MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Sub: In the matter of petition filed under Section 86(1)(e), Section 86(1)(f) and Section 86(1)(a) read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005.

Petition No. 37/2018

ORDER

(Date of Hearing: 09th October, 2018)
(Date of Order: 27th November, 2018)

M/s Shri Durga Khandsari Sugar Mills,
Vill : Mendarana, Tehsil : Pansemal,
District : Barwani (M.P.) - **Petitioner**

Vs.

The Managing Director,
M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.,
GPH Compound, Pologround, Indore. - **Respondent No. 1**

New and Renewable Energy Department,
Government of Madhya Pradesh,
Main Road No. 2, Urja Bhawan,
Near 5 No. Bus Stop, Shivaji Nagar, Bhopal – 462016 - **Respondent No. 2**

Shri Aditya K. Singh, Advocate and Shri Akhilesh Goyal, Representative appeared on behalf of the Petitioner.

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

None appeared on behalf of Respondent No. 2.

2. The instant petition has been filed by the petitioner in the matter of Petition filed under Section 86 (1) (e), 86 (1) (f) and Section 86 (1) (a) of the Electricity Act, 2003 read with Regulation 10 of "Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18. 18.19 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005 seeking directions to interpret and comply with Section 42 of the Electricity Act in letter and in spirit and to declare void ab initio all actions being undertaken by Respondent No. 1 while misinterpreting Section 42 of the Electricity Act and Regulation 13 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005, wherein the petitioners have broadly prayed to the Commission to:

i. Admit the Present Petition;
ii. In the interim, direct Respondent No. 1 issue directions restraining Respondent No. 1 from taking any coercive action till disposal of this Petition;

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iii. Direct Respondent No. 1 to not impose cross subsidy on self consumption of the electricity by the Petitioner from its own generating station by bagasse based cogenerating stations;

iv. Declare that all actions being undertaken by the Respondent No. 1 in regard to imposition of cross subsidy surcharge on the Petitioner is void ab initio and further direct to Respondent No. 1 for refund of all amount paid by the Petitioner for Cross Subsidy Surcharge; and

v. Pass any such other or further order(s) as the Commission may in the facts and circumstances of the present case, may deem fit and proper.

3. The case was listed for motion hearing on 28.08.2018. During the motion hearing, the Commission admitted the petition and directed the petitioner to serve a copy of the petition to the respondents within a week's time. The Commission also directed the respondents to file their reply in hard copy by 18.09.2018, with a copy to the other parties. The case was listed for next hearing on 25.09.2018.

4. Respondent No. 1 submitted the reply on 22.09.2018. During the hearing on 25.09.2018, the petitioner sought one week's time for filing the rejoinder in the matter. The Commission considered the request and directed the petitioner to submit the same in hard copies by 05.10.2018 with copy to the other parties. Further, the Commission enquired from the petitioner about earlier status of its plant in respect of the electricity supply arrangements. The petitioner requested the Commission to allow some time for submission in this regard. The Commission accepted the request and directed to submit the response by 05.10.2018 with copy to the other parties.

5. The case was listed for hearing on 09.10.2018. During the hearing, the petitioner and the respondent no.1 argued the matter at length in favour of their submissions. The petitioner restated that the respondent No. 1 has arbitrarily imposed cross subsidy surcharge on the Petitioner and has relied on various statutory provisions in support of its submission and the respondent no.1 has not demonstrated which Statute/Regulation/Act empowers them to impose such surcharges on the entity which were/is/will never consumer of the distribution agency and has been generating electricity in co generating process. While the respondent no.1 contested the petitioner's views stating that Discom has acted in accordance with the law. Once it is established that plant is not a captive generating plant, levy of CSS is mandatory and automatic

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in accordance with the section 10(2) read with section 42(2) of the Electricity Act, 2003. The respondent no.1 requested the Commission to dismiss the petition being devoid of merit. The petitioner requested the Commission for submission of its written note of argument within a week's time, which the Commission agreed. The Commission also asked the respondents to file their final submission within a week's time, if they want to do so. The petitioner submitted its written note of argument vide dated 15.10.2018 while the respondents have not made any further submission.

6. The petitioner in the petition, rejoinder dated 04.10.2018 and subsequent submission of 15.10.2018 stated that the respondent No. 1 has arbitrarily imposed cross subsidy on the petitioner and has relied on various statutory provisions in support of its submission. The respondent has not countered any of the statutory provisions cited by it or the respondent has not demonstrated which Statute/Regulation/Act empowers them to impose such surcharges on the entity which were/is/will never consumer of the distribution agency and has been generating electricity in co generating process. The petitioner has broadly submitted as below:

i. The petitioner is a partnership concern registered under the provisions of the Indian Partnership Act, 1932 and is operating a bagasse based power plant relying on cogeneration process. Petitioner is compelled to file this petition against unprecedented and possibly only one case in entire India wherein a bagasse based cogenerating unit has been asked to pay cross subsidy for its self-consumption of its own electricity. Cross Subsidy surcharge is open access surcharge and it can only be imposed in terms of statutory provisions and it's interpretation by judicial forums.

ii. Petitioner has installed 11 MW bagasse based cogeneration project at Village: Mendrana, Tehsil: Pansemal in the state of Madhya Pradesh and this factory has been consuming power from its own co generating unit located in the same premises. The Petitioner is a sugar plant generating electricity for our own use by the usage of bagasse in an integrated generating station cum sugar factory.

iii. Sugar industry has been traditionally practicing cogeneration by using bagasse as a fuel. With the advancement in the technology for generation and utilization of steam at high temperature and pressure, sugar industry can produce electricity and steam for their own requirements. It can also produce significant surplus electricity for sale to the grid using same quantity of bagasse. The sale of surplus power generated through optimum cogeneration would help a sugar mill to improve its viability, apart from adding to the power generation capacity of the country. Sugar industry has never been consumer of the distribution licensee for running of its sugar plant. Sugar industry is heavily regulated and

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if any industry will be compelled to buy electricity from distribution licensee, it will be forced to closure because increased electricity charges will have effect on output and as submitted not a single state imposes cross subsidy, MP Sugar industry will become unviable and there will be not any benefit to the distribution licensee and the intent of widening base of subsidised consumer will never be achieved.

iv. Madhya Pradesh Electricity Regulatory Commission ("MPERC") vide its April, 2013 order ("Bagasse Tariff Order") determined tariff for Bagasse based cogeneration power plant. Para 9.4 of this tariff order is reproduced herein below which obliges MP Power Management to procure electricity from bagasse based cogeneration plants:

i. "The energy generated by the bagasse based cogeneration projects will be procure centrally by the M.P. Power Management Co. Ltd. at the rates specified in this order. The energy so procured will be allocated by M.P. Power Management Co. Ltd. to the three distribution licensees on the basis of actual energy input in the previous financial year. Accordingly, the Power Purchase Agreements will be signed between the developer and the M.P. Power Management Co. Ltd. The M.P. Power Management Company Limited, Jabalpur, in turn, will have back to back power supply agreement with the Distribution Licensees. The agreements will be for exclusive sale of electricity for a period of 20 years from the date of commissioning of plant. The developer may execute agreement with M.P. Power Management Co. Ltd. before commissioning of plant and the Commissioning Certificate may form a part of the agreement. The M.P. Power Management Company Limited, Jabalpur is directed to develop the model agreement accordingly."

v. Petitioner is connected to grid as a generator for supplying power to third party and for drawal of power in terms of regulation 10 of MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-I). Prior to VIIth amendment of aforementioned Regulation, Clause 12.2 reads as under:

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

Post VIIth amendment of MPERC RE Regulation, Clause 12.2 reads as under ("VIIth Amendment"):

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"12.2 Wheeling charges, Cross subsidy surcharge and additional surcharge on the wheeling charges etc. as decided by the Commission from time to time under Section 42 of the Electricity Act, 2003 shall be applicable."

vi. Such open access consumer which were drawing power from renewable energy sources were not liable to pay wheeling charges, cross subsidy and additional surcharge prior to VIIth amendment and this amendment withdrew such exemption from such open access consumers. West Discom, mistakenly relying on this VIIth Amendment imposed Cross Subsidy on consumption of electricity by the Petitioner from its own generating station based on cogeneration process relying on bagasse as a fuel. Petitioner is not disputing that whoever will be consumer of the Respondent, they will be necessarily liable to pay such charges but Petitioner which were never a consumer of the West Discom will not be liable to pay such charges. The Petitioner has been drawing electricity from distribution licensee only for off season repair and maintenance purposes and have never used electricity for running our own sugar plant and this fact has been admitted by Respondent Number 1 also.

vii. West Discom imposed cross subsidy surcharge on auxiliary consumption of the power plant and consumption of the co-located and co-owned sugar plant. Section 42(3) of the Electricity Act stipulates imposition of cross subsidy surcharge on open access consumers at the rate determined by the Commission. Para 5.8.3 of the Electricity Policy, 2005 stipulates that cross subsidy is a compensatory charge to compensate distribution licensee for loss of revenue from migration of the customer. Tariff Policy also stipulates this as a compensatory charge.

viii. Petitioner made various representation to West Discom explaining following:

Section 42(4) in clear terms stipulates that these charges will be applicable only on such consumers who have been allowed to avail open access and Petitioner is not an open access Consumer, therefore it is not liable to pay open access charges.

Cross Subsidy is a compensatory charge which is liable to be paid by all subsidising consumers to compensate losses of the distribution licensee by supplying power to subsidised consumers even after such subsidising consumer ceases to be a consumer of the distribution licensee till date it is located within area of such distribution licensee.

ix. It is an undisputed fact that Petitioner procures power from distribution licensee as a generation station for its auxiliary consumption in strict compliance of the Regulation 10 of MPERC RE Regulation.

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x. The Petitioner is generating energy by cogeneration process using bagasse as a source of fuel which is a renewable energy source and illegal burden of cross subsidy surcharge will compel Petitioner to close the generating station and the same would have cascading impact on other bagasse projects also and instead of the much needed boost to the renewable energy sector and developer, the default would act as deterrent for not just the Petitioner but also other developers who are developing/ are proposing to develop bagasse based renewable power projects in the State of Madhya Pradesh. Imposition of illegal charges on self-consumption of electricity by the Petitioner undermines the mandate of the Electricity Act, 2003 to promote renewable sources of energy (Sections 61 (h), (i), 86 (1) (e), para 5.12.1 and 5.12.2 of the National Electricity Policy and paras 4 (e) and 6.4 of the Tariff Policy).

xi. From reading of the relevant regulations it would be concluded that cross subsidy shall be applicable in following cases:

i. Section 42 (2) of the Electricity Act stipulates imposition of the cross subsidy to take care of the requirements of current levels of cross-subsidy.

ii. Paragraph 5.8.3 of the Electricity Policy in very unambiguous terms stipulate mandatorily imposition of cross subsidy on all such consumers who avails supply under open access by switching from distribution licensee.

iii. Paragraph 8 of Tariff Policy clearly demonstrates that Cross Subsidies are being levied on consumers who are permitted open access or if consumers are availing open access and in very unambiguous terms demonstrate that the open access consumers will have such payment.

xii. There are various judicial precedents dealing with these surcharges. Supreme Court of India in "Sessa Sterlite Limited Vs. Orissa Electricity Regulatory Commission" has dealt this issue at paras 25 to 28. The Hon'ble Supreme Court termed it as a compensatory charge and opined that cross subsidy surcharge shall be payable by all consumers who will take electricity from the distribution licensee if the present open access will be discontinued. This Judgment was followed by APTEL in "Steel Furnace Association of India" and Hon'ble Tribunal observed as follows:

> *"This Tribunal in a number of judgments has held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access the consumer would have taken electric supply from the Distribution Licensee and in the result the consumer would have paid the tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.".*

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xiii. For that the Cross Subsidy Surcharge is a compensatory charge. When a subsidizing consumer takes supply from any other source by seeking Open Access, the amount of cross subsidy it was paying to the licensee would also be lost. This would put burden on remaining consumers particularly the subsidized consumers. In order to mitigate the loss of cross subsidy, the legislature has introduced the concept of Cross Subsidy Surcharge. In fact, the Cross-Subsidy Surcharge is required to compensate the subsidized consumers of the distribution licensee.

xiv. The Petitioner had installed 800 TCD pressure boiling sugar plant (Semi Sugar Plant) in 2003 by installing 900 KW Turbine set and taken load from Respondent No. 1 for off season repair and maintenance purposes. In 2006-07 the Petitioner, converted its pressure Boiling Sugar plant in to vacuum sugar plant and was still taking electricity for its off season repair and maintenance purposes and was running its sugar plant by its cogenerating unit of 1.5 MW. In 2016-17 800 TCD pressure boiling sugar plant was expanded to 2500 TCD and was drawing power from its own cogenerating station. During 2015-16 under the expansion from 2000 TCD to 5000 TCD it installed 3.00 MW turbine. Post this expansion, capacity of sugar plant became 5000 TCD and boiler capacity became 75 TPH at 21 KG/CM and power generation was around 5 MW. With the advent of new technology without increasing capacity of the plant, petitioner increased the electricity output of the plant by increasing capacity of boiler and turbine. Due to this production of the electricity got extended to 6 times. This power plant is partial part of the sugar plant and situated within the premises. New system clearly spells that by upgrading the technique, the Petitioner is capable to generate surplus power.

The figures of our revenue from the electricity sale and sugar sale:

Sales of sugar – 90.60 Crore

Sales of Power - Rs. 6.24 Crore

xv. There is no direct precedent dealing with the instant issue because not a single State has till date charged cross subsidy on the sugarcane unit and this Commission will have an opportunity to decide this matter judiciously keeping in mind view of other States Regulator and intent of the imposition of cross subsidy to compensate losses of DISCOM wherein it needs to be demonstrated that there is loss to the distribution licensee.

7. The respondent no.1 in the reply dated 19.09.2018 stated that the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or inconsistent with what is stated herein the petition. The respondent has broadly submitted as below:

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i. The main contention of the petitioner is that the cross subsidy surcharge is not applicable on a category of persons who are neither 'consumers' nor availing 'open access' in terms provided under the 2003 Act and the applicable Regulations. The petitioner is not the consumer of the West Discom and is availing power from Discom only for the start up purpose of its power plant. Further it has never opted for or has been granted open access in terms of the applicable Regulations and has not used the transmission or distribution system owned by the State transmission and distribution licensees. The petitioner further contended that it doesn't fall within the definition of 'consumer' as provided under Section 2 (15) of the Electricity Act 2003 (herein after referred as 'Act' or 'Electricity Act'). According to the petitioner, since it is consuming electricity generated from its own generating plant, they cannot be termed as 'consumer'. As such not liable for payment of CSS.

ii. The concept of open access has been statutorily introduced by Act in order to promote free trade of electricity. The Act, gives freedom to a consumer either to generate his own electricity (Captive Generation) or to purchase it from an Independent Power Generator of his own choice, if he/she/it do not want to get electricity from distribution licensee of his area. However Section 42 of the Act made open access, subject to the Regulations framed in this regard and payment of charges as determined by the State Commission. while introducing concept of open access, Section 42 of Act empowers State Commission not only to determine the charge for wheeling of electricity but also determine cross subsidy surcharge which is to be utilized to meet the requirement of current level of cross subsidy within the area of supply of the distribution licensee.

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

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iv. Section 2 (8) of Act, 2003 and Rule-3 of the Electricity Rule-2005 provide for the criteria to qualify as a captive power plant. The two requirements to be satisfied by the Generating Plant to qualify as a captive power plant are as follows:
(a) Ownership i.e. holding 26% of the ownership;
(b) Consumption of 51% of the units generated.
Rule-3 of Electricity Rules 2005 specifically prescribes the conditions to be satisfied by the Power Plant to be qualified as captive power plant. Therefore, a power plant will be qualified as a captive power plant only when it satisfies both the conditions. Even if any one of the conditions is not fulfilled, the captive power plant will lose its status and become a generating plant or independent power producer.

v. The relevant part of the judgment of Hon'ble APTEL in the matter of M/s. Godawari Power & Ispat Ltd Vs The Chhattisgarh State Electricity Regulatory Commission in Appal No. 33 of 2012 dated 18/02/2013. is reproduced as under:

> *20. The Power of the State Commission to decide about whether the requirements have been satisfied is one thing. At the same time, the power of the State Commission to relax mandates relating to the norms fixed for those requirements fixed by the Rules and the Act is a different thing.*
>
> *21. The Appellant instead of satisfying the mandatory requirements cannot ask the State Commission for deviation from these Rules framed under the Central Act based upon equity which is not permissible under the law. It is well settled principle of interpretation that the statute by implication imports the equitable principle. The modern statutes are framed with a view to equitable as well as legal principles but equity would subordinate itself to statutes.*
>
> *22. The question raised in this Appeal is whether the State Commission has got the powers to relax the Rules framed by the Central Government with intent to carrying out the provisions of the Central Act or not. This eligibility prescription of 51% of annual consumption is in conformity with the statutory requirements as provided U/S 2 (8) of the Act, 2003. The definition of captive generating plants as per definition U/S 2 (8) is that the power plant set-up by any person to generate electricity "primarily for his own use". It means that the major part of the power produced by the captive power plant is to be used for captive consumption.*

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> *23. Similarly, the Sub Rule 2 of rule-3 wherein the word "shall" has been used would make it clear that the obligation of the captive generating plant are mandatorily to be complied with failing which the provisions of Sub Rule-2 would automatically come into operation and consequently the electricity generated in that year by the plant has to be treated as it is the supply of electricity by a generating Company. Therefore, it has to be held that the State Commission does not have any power to relax the rigours of Rule-3 under any circumstances.*

vi. In the present case out of total installed capacity of 11 MW, petitioner is only consuming 3 MW power in its sugar factory and 8 MW power is being sold through energy exchange. Thus condition of at least 51% of captive consumption is not satisfied. Therefore, in accordance with the Rule 3(2) along with aforesaid ruling of Hon'ble APTEL whole power supplied by the cogeneration plant of the petitioner shall be treated as if the power is supplied by a generating company.

vii. Supply of electricity by the generating company to any licensee and/ or consumer has been dealt by the section 10 of the Act. It is noticeable that sub-section (2) of Section 10 has two parts, namely a) a generation company may supply electricity to any licensee; and b) it may supply electricity to any consumer. The words "subject to the regulations made under sub-section (2) of Section 42" as it occurs in sub-section (2) of Section 10 qualifies supply to 'any consumer'. Therefore, when a generation company makes supply to any consumer, such supply is always subject to the regulations made under sub-section (2) of Section 42.

viii. The ruling of the Hon'ble Tribunal in DLF to be read with Section 10(2) and Section 42(2) of the Electricity Act 2003 implies that cross subsidy surcharge is payable not only when open access is availed of but also when supply is made by a generation company to a consumer, or else there would not have been any reference to Section 42 (2) in Section 10 (2). The fourth proviso to Section 42(2) further makes it clear that 'such surcharge' is not leviable in case of captive generating plant using open access for carrying the electricity to the destination of its own use. It is undisputed fact that the petitioner's plant is not a captive generating plant accordingly there is no exemption from CSS.

ix. The petitioner has contended that since it is not availing power supply from the distribution licensee it is not the consumer, provisions contained in Section 42 (2) of the

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2003 Act would not apply, therefore, it is not liable to pay cross subsidy surcharge. Section 2 (15) of the 2003 Act defines the word 'consumer' to mean any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be. Similarly, as noticed earlier under Section 10 (2) generating company may supply electricity (i) to a licensee directly; (ii) to a consumer as per Regulations framed under Section 42 (2), which includes a provision for payment of cross subsidy surcharge. Thus, as per section 10(2) by a generating company (which is not a captive generating plant) supply can be to any distribution licensee or to a consumer; only two modes are permissible and supply through any other mode by a generating company is not contemplated under the Act. In other word any person who is availing power from a generating company shall be considered as consumer.

x. During the period under dispute the petitioner's sugar factory has used electricity from a generating company and not from a captive generator as it has lost its captive status by virtue of operation of law and precisely for this reason it is not entitled for exemption from payment of cross subsidy. The moment by operation of legal fiction supply is considered as supply by generating company, the area distribution licensee becomes entitled to levy cross subsidy surcharge in accordance with the provision of section 10(2) even if no part of distribution system is used.

xi. In the instant case, the petitioner is indisputably falling within the area of supply of West Discom. Since the petitioner was not availing power supply from the distribution licensee, but was obtaining supply from its own generating plant, which doesn't have captive status but a independent power producer, it becomes consumer under Section 2 (15) of the 2003 Act as held by the Supreme Court in Sesa's case at paras 31 & 32. The above extracts from the Sesa judgment puts a full stop to the contention of the petitioner and closes all avenues for any further argument to challenge the reasonableness of levy of the CSS.

xii. The petitioner is trying to establish that the case of levy of CSS by West Discom on the consumption from its own non captive cogeneration generating plant is the only one of its

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kind in the country. This submission of the petitioner does not seem correct as in other states also respective state commissions has upheld the levy of CSS on the power consumed from the non captive cogeneration plant. Discom craves leave of the Commission to submit few orders of the other regulatory commission in the similar matters at the time of hearing.

xiii. It is wrong and denied that levy of CSS is illegal and imposition of such charges undermines the mandate of the Electricity Act to promote renewable source of energy. Section 86(1)(e) of the Act provides for promotion of co-generation and generation of electricity from renewal sources of energy by State Commission, however, such promotion is restricted to two areas (i) provide suitable measures for connectivity with grid and sale of electricity to any person; (ii) compel the distribution licensee to purchase percentage of total consumption of electricity in area from renewal sources of energy (known as renewable purchase obligation 'RPO'). Section 86(1)(e) mandates the State Commission by providing connectivity and specifying a percentage of total consumption to be purchased from renewal energy. The Madhya Pradesh Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Source of Energy) (Revision-I) Regulation 2010 adequately takes care of this aspect and facilitate their smooth operation and connectivity with gird system. The grid connectivity of renewable energy plants gives them freedom and autonomy to sale electricity throughout nation and cross locational boundaries, which itself is an incentive.

xiv. It is also to be seen that RPO (Renewal Purchase Obligation) which is determined by the State Commission in exercise of powers conferred under Section 86(1)(e) is at present 9.25% of the total electricity consumed by answering respondent as against 0.80% in 2010-11. It is also respectfully submitted that for financial year 2021-22 the renewal purchase obligation is 17% of total consumption in area of distribution licensee. When the statute clearly specifies the manner for promotion of Renewable Energy, petitioner should not have termed the levy of CSS as illegal, in the guise of promotion of renewable energy.

xv. The levy of cross subsidy surcharge is for balancing cost of supply as between the subsidizing consumers and subsidized consumers of the licensee. Further the said levy is used for compensating the tariff recovered from the subsidized category below the cost of supply. Therefore it is the weaker section of the society who is getting benefit from the

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levy of cross subsidy surcharge and not the Distribution licensee. Distribution licensee in totality (both from subsidising & subsidised consumer) doesn't get anything more than the cost of supply. Thus, question of unjust enrichment of the distribution licensee on this account doesn't arise.

xvi. Discom has acted fairly and in accordance with the law. Once it is established that plant is not a captive generating plant, levy of CSS is mandatory and automatic in accordance with the section 10(2) read with section 42(2) of the Electricity Act.

8. Section 2(8) of the Electricity Act 2003 provides the definition of the Captive Generating plant as below:

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

9. Electricity rules 2005 further defines :

"3. Requirements of Captive Generating Plant.

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

(a) in case of a power plant

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

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

Provided that xxxxxxxx

Provided further that xxxxxxx

(b) in case of xxxxxx

(2) It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of

Sub: In the matter of petition filed under Section 86(1)(e), Section 86(1)(f) and Section 86(1)(a) read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005.

sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company."

10. The key word in Section 2(8) to be noted is "primarily for his own use". It means majority of the power generated by the captive power plant is to be used for captive consumption. Accordingly Sub rule (1)(a)(ii) of Rule 3 of the Electricity Rules, 2005 provides that not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use.

11. The Commission has noted that the total installed capacity of the petitioner's plant is 11 MW while it is consuming only 3 MW power in its sugar factory leaving remaining 8 MW power to be sold through energy exchange. Thus his own consumption is less than 30% of its generating capacity and, therefore, does not fulfill the criteria of minimum 51% consumption as specified in Sub rule (1)(a)(ii) of Rule 3 of the Electricity Rules, 2005. Further as per Sub rule (2) of Rule 3, if the consumption by a captive user is less than percentage mentioned in Sub clause (a) and (b) of Sub rule (1) above, then in such case the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. Thus, this is a case of supply of electricity by a Generating Company to any consumer or a person and that consumer/person is being supplied electricity through its own line. The consumer could be in the same premises or located elsewhere. On a similar issue, Hon'ble APTEL vide para 17of its order dated 09.02.2010 in Appeal No. 119 & 125 of 2009 provided as under:

" 17. The cross subsidy surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee's line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. On this principle it has to be held that the cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not ."

Sub: In the matter of petition filed under Section 86(1)(e), Section 86(1)(f) and Section 86(1)(a) read with Regulation 10 of "MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and Para 18.15, 18.16. 18.18 and 18.20 of MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2005.

12. The contention of the petitioner that the cross subsidy surcharge is not charged by other States on the sugarcane unit and, therefore, this Commission is to decide the matter keeping in view of the other States' Regulators, is not tenable as the levy of all statutory charges is governed under the extant provisions of the Electricity Act, 2003, the Electricity Rules, 2005 and related Regulations.

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

14. In view of the above, petition no. 37/2018 stands disposed of.

Ordered accordingly.

(Anil Kumar Jha)	(Mukul Dhariwal)	(Dr. Dev Raj Birdi)
Member	**Member**	**Chairman**