *shall be entitled to continue to avail open access on such transmission and distribution system on the same terms and conditions, for the term of the existing agreement or arrangement* ***on payment of transmission charges, wheeling charges and other charges as may be determined by the Commission from time to time.*** *They shall submit to the State Load Despatch Centre details of capacity utilized, point of injection, point of drawal, duration of availing open access, peak load, average load or such other information as the State Transmission Utility/Transmission Licensee/concerned Distribution.*

In view of aforesaid regulation it is clear that all existing consumer or generating company on the date of such notification i.e 16/06/2005 supplying power under government policy are also liable to pay open access charges determined by the Commission in accordance with the regulation of 2005. The regulation of 2010 had merely granted the exemption for payment of such charges which were otherwise payable. It is also pertinent to mention that relief granted vide aforesaid order dated 14/09/2004, is subject to regulation of the Commission issued from time to time. Therefore by virtue of this order also 7th amendment to regulation of 2010 is applicable to the petitioners as against the claim of petitioner regarding non applicability of the same. Therefore petitioners are not entitled for any relief based on this order of the Hon'ble Commission.

Copy of regulation of 2005 is enclosed as Annexure-R/5.

D. *Order of the Hon'ble Commission dated 4/08/2007in the Petition No. 37/2007:*

28. That, the petitioner No. 33 of 2007 was filed due to dispute arises regarding execution of Bulk Power Transmission agreement. In the order dated 4/08/2007 Hon'ble Commission merely noted the provision of clause 4.3 of the aforesaid provision of open access regulation and didn't adjudicated any dispute regarding applicability of open access charges. Even otherwise the present respondents were not the party in this case.

29. That, reliance cannot be placed on any decisions of a court without ensuring as to how the factual situation fits in with the fact or situation of the decision on which reliance is placed. Present circumstances are different from what was prevailing at the time of such decisions. At that point of time open access charges were not determined by the Commission. Further subsequent to these decision following two development has taken place:

i. Regulation of 2005 issued by the Commission which categorically stated that existing open access consumers are also liable to pay open access charges determined by the Commission from time to time.

ii. 7th amendment to regulation of 2010 has withdrawn the exemption of open access charges available to consumer availing power from RE sources.

In this regard Hon'ble Supreme Court in Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778) held as under:

Courts 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. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

..

In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition it will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:
"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"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, the broad resemblance to another case is not at all decisive."

30. *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 also a settled legal position that a decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted. Therefore post 7th amendment to regulation of 2010 reliance by the petitioner on the aforesaid decisions is grossly misplaced.*

E. Power Purchase Agreement dated 26/07/1999 :

31. *That, with regard to PPA dated 26/07/1999 it is suffice to refer the judgment of Hon'ble Supreme Court in PTC India Limited v. Central Electricity Regulatory Commission(2010 (4) SCC 603). The relevant para of the said judgment is reproduced as under:*

"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging

responsibilities and objective inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76 (1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Section 76 (1) and 79 (1) one finds that Central Commission is empowered to take measures / steps in discharge of the functions enumerated in Section 79 (1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-state transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79 (1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order / decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g)............................

56. ....

57.

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. ***<u>Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate</u>***

Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79 (1) (j)."

In view of above it clear that regulation issued by the Commission being a subordinate regulation has the effect of interfering and overriding the existing Power Purchase Agreements dated 26/07/1999. Therefore post 7th amendment to regulation of 2010 reliance on the provision of PPA to the extent inconsistent with the provisions of the regulations cannot be placed.

32. *That, with regard to PPA it is also necessary to refer clause 2.4 of the PPA. The same is reproduced as under:*

"2.4 Consequence of Change in Law:

***As a result of change in law, the Board shall not be responsible for any financial compensation to the company,** however necessary time extension for completion of the project may be considered by the Board. The Company shall meet all such financial implication with its own resources or seeking suitable insurance covers."*

It may be seen that aforesaid agreement itself specifically provided that in case of any change in law board shall not be responsible for financial implication.

33. *That, petitioners also have raised the plea with regard to saving of PPA under section 185(2) of the Electricity Act 2003. The said section is reproduced as under:*

*"anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in **so far as it is not inconsistent with the provisions of this Act**, be deemed to have been done or taken under the corresponding provisions of this Act."*

In view of above it is clear that only those provisions of PPA are saved under this section which is consistent with the provision of the Electricity Act 2003. In the present case provision of PPA related to levy of wheeling charges/open access charges is certainly inconsistent with the provision of tariff orders, regulation of 2005 and regulation of 2010 issued by the Hon'ble Commission, which is having force of law under the Electricity Act 2003 and same cannot be considered as saved under this section. This conclusion is in line with the findings of the Hon'ble Supreme Court in PTC India Limited v. Central Electricity Regulatory Commission supra that regulation being subordinate legislation overrides the existing power purchase agreements.

That, charging of tariff (open access charges) mentioned in the PPA dated 26/07/199

would amount to determination of tariff/open access charges by the Government/Board/Licensee even after enactment of the Electricity Act 2003. In PTC India Ltd. V. Central Electricity Regulatory Commission supra, Hon'ble Supreme Court has categorically held that Electricity Act, 2003 is an exhaustive code on all matters concerning electricity.

34. *That, it is also pertinent to mention that Electricity Regulatory Commissions Act, 1998 had made applicable in the State of Madhya Pradesh w.e.f 20/08/1998 and PPA executed on dated 26/07/1999 much after enactment of the said Act. As per section 22 of the said Act regulatory commission is entrusted with the task of the determination of tariff. Therefore, PPA dated 26/07/1999 is subject to regulatory intervention of the Commission since beginning. At this juncture, it would be appropriate to refer to the judgment of Hon'ble Supreme Court in the case of BSES v. Tata Power Co.Ltd. (2004) 1 SCC 195 wherein following pertinent observations were made:*

"16. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. "Utility" has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that the terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (a) to (g) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act

and Regulations show that the Commission has the exclusive power to determine the tariff. ***The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff."***

In view of above commission has exclusive jurisdiction to determine the open access charges and respondent distribution licensee is bound to charge open access charges approved by the this Hon'ble Commission. Open access charges mentioned in the PPA have no relevance post 7th amendment to regulation of 2010.

F. Tariff Policy issued by Central Government

35. That, the petitioners have challenged the levy of additional surcharge citing it as violation of Tariff Policy notified by the Central Government. It is submitted that additional surcharge is being levied as per provision of the section 42(4) of the Electricity Act 2003. Further there is no provision in the Electricity Act 2003 regarding any exemption from levy of additional surcharge. Hon'ble Supreme Court in the Sesa Sterlite Ltd supra has explained the rationale behind levy of additional surcharge. Vide tariff order 2017-18 Hon'ble Commission has first time determined the additional surcharge. While determining additional surcharge Hon'ble Commission has duly considered the all the statutory provisions. Relevant part of the tariff order 2017-18 is reproduced as under:

3.28 The Commission, taking cognizance of the Petitioners prayer in instant ARR & Retail supply tariff petition for determination of additional surcharge for FY 2017-18, has merged the Petition No. 52/2016 with instant petition. Accordingly, the Commission has considered the submissions made by the Petitioners and stakeholders in light of the provisions specified in the clause 5.8.3 of the National Electricity Policy, Section 42(4) of the Electricity Act 2003 besides relevant clause 13.1 of MPERC (Term & conditions for Open Access in MP) Regulations, 2005 and determined additional surcharge on a yearly basis for Open Access consumers of the State in addition to levy of Cross subsidy surcharge specified in Tariff policy 2016.

....

The Commission has thus determined the additional surcharge of Rs 0.646 per unit on the power drawn by the Open Access consumers from the date of applicability of this Retail Supply Tariff Order.

It may be seen that Hon'ble Commission has considered all relevant statutory provisions and comments of stakeholders. Further the said tariff order has attained the finality and

cannot be challenged in the present petition. Therefore petitioners being open access consumers are equally liable to pay additional surcharge.

36. That, in the present case in the month of July 2006 the generation and third party sale of power commenced from the power plant of petitioner no 1. As such it certainly results in the stranded capacity of power and adversely affects the finances of the respondent licensee, which requires compensation in the form of additional surcharge. Therefore petitioners being open access consumers are equally liable to pay additional surcharge.

G. 2nd Amendment to MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005:

37. *That, petitioners have relied upon the 2st amendment to the regulation of 2005 (**Annexure P/16**). The un amended and amended provision is reproduced as under:*

Pre 2nd Amendment

*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.

Post 2nd Amendment

*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."

38. That, section 42 (2) of the Electricity Act 2003 empowered the state commission to introduce open access in phased manner. Clause 3 of the regulation of 2005 provides such phases in which open access shall be allowed and deals with the time line of availability of

access of transmission/distribution system. This clause doesn't deals with the levy of open access charges.

39. That, clause 3.2 of regulation of 2005 deals with the levy of open access charges same is reproduced as under:

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.

Further as already stated, that clause 4.3 of the regulation of 2005 specifically dealt with the existing consumers and generator. The same is again reproduced as under:

Existing consumers and generators

4.3 The existing consumers or generating companies including the non conventional energy sources availing open access under agreements or government policy on the date of coming into force of these regulations shall be entitled to continue to avail open access on such transmission and distribution system on the same terms and conditions, for the term of the existing agreement or arrangement ***on payment of transmission charges, wheeling charges and other charges as may be determined by the Commission from time to time.*** *They shall submit to the State Load Despatch Centre details of capacity utilized, point of injection, point of drawal, duration of availing open access, peak load, average load or such other information as the State Transmission Utility/Transmission Licensee/concerned Distribution Licensee or State Load Despatch Centre may require, within 60 days of coming into force of these regulations.*

It may be seen that aforesaid clause 3.2 doesn't provide any discrimination regarding levy of open access charges. It only says that such charges shall be leviable in accordance with the regulations of the commission. Further clause 4.3 specifically provides that open access shall be provided to existing consumer/generators on payment of open access charges determined by the Commission from time to time. Therefore it is clear that these regulation never provided any perpetual immunity from levy of open access charges to the petitioner or other similarly placed consumers. In the present case Hon'ble Commission vide 7th amendment to regulation of 2010 has levied open access charges to petitioner and other similarly placed consumers availing power from RE sources. Thus these charges shall be applicable to petitioners and no relief in this regard can be granted.

H. MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) 2010 :

40. That, the petitioners have placed reliance on the provisions (including pre amended clause 12.2) of regulation of 2010 to submit that facility available to the petitioner under the policy of 1994 was continued in the said regulation without any change.

41. That, in this regard it would be appropriate to refer the relevant provisions on which reliance have placed by the petitioners:

8. Open Access for Co-generation and Renewable Sources of Energy
Any person generating electricity from Co-generation and Renewable Sources of Energy shall have Open Access, subject to availability of adequate transmission capacity in Transmission Licensee‟s system within the State as per Open Access Regulations under Section 42 of the Act subject to the provisions of the Government of M.P. incentive policy for encouraging generation of power in M.P. through Non-conventional Energy Sources notified on 17.10.2006.

12.2 (pre amended). 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.

42. That, the aforesaid clause 8 deals with the availability of open access of transmission/distribution system. This clause doesn't speak about the levy of open access charges. This clause is similar to the clause 3.3 (i) of the regulation of 2005. Clause 12.2 provides for the open access charges. There are two part of this clause. First part provides that open access charges shall be levied as decided by the commission from time to time and second part provides for the exemption.

43. That, post 7th amendment to regulation of 2010 first part of clause 12.2 has kept intact, only second part pertains to exemption has been removed. Petitioners contended that there was no liability on them regarding open access charges before 7th amendment. This contention of the petitioner is untenable. The first part of clause 12.2 which is extracted

above and is the charging provision i.e Wheeling charges, Cross subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time. Second part speaks of exemption i.e 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. The question of exemption arises only when there is a liability. Exigibility to open access charges is not the same as liability to pay the open access charges. In other words, exemption presupposes a liability. Unless there is liability question of exemption does not arise. Liability arises in term of first part of clause 12.2 but for the exemption vide second part of the clause 12.2 open access charges has not paid by the consumers.

44. That, it cannot be said that as open access charges was not paid till 7th amendment, the petitioners had no liability under the regulation. They were definitely liable to pay open access charges under the regulation, but for the exemption. Therefore, as far has liability of charges is concern it was there even before 7th amendment to the regulation of 2010.

45. That, after seventh amendment there is no exemption available to the petitioner and other similarly placed consumers. Therefore, now they are liable to make payment of such open access charges as determined by the commission from time to time.

I. MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) 2008 :

46. That, the petitioners have relied on the some provisions of MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) 2008 (herein after referred as regulation of 2008).This regulation has already been repealed by the regulation of 2010 therefore reference on the provision of this regulation is devoid of merit and doesn't deserves to deal with the same.

That in the light of submission aforesaid made the petitioner sans merit and the petitioner is not entitled for any relief claimed therein, thus the petition is liable to be dismissed with cost.

15. In response to the above submissions by the Respondent, MPPMCL and Discoms, the petitioner submitted the following in its rejoinder:

*"A. **PRELIMINARY SUBMISSIONS:***

(I) HON'BLE MPERC HAS ALREADY RENDERED DECISION ON THE APPLICABILITY OF OPEN ACCESS CHARGES ON THE PETITION BY ITS ORDERS DATED 14.9.2004, 19.10.2004 AND 4.8.2007

(A) The Hon'ble Commission has already decided in the 2004 Orders that the only compensation payable for the usage of the transmission and distribution system for sale of electricity from petitioner no.1 is an adjustment in kind of 2% of the total quantum of generated electricity injected into the grid.

(B) The Hon'ble Commission also held that there shall be no levy of "surcharge" and "additional charge" on the electricity being wheeled from the hydel plant of Petition No.1 for consumption by the HT consumers. The word "surcharge" is referable to the 2nd Proviso of sub-section(2) of Section 42 of the 2003 Act which states that "surcharge shall be utilized to meet the requirements of current level cross subsidy within the area of supply of the distribution licensee". This is known as the Cross Subsidy Surcharge. Furthermore, the term "additional charge" is referable to sub-section (4) of Section 42 which states that "additional surcharge on the charges of wheeling, ….., to meet the fixed cost of such distribution licensee arising out of his obligation to supply".

(C) The Respondent Discoms have already implemented the aforesaid decision of the Hon'ble Commission by charging by way of adjustment of 2% units in kind. However, the Discoms started violating and contravening Hon'ble MPERC'S order dated 14.09.2004 & 19.10.2004 2004 ("the 2004 Orders") w.e.f. December 2017 The contravention started ostensibly in order to justify such an action based on the 7th Amendment Regulations. However, the 7th Amendment Regulations do not permit the Respondent Discoms to contravene the Hon'ble MPERC's 2004 order. The 2004 Order is a specific adjudication in the matter of levy of charges on the Petitioner.

(D) In reply, the Respondents rely on the Supreme Court's judgment in PTC India Vs. CERC to contend that "subordinate legislation can even override the existing contracts including Power Purchase Agreements ……"., The question here is different viz. whether the 7th Amendment Regulations can in law override the 2004 orders?

(E) The 2004 Order has been passed in exercise of powers under Section 86 of the Electricity Act, 2003 r/w. the Madhya Pradesh Vidyut SudharAdhiniyam 2000. The 2004 Order has sanctity in law having specifically decided that no more than 2% of adjustment in kind would be taken from the Petitioners as open access charges for the use of the Board's system. The said 2004 Order cannot be disturbed by promulgation of subordinate legislation in the form of 7th Amendment Regulations. There is no

sanction by the Supreme Court in its judgment in PTC India Supra to make subordinate legislation so as to override the judicial and adjudicatory orders.

(F) *In PTC India Supra, it was NOT held that "subordinate legislation can even override the existing adjudicatory and judicial orders ". The Respondents are misreading the Supreme Court's judgment in PTC India Supra.*

(G) *If the Commission adjudicates on matters and passes orders, the same are appealable before the Appellate Tribunal for Electricity under Section 111 of the 2003 Act. Only in Appeal, the Appellate Tribunal can set aside and/or quash the orders of the Commission. However, the orders of the Commission cannot be negated by the Commission itself by way of making subordinate legislation. In such a case, there would be anarchy in the judicial system, as the validity of the orders of the Commission passed in exercise of judicial and adjudicatory functions would be negated by the very same Commission in exercise of its legislative functions. Such an approach is unknown to the field of jurisprudence and law.*

(H) *The 7th Amendment Regulations have been made in exercise of powers under Section 181 of the 2003 Act which empowers the State Commissions to make Regulations. Section 181 does not state that the Regulations made thereunder would be notwithstanding the discharge of functions by the State Commissions under Section 86. There is no non obstante clause under Section 181 of the 2003 Act overriding the orders and directions passed by the State Commissions under Section 86 of the 2003 Act.*

(I) *Section 181 of the 2003 Act enable State Commissions to make regulations "to carry out the provisions of this Act". Accordingly, the 7th Amendment Regulations must be given effect to carry out the provisions of the 2003 Act which includes the Second Order issued under Section 183 of the Act.*

(J) *The Respondent No.1 distribution licensee violated the 2004 Orders of the Hon'ble Commission by levying compensation in kind by the adjustments in the wheeling units exceeding 2% and further by levying cross subsidy surcharge and additional surcharge. The distribution licensee also violated the 2005 Order by levying cross subsidy surcharge and additional surcharge. [Ref: bills @ pages 128 to 182]*

(K) *The Respondent No.1 distribution licensee implemented the 2004 Orders till November, 2017 by restricting the compensation for usage of transmission and distribution system at 2% of wheeled units adjustment in kind. It is noteworthy that the Respondent No.1 distribution licensee did not even comply with the 2010 Regulations of the Hon'ble Commission which had granted exemption from the levy of all forms of open access charges on the renewable energy sale/purchase, by continuing*

to deduct 2% of the wheeled energy as a compensation for use of the transmission and distribution network.

(L) *The Respondent No.1 distribution licensee is not only violating the 2004 Orders of this Hon'ble Commission but is also violating the 1994Policy by claiming to pass on the 4% subsidy received from the State Government to the Petitioners as against the specific provision that the subsidy support is provided to the licensee for his accounting and not for passing the same on to the Petitioners.*

(M) *During the course of the hearing before the Hon'ble Commission, on a query raised by Hon'ble Commission, pertaining to levy wheeling adjustment more than 2% of wheeled units and the claim of 4% subsidy from the State Government, Respondent No.1 licensee stated that the subsidy was being received and the same was being passed on to the Petitioner consumers. This is a contravention of the 1994 Policy which, inter-alia, states that "The State Government will separately compensate MPEB towards line losses etc. at the rate of 4% of power wheeled". Since the 1994 Policy has been held to be still in force in 2004 Order of the Hon'ble Commission, and continues to be valid, this is a clear violation by the Respondent No.1 distribution licensee.*

(N) *In view of the above, the contentions that the exemption from full wheeling charges and all other surcharges were granted by way of regulations by the Respondent Commission is factually incorrect and in fact contrary to the actions of the Respondent Discom which did not implement the 2010 Regulations and kept on charging the 2% adjustment in kind as open access charges as decided under the 2004 Order of the Commission. Hence, the argument of the Respondents that such an exemption could be curtailed or taken back or withdrawn by the Commission by way of the 7th Amendment Regulations is wholly unjustified and unsustainable in law. If the Hon'ble Commission had to withdraw the 2% adjustment in kind, then the Hon'ble Commission would have had to recall and/or review the said 2004 Order, if so permissible in law. However, the Hon'ble Commission certainly cannot withdraw the 2% adjustment in kind by way of exercise of its legislative power by making the 7th Amendment Regulations. The contentions advanced by the Respondents are legally untenable and destructive of the legal and jurisprudential system of this country. In view thereof, Respondent's reliance on the judgment of the Hon'ble High Court of Madhya Pradesh in Writ Petition No.9870 of 2018 is totally misplaced in the facts and circumstances of the present case as the said judgment is totally distinguishable and totally not applicable to the case of the Petitioners herein where the Hon'ble Commission has specifically adjudicated on the quantum of open access charges not to exceed 2% adjustment in kind and where the Second Order 2005 also grants exemption from any surcharge on the electricity sale of Petitioner No.1 generating company.*

(O) *The Respondents have made another legally unsustainable argument that the 1994 incentive policy is not a Policy directive or directions under the MP Vidyut SudharAdhiniyam or the Electricity Act. The Respondents have completely lost sight of the 2004 Order of the Hon'ble Commission where the said 1994 Policy has been upheld and implemented in terms of quantifying the open access charges not to exceed 2% adjustment in kind. These arguments are now not available to the Respondents without having challenged the 2004 Order in Appeal and in fact having accepted and implemented the Hon'ble Commission's order by charging 2% adjustment in kind all along until the notification of the 7th Amendment Regulations whereafter illegally the Respondents started contravening the said 2004 Order.*

(P) *The Respondents wrongfully submitted that the matter of levy of wheeling charges or open access charge was not directly or substantially in issue in Petition No.83 of 2004. While quoting extracts from the 2004 Order, the Respondents conveniently concealed and did not extract the following paragraphs which is a clear ratio and decision on the subject matter of payment of wheeling charge and any surcharge and additional charge:*

> *"……*
>
> 5. *Commission observes that **if the respondent** recovers **over and above 2% wheeling charges** from the petitioner then **it goes against the Government policy and the agreement executed.** Either the Bard should revise the stand or the Government should revise its stand regarding the wheeling charges. The policy announced by the Government in respect of non-conventional sources in 1994 **is still in force** which has been **recently confirmed by the GoMP.** Copy of the Government's letter can be availed from this office. The Board should state clearly whether they adhere to the policy of the Government or else they should take up this matter with the Government and inform its stand within the period of one month."[Order dated 14.9.2004]*
>
> *"6. Having considered the facts and circumstances of the case, Commission appreciates that in view of GoMP policy **no surcharge and additional charge** is presently payable by the wheeled consumer for third party sell to the Respondent. **Commission reviewing its Order dated 14.9.04 decides to** grant exemption from requirement of obtaining license for sale of electricity to the third party u/s. 16 of M.P. Vidyut*

SudharAdhiniyam, 2000 for the period of PPA from the date of Order ***subject to the conditions of payment of wheeling charges at the existing rate of 2% by the petitioner and payment of subsidy 4% by the State Government as per the policy dated 26.09.04.*** *The inadvertent flow of energy on the Board's system shall be paid @ Rs.2.25 per unit as per prevailing GoMP policy. "*
[ref. Order dated 19.10.2004]

It is unfortunate that the Respondents being public utilities are attempting to mislead the Hon'ble Commission by not even fully extracting the 2004 Order.

The 2004 Order is clearly a decision that charging excess of 2% is against the Government policy and the power purchase agreement executed. The Hon'ble Commission expressly held that the 1994 Policy "is still in force which has been recently confirmed by the GoMP". Thereafter, the Board never stated whether they were not adhering to the policy of the Government and instead kept on charging wheeling charges at the rate of 2% in kind implementing the 2004 Order.

*There is a clear ratio and decision of the Hon'ble Commission in the following "**Commission reviewing its Order dated 14.9.04 decides to**……………………..**subject to the conditions of payment of wheeling charges at the existing rate of 2% by the petitioner and payment of subsidy 4% by the State Government as per the policy dated 26.09.04."***

*The Respondent submits that the Hon'ble Commission "merely observed". The Respondent conveniently loses sight of the words "**Commission … decides to"**. There is a decision that if the ratio contained in the aforesaid order and to suggest that this is a mere order, is an ex facie, incorrect and misleading contention advanced by the Respondent.*

(Q) The reference to intra-State Open Access Regulations, 2005 is misplaced, as the concept of open access was not there "under Agreements or Government Policy till the date of coming into force of these Regulations". Therefore, the 2005 Regulations apply to those "existing consumers of generating companies" who had availed "open access under Agreements or Government Policy on the date of coming into force of these Regulations". The Appellate Tribunal had held in the judgment of Vandana Vidyut Supra that "23…. The Appellant during the currency of the authorization and consent, is not required to apply for open access…". Hence, even in the case of the present

Petitioner No.1 which had the consent under the 1948 Act to sell to persons other than the Board there was no requirement to apply for open access under the inter-State Open Access Regulations, 2005. Therefore, the Respondents have wrongly relied upon the said Regulations.

(R) The 2007 Order dated 04.08.2007 distinguishes the Intra-State Open Access Regulations, 2005, and holds as follows:

> *"7. Considering the facts and circumstances mentioned above, the Commission directs that the Agreement executed between M/s. AHPL and MPSEB on 26/7/1999 still holds good".*

In view of the above, the Agreement executed between M/s. AHPL and MPSEB on 26/7/1999 providing that "2% would be recoverable in terms of electrical units from the energy received at inter-connecting point as per the Scheme of Incentives dated 26/9/1994 …" still holds good.

The Respondents being successors to the MPEB, cannot now today, having signed the PPA agreeing to levy 2% from electrical units as per the 1994 Policy, argue that the 1994 Policy is not a direction to the Hon'ble Commission or it is not enforceable.

Now, in reply the Respondents argue that the aforesaid PPA related to levy of wheeling charges/open access charges is inconsistent with the Tariff Orders, Intra State Open Access Regulations, 2005 and the 2010 Regulations. However, the Respondents have lost sight of the fact that the aforesaid PPA related to the levy of the said charges have been upheld by the Hon'ble Commission in their Orders of 2004. Moreover, no proceedings whatsoever have yet been initiated by the said Respondents to seek invalidation of the provisions of the said PPA related to the levy of 2% wheeling charges. Neither have the Respondents filed any proceedings in review or in appeal from the 2004 Orders. Hence, today having implemented the 2% consolidated charges in terms of wheeled units for several years, suddenly in reply the Respondents cannot take a volte face stand in ex facie contravention of the 2004 Orders. The said 2% consolidated charges are saved under section 185(2) of the 2003 Act and have moreover been upheld by the Hon'ble Commission.

The Respondents have meekly stated that Third Party sale by the Petitioner certainly results in stranded capacity of power. However, the Respondents have failed to demonstrate how owing to the third party sale, the Respondent No.1 have stranded their long-term PPAs exposing them to fixed costs.

The case laws relied upon by the Respondents reported in AIR 2004 SC 778 supports the case of the Petitioner herein as the 2004 Orders have been rendered by the Hon'ble Commission in the specific facts arising in the present case.

(II) ***JUDGMENT IN PTC INDIA V/S. CERC SUPRA IS NOT TO BE READ AS A STATUTE AS PER SETTLED LAW:***

A. *A decision is an authority for what it actually decides. Judgment of a court is not to be construed as a statute..* ***State of Haryana v. Ranbir @ Rana 4 (2006) 5 SCC 167 – para 12, 13, 14 and ADM Jabalpur v. Sivakant Shukla (1976) 2 SCC 521***

B. *In PTC India case, the Supreme Court has not laid down the proposition that orders (passed by the same authority which has issued the subordinate legislations/regulations) can be interfered with by making regulations. The Supreme Court explained that a subordinate legislation can override the existing contracts including PPAs which could not have been done across the board by an order of the Central Commission. The Supreme Court held that there could be an order/decision under the Electricity Act even in the absence of a regulation. The Supreme Court was examining the width of a delegated legislation which if made will have a general application across the board affecting several entities all over the country, which the Central Commission did not wish to do on case to case basis by way of orders affecting each and every entity which trades in electricity all over the country. The ratio of PTC India case needs to be understood in the context of trading of electricity by several inter-state traders, who enter into contracts with the sellers and purchasers of electricity, as contra-distinguished with the PPA between the Petitioner No.1 and the Madhya Pradesh Electricity Board made under the sovereign provisions of the "Scheme of Incentives" i.e. 1994 Policy notified by the Government of Madhya Pradesh, as in the present case.*

C. *A decision of the Supreme Court based on specific facts does not operate as a precedent in future cases* ***(Fida Hussain &Ors. v. Moradabad Development Authority & Anr. (2011) 12 SCC 615)*** *The facts of the present case are distinct from the facts in PTC India Supra.*

D. *The Respondents are trying to curtail the power and jurisdiction of the State Commission to deal with open access charges. The effect of such interpretation will be contrary to the object of the Electricity Act. If such interpretation is accepted the State Commission will not be able to correct or modify the open access charges even if it is against law and requires to be corrected and modified by exercising the regulatory and/or adjudicatory powers. The interpretation placed by the Respondents which will have the effect of denuding the Electricity Regulatory Commission of such an*

important regulatory power is not warranted. In the circumstances, the reply of the Respondents are devoid of merits and deserve to be dismissed.

E. *The Supreme Court in* ***BSES Ltd. v. Tata Power Co. Ltd. & Ors. (2004) 1 SCC 195*** *inter alia held as under:*

"16. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Subsection (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. "Utility" has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that the terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (a) to (g) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. ***The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff."***

The Hon'ble Commission has already decided in the 2004 Orders that the only compensation payable for the usage of the transmission and distribution system for sale of electricity from Petitioner No.1 is an adjustment in kind of 2% of the total quantum of generated electricity injected into the grid. This compensation is nothing

other than "Tariff" within the meaning of ***BSES Ltd. v. Tata Power Co. Ltd.*** *Hence, following the law laid down by the Hon'ble Supreme Court, the open access charges already approved by the Commission in the 2004 Order is final and binding and it is not permissible for the licensee, Respondent Discoms to charge different or higher open access charges.*

(III) ***The petitioners are totally covered by the exemption under the electricity (removal of difficulties) order, 2005 of the central government***

(A) *Under Section 181 the State Commissions may make Regulations "consistent with this Act..". Therefore, the 7th Amendment Regulations have to be consistent with the orders passed by the Central Government under Section 183 of the Act. Therefore, the 7th Amendment Regulations cannot be inconsistent with the Electricity (Removal of Difficulties) Second Order, 2005 ("**Second Order**"). Accordingly, the 7th Amendment Regulations cannot curtail or take away in any manner whatsoever the exemption under the Second Order from payment of surcharge on sale or supply of electricity by the generating companies which had procured the consent of the Competent Government under the 1948 Act.*

(B) *The Electricity (Removal of Difficulties) Second Order, 2005 states that "**No surcharge would be required to be paid**, in terms of sub-section (2) of section 42 of the Act **on the electricity being sold by the generating companies with consent of the competent government** under clause (c) of sub-section (1) of section 43Aof the Electricity Supply Act, 1948 (now repealed by the Act), ..., **till the current validity of such consent or authorizations".***

(C) *The effect of the Second Order is to prevent the obliteration of consent given to the generating company under the 1948 Act in spite of its repeal to keep intact rights acquired or accrued during the operation of the said consent and permit continuation of such rights which are available before the repeal of the 1948 Act. This is as per the settled law under the General Clauses Act.*

(D) *The saving of the right of the generating company to be exempted from payment of surcharge on sale of electricity is in respect of the right which was acquired under the repealed statute i.e. the 1948 Act. The right which is preserved by virtue of the Second Order flows from the "consent" under the 1948 Act for selling electricity to persons other than the Board "till the current validity of such consent...".*

(E) *The flow of electrons by the generating company on the date when the 2003 Act was enacted is immaterial and certainly not a condition precedent as long as the generating company had a "consent" under the 1948 Act for selling electricity to persons other than the Board.*

(F) The meaning to the words "being sold" is to be derived from the words "were allowed to enter into a contract for sale of electricity with any other person with the consent of the Competent Governments"[ref. Fifth recital of the Second Order].

(i) For example, it is possible that the generating company was selling electricity in the year 2002 under a "consent" under the 1948 Act from the Competent Government but had to shut down the generating station during the year 2003 and again started generating and selling in the year 2005. Simply because, in the year 2003, i.e. the year of enactment of the 2003 Act, there were no flow of electrons from the generating station, that would not take away the right of the generating company from exemption to pay surcharge "till the current validity of such consent". The right had already been acquired and accrued to the generating company under the "consent" to sell electricity to persons other than the Board and nothing requires the generating company to actually generate and sell electricity on the date of enactment of the 2003 Act in order to get the benefit of the Second Order. The right of the generating company is unaffected and preserved till the validity and subsistence of the "consent" under the 1948 Act.

(ii) The question is whether the steps that remain to be taken under the repealed statute i.e. the "consent" under the 1948 Act were steps necessary for acquiring a right or for enforcing a right that had come into existence on the date of grant of the "consent".

(iii) The right under the consent accrues even if the steps taken do not reach the stage when the right is given under the Second Order, 2005. Without prejudice to the aforegoing submissions, it is submitted that the Petitioner No.1 took steps under the aforesaid "consent", as summarized in ***Annexure – 1*** *hereto. It will be clear from this information that it is only due to the delay on the part of the Respondent viz. the parent MPEB to allocate the land for construction of the project and as committed in the PPA (Ref @ Pg. 117 of Petition) that the Petitioner No.1 could not generate electricity on the date of enactment of the 2003 Act. This contention is without prejudice to the position that it is not required under the Second Order that there has to be an actual flow of electrons on the date of enactment of the 2003 Act.*

(G) The above provision is couched in a negative language. No surcharge is payable if there is a consent of the competent government under clause (c) of sub-section (1) of section 43A of the Electricity Supply Act, 1948 on sale of electricity by the generating companies. No surcharge is payable till the current validity of such consent.

(H) Purpose and object of creating a legal fiction is well known. Once a fiction is created upon imagining a certain state of affairs, the imagination cannot be permitted to be boggled when it comes to the inevitable corollaries thereof. (See Dipak Chandra

Ruhidas v. Chandan Kumar Sarkar[(2003) 7 SCC 66] , ITW Signode India Ltd. v. CCE [(2004) 3 SCC 48] and Ashok Leyland Ltd. v. State of T.N. [(2004) 3 SCC 1])

(I) *The Hon'ble Supreme Court has held that the "33. The purpose and object of creating a legal fiction in the statute is well known. When a legal fiction is created, it must be given its full effect. In East End Dwellings Co. Ltd. v. Finsbury Borough Council [(1951) 2 All ER 587 : 1952 AC 109 (HL)] , Lord Asquith, J. stated the law in the following terms: (All ER p. 599 B-D)*

> *"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.*
>
> *The said principle has been reiterated by this Court in M. Venugopal v. Divisional Manager, LIC of India [(1994) 2 SCC 323 : 1994 SCC (L&S) 664 : (1994) 27 ATC 84] . See also Indian Oil Corpn. Ltd. v. Chief Inspector of Factories [(1998) 5 SCC 738 : 1998 SCC (L&S) 1433] , Voltas Ltd. v. Union of India [1995 Supp (2) SCC 498] , Harish Tandon v. ADM, Allahabad [(1995) 1 SCC 537] and G. Viswanathanv. Hon'ble Speaker, T.N. Legislative Assembly [(1996) 2 SCC 353] .*

(J) *The words "being sold" is not preceded with the words "on the date" or the words "on the date" of this Order, or the words "on the date hereof".*

For example, the words "on the date" is employed in the explanation to Section 133 of the 2003 Act. The provision reads as follows:

> *"Explanation – for the purposes of this section and the transfer scheme, the expression "officers and employees" shall mean all officers and employees who **on the date specified in the scheme** are the officers and employees of the Board or transferor, as the case may be."*

(K) *The words "being sold" is not conditional upon the flow of electrons on the date of notification of the 2005 Order / 2003 Act. If that be not the case, then in that event the consent of the competent government that has been provided to the Petitioner would be rendered redundant and otiose and stand reneged though saved under Section. 185 of the 2003 Act. The consent of the competent government is valid for a certain period i.e. the term of PPA which is 30 years. The generating company can generate electricity*

at any time within the validity period of the consent. In terms of the 2005 Order, the exemption from the payment of surcharge operates "till the current validity of such consent" provided by way of the 1994 Policy Notification, the agreement having as its integral part, the 1994 policy, the allotment letter dated 14.01.1999 modified to allow third party sale (P.122 of Petition) on directive of the Government of Madhya Praesh, Energy Department by letter ref. 4090/13/98 dated 29.05.1998 directing MPEB respondent to allow third party sale

(L) It is submitted that till the validity of such consent, the generating company is entitled to generate and supply electricity at any point in time. There is no mandate that the generating company must generate and supply electricity on the date of notification of the 2005 Order / 2003 Act. There is NO "cut off" date stated in the 2005 Order so far as commencement of sale or supply of electricity under the consent. Neither is there any condition in the consent granted by the State Government that the commencement of sale and supply of electricity must begin from any specific date.

(M) The only requirement is that the consent was granted under the 1948 Act when the sale of electricity by the generating company "was not subject to payment of any surcharge". Accordingly, in law, as long as the generating company has the consent under the 1948 Act and will be supplying electricity as per the said consent, no payment of surcharge can be levied on the generating company in terms of the 2005 Order.

(N) Supreme Court held in ITW Signode India Ltd. v. CCE, (2004) 3 SCC 48 :-

> *"It is well settled by the decisions of this Court that when a validity of a particular statute is brought into question, a limited reference, but not reliance, may be made to the Statement of Objects and Reasons. The Statement of Objects and Reasons may, therefore, be employed for the purposes of comprehending the factual background, the prior state of legal affairs, the surrounding circumstances in respect of the statute and the evil which the statute has sought to remedy. It is manifest that the Statement of Objects and Reasons cannot, therefore, be the exclusive footing upon which a statute is made a nullity through the decision of a court of law."*

(O) The 2005 Order needs to be read in its totality in order to understand the context and the scope and coverage. The operative part of the 2005 Order precedes with eight recitals.

i. *In the fifth recital the 2005 Order takes into account that "generating companies" were allowed to enter into a contract for sale of electricity with any other person….., and sale of electricity by such companies was not subject to payment of any surcharge under that repealed law". Therefore, the 5th recital of the 2005 Order specifically pertain to those generating companies who had in their possession the consent of the competent government under the 1948 Act. "to enter into a contract for the sale of electricity generated by it… with any other person….".*

ii. *In the present case, Petitioner no.1 was allowed the sale of electricity to any other person by the Government of Madhya Pradesh Scheme of Incentives, 26.09.1994. Letter dated 2.11.1999 by the MPEB and the Order dated 20.6.2002 by the Govt. of Madhya Pradesh required that the terms and conditions of the Agreement dated 26.7.1999 shall be applicable. The PPA dated 26.7.1999, (para 3.3) inter-alia states that "The company is permitted to sell power to third party consumers…..". The sale of electricity by the mini hydel plant of Petitioner no.1 was not subject to payment of any surcharge under the 1948 Act. Neither did the aforesaid PPA contemplate the payment of any surcharge on the sale of electricity by petitioner no.1. Hence, the Petitioner no.1 already had the consent of the competent government under the 1948 Act i.e. prior to enactment of Electricity Act, 2003, to sell electricity to any other person, thus the Petitioner no.1's hydel plant is squarely covered under the 5th recital of the 2005 Order. Such an authorization for third party sale through 1994 Policy, the PPA permitting third party sale on specific direction of GoMP Energy Department letter dated 29.05.1998 (Annexure-2), the GoMP requiring the project to be set up as per Agreement dated 26.07.1999 have to be rested under the provisions of then prevailing 1948 Act viz. u/s. 43 A (1) (c).*

iii. *The 8th recital to the 2005 Order states that "difficulties have arisen….. with regard to the levy of surcharge on the sale of electricity by the generating company under clause (c) of sub-section (1) of Section 43A of the electricity (Supply) Act, 1948…."*

   A. *The 2005 Order addresses the issue of levy of surcharge on sale of electricity by a generating company that is in the possession of such consent of the competent government to sell electricity under Section 43A(1)(c) of the 1948 Act. The intention of the legislature is clear that every such generating company in possession of the consent fulfills the eligibility to be covered under the 2005 Order.*

B. *Illustratively, the Electricity (Supply) Act, 1948 was repealed on 10.6.2003 with the enactment of the 2003 Act. Hence, till 9.6.2003, the 1948 Act was operative and subsisting. The 1994 policy notification providing mandate for third party sale was very much in force on the date of enactment of the 2003 Act. It is, therefore, the words "consent" and "till the current validity of such consent or authorizations" in Clause 2 of the 2005 Order extends the exemption from payment of surcharge to the electricity sold by the mini hydel plant of Petitioner no.1 till 30 years (PPA term) from commencement of such sale under the said consent irrespective of the date from which the sale is effected so long as it is within/during the period for which the consent is valid.*

(P) *The Respondents have relied on certain paragraphs of the Appellate Tribunal's judgment in Vandana Vidyut Ltd. Vs. Chattisgarh State Electricity Board & Anr. [Appeal Nos.2010 & 112 of 2006]. It is submitted that the said judgment is not a decision on the issue as to whether a generating company must have had to generate and sell electricity on the date of commencement of the Electricity Act, 2003 in order to avail the exemption under the Second Order, 2005. This issue never arose in the aforesaid case. In the said judgment the words "during the currency of the authorization and consent, is not required to apply for open access nor it is required to pay surcharge" is the condition to be satisfied for seeking the exemption under the Second Order, 2005. The second part of that paragraph from the aforesaid judgment is merely a recordal of facts, as it reads "as it is a generating company which has been factually selling power with the consent of the Competent Government under section 43(A)(1)(c) of the Act, 1948 before the commencement of the Electricity Act, 2003 as well as on the date of commencement of the said Act".*

(IV) ***<u>Judgment of supreme court in sesa sterlite ltd., vs. orissa electricity regulatory commission & ors. is not applicable</u>***

(a) *The Electricity (Removal of Difficulties) Second Order, 2005 was not in issue before the Supreme Court in the judgment in Sesa Sterlite. Hence, Sesa Sterlite does not negate the exemption granted to the generating companies under the Second Order, 2005. The judgment in Sesa Sterlite cannot be read in that light.*

(b) *The Respondents have wrongly submitted that Section 42 or any other provisions of the Electricity Act, 2003, exempts levy of cross subsidy surcharge on consumers availing open access. (The Respondents have totally lost sight of the Second Order, 2005 which states that "No surcharge will be required to be paid". There is a statutory*

exemption granted by the Central Government in exercise of powers under section 183 of the 2003 Act. Hence, the submissions made by the Respondents is ex facie incorrect in law and on a plain reading of the Second Order, 2005.

(c) *The Respondents thereafter admit that the Second Order 2005 provides exemption only from the levy of cross subsidy surcharge and there is no mention about the exemption from other open access charges i.e. wheeling charges, additional surcharge. This again is a wrong submission by the Respondents for the following reasons:*

i. *The Third recital of the Second Order, 2005 states "payment of a surcharge" in addition to the charges of wheeling;*
ii. *Fourth proviso refers to "surcharge shall be utilized to meet the current level of cross subsidy";*
iii. *Fifth proviso refers to "any surcharge";*
iv. *Sixth proviso refers to "any surcharge";*
v. *Seventh proviso refers to "any surcharge";*
vi. *Eighth proviso refers to "levy of surcharge";*
vii. *Clause 2 of the Second Order, 2005 refers to the word "surcharge".*

In Section 42, the word "surcharge" appears in First, Second, Third, and Fourth provisos of sub-section (2) of Section 42 and again in sub-section (4) of Section 42. Hence, the Second Order grants exemption from all surcharges under Section 42 which would undoubtedly include the "cross subsidy surcharge" and the "additional surcharge".

(d) *The Respondents submit that if the power was already being supplied to the Third Party consumer at the time of commencement of the 2003 Act, there would be no element of cross subsidy on such quantum of power and as such this consumption other than from Distribution Licensees does not require any compensation in the form of cross subsidy surcharge. However, the Respondents have not answered as to what happens in case such power continues to be supplied post the commencement of the 2003 Act. Thus, as per the Respondents, there is no need of levy of cross subsidy surcharge if power is already being supplied on the date of commencement of the 2003 Act. The Respondents have lost sight that there would be still be an element of cross subsidy on such quantum of power after the date of commencement of the 2003 Act. However, there is a statutory exemption under the Second Order 2005 till the validity of the "consent" under the repealed laws. While on the other hand, the Respondents contradict themselves by stating that since charges are being levied by virtue of the Regulations, the Second Order 2005 shall be of no avail to the Petitioners.*

(V) ***The petitioner no.1 generating company has the necessary consent under the repealed law to sell electricity to petitioner nos.2 and 3 i.e. persons other than the board:***

(A) *The Govt. of Madhya Pradesh issued the scheme of incentives dated 26.9.1994 inter-alia stating that a power generating unit may sell the power generated to MPEB or to a third party [Ref Clause 3]. This mandate to sell to third parties is permission under Section 43A(1)(c) of the 1948 Act permitting sale of electricity by the generating company to MPEB or to any other person.*

(B) *The Govt. of Madhya Pradesh letter dated 20.6.2002 which inter-alia states that "Project shall be executed in accordance with the terms and conditions of agreement between MPSEB and the Company" is not only a statutory permission under Section 18A of the 1948 Act but is also a permission under Section 43A(1)(c) of the 1948 Act as the Govt. of Madhya Pradesh on the date of the letter had taken into account the permission to petitioner no.1 to sell power to third parties (other persons) as contained in clause 3.3 of the agreement dated 26.7.1999 as well as para 3 and 4 of the Policy dated 26.9.1994 forming part of the said agreement.*

(C) *The consent is provided by way of the 1994 Policy Notification, the PPA having as its integral part the 1994 policy and the allotment letter dated 14.01.1999 modified to allow third party sale (P.122 of Petition) on directive of the Government of Madhya Praesh, Energy Department by letter ref. 4090/13/98 dated 29.05.1998 (Annexure-2) directing MPEB respondent to allow third party sale permitting third party sale on such specific direction of GoMP Energy Department, the GoMP requiring the project to be set up as per Agreement dated 26.07.1999,have to be rested under the provisions of then prevailing 1948 Act viz. u/s. 43 (1) (c).*

(D) *The Hon'ble Supreme Court has held that "Non-mentioning of the provision does not invalidate an order". [Ref:(2009) 9 SCC 173, paras 26-29].*

(E) *The "consent" of the Govt of Madhya Pradesh, issued under the 1948 Act (repealed law) allowing the Petitioner No. 1 to sell and supply electricity to "other persons", is saved under Section 185 of the 2003 Act. Section 185 states " Notwithstanding such repeal, (a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or <u>any document</u> or instrument executed or any*

direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act."

*(F) The evil which the 2005 Order has sought to remedy is with respect to the "consent" of the Govt of Madhya Pradesh, issued under the 1948 Act (repealed law) allowing the Petitioner No. 1 to sell and supply electricity to "other persons" , when "**sale of electricity by such companies was not subject to payment of any surcharge under that repealed law**";*

In view of the above submissions, the common reply filed by the Respondents is wholly unsustainable in law and on facts and deserves to be rejected in the interests of justice. The Petitioners crave leave to advance full submissions and to submit case laws during the course of hearing on the merits.

Commission's Observation:

16. The issues raised by petitioner in the subject matter are for the period from year 1994 to year 2017. Therefore, it would be appropriate to draw the chronology of events occurred in the subject matter: The issues raised by the petitioner in the subject matter for the period from FY 1994:

S. No.	Dates	Events
1.	26.09.1994	Govt. of MP notified a policy for scheme of incentives for generation of power through non-conventional energy sources (mini-micro hydel, solar, wind, bio energy, etc.) in Madhya Pradesh permitting third party sale of power to HT consumers on fixed 2% wheeling charges in terms of energy units adjustment
2.	14.01.1999	Letter of allotment by MPEB for setting up of a Birsinghpur (2x1100 kw) and Barna (2x750 kw) mini hydel projects allowing third party sale of energy as per Policy of Govt. of MP of 26.09.1994.
3.	26.07.1999	Agreement executed between the Petitioner No. 1 and the MPEB with 1994 Policy as part of it for a Term of 30 years.
4.	02.11.1999	MPEB granted permission u/s 44 of the Electricity Supply Act, 1948 for setting up of the said project in accordance with the Agreement between MPSEB and the Company.
5.	20.06.2002	Order of the Govt. of MP u/s 18A of the Electricity Supply Act, 1948

		for setting up of the said project in accordance with the Agreement between MPSEB and the Company.
6.	08.06.2005	Electricity (Removal of Difficulties)(Second Order) published in Gazette of India vide SO 789E confirming that no surcharge would be required to be paid u/s 42(2) of the Act on electricity being sold by the generating companies with consent of the competent government till the current validity of such consent or authorization.
7.	03.07.2006 and 15.07.2006	Generation of electricity commenced at the Birsinghpur Mini Hydel Project and concurrently third party sale started.
8.	17.10.2006	Non-conventional energy policy of Govt. of M.P. – Clause 40 confirming that the policy of 26.09.1994 shall be applicable to the projects permitted under the erstwhile policy. Clause 9 confirming that power generation units based on non-conventional sources of energy are exempted from open access charges.
9.	07.11.2008	Gazette Notification No. G-33/2008 – MPERC (co-generation and generation of electricity from renewable sources of energy) Regulation, 2008 which reiterated validity and applicability of exemption from open access charges in the GoMP Policy.
10.	19.10.2010	Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 (Revision-I) were notified and which continued maintaining the GoMP policy incentive and exemption from open access charges further clarified in Clause 12.2 stating exemption towards open access charges etc to consumers of renewable energy.
11.	17.11.2017	Madhya Pradesh Electricity Regulatory Commission (Co-Generation and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010, Seventh Amendment ("Seventh Amendment") was notified by the Hon'ble Commission.
12.	08.01.2018	The petitioners' preferred a writ petition bearing No. 727/2018

		before the Hon'ble High Court of Madhya Pradesh, Indore Bench seeking a declaration that regulation 12.2 of the Seventh Amendment Regulations be not applicable to the Petitioner No. 1, 3 and 4 and that be struck down accordingly; and Petitioner No. 1, 3 and 4 be permitted to pay bills and incur expenses on the basis of the earlier charges before the said notification came into force.
13.	15.03.2018	Hon'ble High Court dismissed the aforesaid writ Petition No. 727/2018 inter-alia, holding that this Hon'ble Commission is competent to adjudicate the dispute.
14.	27.04.2018	The petitioners preferred a writ appeal against the aforesaid order dated 15.03.2018, bearing writ appeal No. 565/2018.
15.	29.01.2019	The petitioner withdrew the said writ appeal which was allowed by the Hon'ble High Court vide its order dated 29.01.2019.

17. The petitioner has made a number of prayers in its subject petition which include an alternative prayer to alter, modify or amend the Seventh Amendment to MPERC (Co-Generation and Generation of Electricity from Renewable Sources) Regulations, 2010 or to provide a clarification that the aforesaid Seventh Amendment Regulations are not applicable to the petitioners.

18. It is evident that besides several prayers, the petitioners have also sought clarity or amendment or removal of difficulty in Seventh Amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010 notified on 17th November, 2017. In para 36 of the subject petition, it is mentioned that the bills dated 28.12.2017 to 05.02.2019 (impugned bills as per petitioner) are capricious and contrary to the consistent course adopted since the beginning till 17.11.2017 i.e. the date of notification of Seventh Amendment to MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I) Regulations, 2010. From the aforesaid contention of the petitioners, the bills issued since beginning till notification of aforesaid amendment to Regulations are undisputed however, the bills (impugned bills as per petitioner) issued only after notification of said Regulations as under dispute in the subject petition. Evidently, the Respondents have issued all said bills under dispute on the basis of said seventh amendment in the Regulations, and the petitioners are seeking relief mainly on the ground of removing the difficulty in implementing the provisions of said Regulations.

19. The setting up of 2x1100 kw power project being mini hydel power project in MP and execution of PPA between the petitioner and erstwhile M.P. Electricity Board on 26.071994 is

undisputed from the submissions of all the parties in the subject matter. It is also undisputed that the power purchase agreement dated 26.07.1999 interalia makes arrangement for sale of energy to third party HT consumer by wheeling through erstwhile MPEB's system and the said project stated its commercial operation and the units of said project started the commercial operation from 03.07.2006 and 15.07.2006, respectively.

20. The petitioner in its petition as well as supplementary submissions/ rejoinders have referred the incentive policy issued by the Government of MP in 2006 for development of small hydro power project in MP. It has also referred to non-conventional energy policy of Government of MP issued on 26.09.1994. The petitioner has also referred MPERC Regulations for cogeneration and generation of electricity from renewable sources of energy notified on 07.11.2008 and 19.10.2010. Apart from the aforesaid policies and regulations issued by Government of MP or this Commission, as the case may be, the petitioner has mentioned order dated 14.09.2004 and 04.08.2007 passed by this Commission in Petition No. 83/20014 and 33/2007, respectively.

21. As mentioned above, the bills which were being issued by Respondent No. 1 since beginning till 17.11.2017 are undisputed. It is noted that the respondents have issued first disputed bills on 28th December' 2017 after notification of Seventh amendment to MPERC (Cogeneration and Generation of Electricity from renewable sources of energy)(Revision-I) Regulations' 2010 notified on 17th November' 2017. In sub-regulation 12.2 of Seventh Amendment of Cogeneration and Generation of Electricity from renewable sources of energy) the following has been provided:

> *"Wheeling charges, cross subsidy surcharge, additional surcharge on the wheeling charge 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 from time to time in its retail supply tariff order."*

22. In substance, the benefit of payment of wheeling charges, cross subsidiary surcharge, additional surcharge on the wheeling charges and such other charges under Section 42 of the Electricity Act, 2003 earlier available to the open access consumers like petitioner case has been withdrawn by the said Seventh Amendment to Regulation 2010. Further it is mentioned in the order dated 15.03.2018 passed by the Hon'ble High Court of MP, Indore Bench in WP No. 727/2018 that the petitioners have not challenged the validity of Regulation 12.2 in Seventh amendment to MPERC (Cogeneration and Generation of Electricity from renewable sources of energy) (Revision-I) Regulations' 2010 notified on 17.11.2017. Without challenging the legality and validity of the said amendment, the petitioners in subject petition are claiming that the aforesaid Seventh Amendment is not applicable to them and they are entitled to enjoy the exemption from open access charges. In nutshell, the dispute in the present petition has cropped up after seventh amendment notified by this Commission in MPERC

(Cogeneration and Generation of Electricity from renewable sources of energy)(Revision-I) Regulations' 2010.

23. The petitioners have laid emphasis primarily on the ground that because of the Scheme of incentives for generation of power through non-conventional energy sources (mini-micro hydel) etc in MP by the Government of MP on 26.09.1994 read with GoMP Policy dated 17.10.2006 alongwith their PPA, the Seventh Amendment to Regulations (Cogeneration and generation of electricity from renewable source) Regulations 2010 would not be applicable to them in light of Electricity (Removal of Difficulties) 2nd Order 2005, issued on 8th June' 2005. Besides, the petitioner has also placed reliance upon aforementioned orders dated 14.09.2004 (final order passed on 19.10.2004)and 04.08.2007 passed by this Commission in Petition No. 83/ 2004 and 33/2007.

24. With regard to the order dated 19.10.2004 in the Petition No. 83/2004, it is observed that Petition No. 83 of 2004 was filed merely for seeking exemption from obtaining the licensee to supply power to the third- party consumers. Vide order dated 19.10.2004, the Commission granted the exemption from obtaining license subject to certain condition. The relevant part of the said order is reproduced below:

"5. The Petitioner also submits that the Respondent MPSEB did not have any objection to the petitioner supplying power to third party consumers as confirmed in its submission dated 12.09.04. ***The petitioner further submits that payment of any additional wheeling charges or surcharge was not an issue in respect of the current petition no. 83/2004 of the petitioner wherein exemption U/s 16 of MPVSA 2000 has been sought.*** *It is therefore, requested by the petitioner for exemption from license U/s 16 of MPVSA, 2000 be considered by the Hon'ble Commission keeping in view that the matter is governed by the PPA executed with MPSEB and GoMP policy restricting the quantum of wheeling charges and no other charges either by the petitioner or the third party consumer is payable.*

6. Having considered the facts and circumstances of this case Commission appreciates that in view of GoMP policy, no surcharge and additional charge ***is presently payable*** *by the wheeled consumer for third party sale to Respondent.......................*

This order will also be subject to the following other conditions.

vi) ....

vii) The supply and sale of power shall be governed by the policy of the state government ***and other provision of law to be made applicable from time to time*** *and also as per terms and conditions of PPA executed by the petitioner with the MPSEB.*

viii) ***The petitioner shall comply with the provisions of*** *Madhya Pradesh Vidyut Sudhar Adhinyam 2000, and other laws applicable,* ***the Regulation of the Commission,*** *Technical codes, Standard of performance or any other guidelines issued by the Commission from time to time.*

ix) ....

x) ....

From the aforesaid extract of above order of the Commission, it is clear that, this order is supporting to the relief being sought by the petitioners in the subject petition. It is mentioned in above order that the supply and sale of power shall be governed by the policy of the state government and other provision of law to be made applicable from time to time

25. With regard to the order dated 04.08.2007 in Petition No. 33/2007, it is observed that the petition No. 33 of 2007 was filed on account of dispute regarding execution of Bulk Power Transmission agreement. In the order dated 4/08/2007, the Commission didn't adjudicated any dispute regarding applicability of open access charges. Accordingly, this order is also not supporting to the relief being sought by the petitioners in the subject petition

26. In view of all the aforesaid observations, the following issues are before this Commission for adjudication of the subject petition:

(i) Whether the consent of competent government can be considered in terms of order of the State government issued to M/s. Ascent Hydro Power Projects Ltd. vide GoMP, Energy Department's letter No. 5234/18/2002 dated 20.06.2006.

(ii) Whether the exemption from payment of surcharge on the sale or supply of electricity is applicable on the petitioners in terms of Electricity (Removal of Difficulties) 2nd Order 2005.

27. The above-mentioned issues are examined in this order as below:

(i) Whether the consent of competent government can be considered in terms of order of the state government issued to M/s. Ascent Hydero Power Projects Ltd. vide GoMP, Energy Department's letter No. 5234/18/2002 dated 20.06.2002 –

28. Vide letter No. 20/6/2002, GoMP, Energy Department has required Petitioner No. 1 to establish, operate and maintain its 2x1100 KW mini hydel project at Birsinghpur, District Umariya (M.P.) mentioning that the said project shall be executed in accordance with the terms and conditions of agreement between erstwhile MPSEB and the petitioner No. 1.

29. On perusal of the power purchase agreement executed between the erstwhile MPSEB and Petitioner No. 1 (M/s. Ascent Hydro Power Project Ltd.) , it is observed that the aforesaid agreement is for wheeling, captive use, third party sale and purchase of power and setting up of Birsingpur Mini Hydro Project (2x1100 MW). Further, in sub-article 3.3 of the said agreement, the following is mentioned:

"The Company is permitted to sell power to third party consumers who are referred to as WP Consumers. The WP Consumer should be (i) H.T. Consumers of the Board and (ii) should not be defaulter of Board under the subsisting HT Agreement executed by them as Consumers of Board (iii) WP Consumer should not take power from more than one Power Plant but can use power its own captive generation".

30. Further, Section 43 A of Electricity Act 1948 provided that,

43 A. Terms, conditions and tariff for sale of electricity by Generating Company.

(1) A Generating Company may enter into a contract for the sale of electricity generated by it—

(a) with the Board constituted for the State or any of the States in which a generating station owned and operated by the company is located;

(b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15 A; and

(c) with any other person with consent of the competent government or governments.

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority……………………………………………………"

(Emphasis Supplied)

31. As stated by the petitioners, the scheme of incentives for generation of power through non-conventional energy sources (mini-micro hydel, solar, wind, bio-energy etc) issued by the Govt. of Madhya Pradesh on 26.9.1994 inter-alia stated that a power generating unit may sell the power generated to MPEB or to a third party but the third party must be a HT consumer of the Board. Further, it is mentioned in the letter dated 20.06.2002 issued by the Govt. of Madhya Pradesh that "Project shall be executed in accordance with the terms and

conditions of agreement between MPSEB and the Company. In the aforesaid permission Section 18A of the 1948 Act was mentioned but this permission is fulfilling the requirements under Section 43A(1)(c) of the 1948 Act also as the Govt. of Madhya Pradesh on the date of the letter had taken into account the permission to petitioner No.1 to sell power to third parties (other persons) as contained in clause 3.3 of the agreement dated 26.7.1999 as well as para 3 and 4 of the Policy dated 26.9.1994 forming part of the said agreement.

32. The petitioners have mentioned that the Hon'ble Supreme Court has held that "Non-mentioning of the provision does not invalidate an order". [Ref:(2009) 9 SCC 173, paras 26-29]. Besides, Hon'ble Appellate Tribunal in para 25 of its Judgment dated 16th October'2006 in Appeal No. 210 of 2006 and 112 of 2006 while mentioning pronouncement of Hon'ble Supreme Court in case of A.P. Gas Power Corporation V/s A.P. State Electricity Regulatory Commission {reported in 2004 (10) SCC 511}, hold that *"the appellant had secured consent to sell the power generated by it to third parties and it is deemed to have been granted under Section 43(A)(c) of 1948 Act apart from grant of sanction under Section 28 of the Indian Electricity Act,1910."*

33. Considering all above, this Commission hold that the petitioner No. 1 had secured consent from the competent Government to sell the power generated by it to third party/any person other than the erstwhile Board and such consent is deemed to have been granted under Section 43(A)(c) of 1948 Act apart from the consent of the Government of MP under Section 18-A of Electricity Supply Act'1948.

(ii) Whether the exemption from payment of surcharge on the sale or supply of electricity is applicable to the petitioners in terms of Electricity (Removal of Difficulties) Second Order 2005 issued by Ministry of Power dated 08.06.2005.

34. In exercise of its power under section 183 of the Act, the Central Government in order to remove the difficulties has made Second Order on 08.06.2005 to make provisions in respect of such electricity being sold and supplied under repealed laws. In the preamble of the Electricity (Removal of Difficulties) second Order,2005, the central government has recorded the reasons for providing exemption of surcharge in terms of sub-section (2) of section 42 of the Act. The relevant parts in preamble are reproduced as under:

> *"And whereas the first proviso to sub-section (2) of section 42 of the Act provides that such open access may be allowed before the cross subsidies are eliminated on payment*

of a surcharge in addition to the charge for wheeling as may be determined by the State Commission;

And whereas the second proviso to sub-section (2) of section 42 of the Act provides that such surcharge shall be utilized to meet the requirement of current level of cross subsidy within the area of supply of the distribution licensee;

And whereas generating companies were allowed to enter into a contract for sale of electricity with any other person with the consent of the competent governments under the provisions of clause (c) of sub-section (1) of section 43A of the Electricity (Supply) Act, 1948 (repealed by the Act), and ***sale of electricity by such companies was not subject to payment of any surcharge under that repealed law;***

....

And whereas in case of electricity being sold or supplied under permissions from competent government or authorizations of the State Government, as the case may be, under the said repealed laws, there was no element of cross subsidy and, therefore, there was no requirement of any surcharge for the same;

……………………………………………………………

35. Section 2 of the aforesaid second order under Electricity (Removal of Difficulties) provides as under:

2. "Exemption from payment of surcharge on the sale or supply of electricity: -

No surcharge would be required to be paid, in terms of sub-section (2) of section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government under clause (c) of sub-section (1) of section 43A of the Electricity act 1948 (now repealed by the Act), and on the electricity being supplied by the distribution licensee on the authorization by the State Government under section 27 of the Indian Electricity Act, 1910 (now repealed by the Act), till the current validity of such consent or authorization".

36. On perusal of foregoing reason assigned by the Central Government, it is clear that exemption is given under this second order under Electricity (Removal of Difficulties) due to the following reasons:

(i) The power was already being sold by the generator to the third party consumer at the time of commencement of the Electricity Act 2003 and the introduction of open access in phases along with conditions for cross subsidy surcharge was to be

specified by the State Commission within one year of the appointed date, hence no element of cross subsidy was determined on such quantum of power. Accordingly, such consumption by third party, other than distribution licensee under Electricity Act 1948 repealed by the Electricity Act come into force need not any compensation in the form of cross subsidy surcharge.

(ii) As mentioned above, in Section 2 of second order, it is explicitly made clear that the exemption of surcharge in terms of sub-section (2) of section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government is till the current validity of such consent or authorization by the competent government. The requirement of consent by the competent Government for sale of electricity by a generator to third party/other person was mandatory under Electricity (Supply) Act 1948 but the provisions for open access of electricity under Section 42 of the Electricity Act'2003 have wiped out such obligations under repealed laws. However, exemption under Electricity (Removal of Difficulties) Second Order is applicable only when the electricity generated was being sold at the time of its enactment. Moreover, MPERC (Terms & Conditions for Intra State Open Access in Madhya Pradesh) Regulations-2005 has been notified by this Commission on 16th June' 2005 before commencement of supply to third parties in July,2006.

37. In the present case, unit No. 1 and 2 of Petitioner No,1 started generation of electricity and supply of power to the third party consumers only on 03.07.2006 and 15.07.2006 respectively. The petitioners have placed reliance upon the judgment of the Hon'ble APTEL dated 16/10/2006 in the Appeal No. 210 of 2006, 112 of 2006. The relevant part of said judgment is reproduced as under:

"23) The sanction of the State Government which sanction under Section 28(1) of The Indian Electricity Act, 1910 viewed from the different angle in our view would also include a consent in terms of Section 43A(1)(c) of The Electricity (Supply) Act, 1948 as it is clear from the orders referred above. In other words the appellant who had the consent of the State Government to sell power to third parties, is entitled to invoke the Electricity (Removal of Difficulties) Second Order, 2005. The appellant satisfied the conditions prescribed under Section 2 of the said Removal Order, which would mean that the appellant during the currency of the authorization and consent, is not required to apply for open access nor it is required to pay surcharge in terms of Proviso to Sub Section (2) of Section 42 of The Electricity Act, 2003 ***as it is a generating company which has been factually selling power with the consent of the competent Government under Section 43A(1)(c) of The***

> ***Electricity Act, 1948 before the commencement of The Electricity Act, 2003 as well as on the date of commencement of the said Act."***

38. From the above Judgment of Hon'ble Appellate Tribunal for Electricity, it is observed that the said judgment is not applicable in the present case because in that case the generating company was actually selling power before the commencement of the Electricity Act 2003 as well as on the date of commencement of the said Act hence the electricity was being sold by the generator in terms of second Order dated 08.06.2005 whereas, in the subject matter, power supply has commenced only in the month of July 2006 much after enactment of Electricity Act. Therefore, the conditions mentioned in the removal of difficulty order are not fulfilled by the petitioner for benefit of exemption.

39. Further, it is observed from the submission of Respondent that in the present case the generation and third-party sale of power commenced from the power plant of the generating company in the month of July 2006. As such it certainly results in the loss of cross subsidy included in the tariff and adversely affects the finances of the respondent licensee, which requires compensation in the form of cross subsidy surcharge. Apart from above, the stranded capacity on account of third party sale, allows the Distribution licensee to levy additional surcharge and there is no relief on that in the Electricity (Removal of Difficulties) second Order.

40. In view of all aforesaid observations, the Seventh amendment to MPERC (Cogeneration and Generation of Electricity from renewable sources of energy) (Revision-I) Regulations' 2010 notified on 17th November' 2017 is applicable to the petitioners in the subject petition. The prayers of the petitioners as mentioned in para 6 of this order are not considered by the Commission in this order read with the interim orders passed by this Commission during proceedings in the subject petition. With all aforesaid observations and finding, the subject petition is disposed of.

(Shashi Bhushan Pathak)	**(Mukul Dhariwal)**	**(Dr. Dev Raj Birdi)**
Member	**Member**	**Chairman**