

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION  
GANDHINAGAR**

**Petition No.1362/2013 and I.A. No. 06 of 2014.**

**In the Matter of:**

**Petition seeking adjudication of the dispute under section 86 (1) (f) of the Electricity Act, 2003 between the parties with respect to the non-applicability of levy of additional surcharge in terms of Section 42 (4) of the Electricity Act, 2003 read with Regulation 25 of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011.**

Petitioner : Essar Steel India Limited,  
Essar House, Opp- Gujarat College,  
Ellisbrige, Ahmedabad-380006.

Represented By : Learned Senior Advocate Shri Mihir Thakore  
with Advocates S/Shri Sahil Shah and Aayush  
Modi alongwith S/Shri Ashok Verma and D.J.  
Saxena.  
  
V/s.

Respondent No. 1 : Gujarat Urja Vikas Nigam Limited,  
Sardar Patel Vidhyut Bhavan,  
Race Course Circle, Vadodara-390007.

Represented By : Learned Advocate Shri M. G. Ramchandran with  
Advocate Shri Anand Ganesan alongwith Shri  
V.T Patel.

Respondent No. 2 : Dakshin Gujarat Vij Company Limited,  
Nana Varachha Road, Kapodara,  
Surat - 395 006.

Represented By : Shri B.C. Godhani.

**CORAM:**

**Shri Pravinbhai Patel, Chairman**

**Dr. M. K. Iyer, Member (Finance)**

**Date: 13/01/2015.**

**ORDER**

1. The present petition has been filed by the petitioner and sought the following reliefs:

(A) To declare that the Respondents herein cannot levy additional surcharge on the Petitioner in terms of Section 42(4) of the Electricity Act, 2003 read with Section 25 of the GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011;

(B) Pending the hearing and the final disposal of the present petition, Commission may be pleased to stay the proceedings pending in Petition No. 1302 of 2013 qua the present petitioner;

(C) Pending the hearing and the final disposal of the present petition, direct the Respondents not to raise any demand of additional surcharge from the Petitioner;

2. The facts mentioned in the petition in brief are stated below:

2.1 The Petitioner, is a company incorporated under the Companies Act, 1956, and was a consumer of the Respondent No. 2 Dakshin Gujarat Vij Company Limited (DGVCL).

2.2 The respondent Gujarat Urja Vikas Nigam Limited (GUVNL) and other Distribution Companies (Discoms), including Dakshin Gujarat Vij Company Limited (DGVCL), filed a Petition No. 1302 of 2013 before the Commission whereby they have sought to levy additional surcharge on Open Access Consumers. The Commission vide its

order dated 10.05.2013 in Petition No. 1302 of 2013, was pleased to invite objections/suggestions from the objectors/stakeholders regarding levy of additional surcharge by GUVNL and other Discoms.

2.3 The petitioner filed its objections to the said petition, though additional surcharge as sought to be levied by the Petitioners therein under Section 42(4) of the Electricity Act, 2003 would not be applicable to it. The petitioner stood on a different footing as compared to the other objectors, petitioner preferred an application being Application No. 1 of 2013; seeking a separate hearing of the objections filed by the petitioner.

2.4 Without prejudice to the contents of Application No. 1 of 2013 and the objections filed by petitioner in Petition No. 1302 of 2013, the petitioner filed the present petition challenging the levy of additional surcharge in as much as the same cannot be levied on the petitioner in terms of Section 42(4) of the Electricity Act, 2003 read with Regulation 25 of the Open Access Regulations.

2.5 The petitioner submitted that the objections filed by petitioner in Petition No. 1302 may be treated as part and parcel of the present petition.

2.6 The basic premise of GUVNL and other Discoms for levy of Additional Surcharge is that due to open access consumers who do not avail power supply from the local Discoms, generating capacities tied up by the Discoms remain idle and not utilized and the distribution companies have to pay fixed charges to the generators as per the terms of the Power Purchase Agreement (PPA), irrespective of utilization of the power whether generated or not by the generator. It is the statutory obligation of the Discoms to supply electricity to the consumers on demand basis, the Discoms

have tied up certain generating capacities through the PPAs; as a result of which the Discoms would allegedly be forced to pay certain fixed charges to the generators as per the terms of the PPA, irrespective of the fact as to whether the generated power is utilized by the Discoms or not.

2.7 The petitioner had been granted the status of a Regional Entity, vide order dated 08.06.2013 passed by the Central Electricity Regulatory Commission, in Petition No. 245/MP/2012. Regional Entity has been defined in the Indian Electricity Grid Code to mean such persons who are in the Regional Load Dispatch Centre (RLDC) control area and whose metering and energy accounting is done at the regional level. Accordingly, the connectivity of the petitioner had been shifted from the State Load Dispatch Centre (SLDC) Gujarat to Western Regional Load Dispatch Centre (WRLDC). Upon shifting of the connectivity of petitioner from SLDC to WRLDC, petitioner has ceased to be an embedded customer of Gujarat for all intent and purposes and it is treated as a regional entity independent of the State of Gujarat in the matter of scheduling, dispatch, energy accounting, UI mechanisms, backing down instructions etc. Therefore, although the petitioner is located physically in DGVCL area, after disconnection from Gujarat Transmission system, the status of petitioner would not remain as a consumer of DGVCL as its physical asset would not be used for supply of electricity to the petitioner. Accordingly, petitioner being conferred with the status of a Regional Entity, DGVCL would not have any obligation to supply power to petitioner.

2.8 The Discoms through Petition No. 1302 of 2013, in turn sought to recover the fixed charges allegedly paid by them to the generators, from the open access consumers

through levy of additional surcharge in accordance with Section 42(4) of the Electricity Act, 2003 read with Regulation 25 of the Open Access Regulations.

2.9 In the present case, though the peak demand is only 1050 MW of power, on insistence of disconnection from Intra-state Grid, ESIL has arranged for supply of 1381.50 MW of power. Therefore, ESIL would not require any power to be supplied by the local Discoms i.e. DGVCL. In view of the said situation, it cannot be said that DGVCL has any obligation to supply power to ESIL, under Section 43 of the Electricity Act, 2003 and consequently, DGVCL would not be in a position to levy any additional surcharge on petitioner.

2.10 The power requirement of petitioner has gone up to almost 850 MW average power and 1050 MW peak power. In order to meet its power requirements, petitioner had entered into a Power Purchase Agreement (PPA) with Essar Power Madhya Pradesh Limited (EPML) on a long-term basis, for purchase of 682 MW power. Petitioner has also tied up with other group companies and captive power plants for the purpose of procurement of power. Thus, the petitioner meets its requirement of power through its own CGPs and from its group companies.

2.11 The petitioner has already secured supply of 1381.50 MW of power, as against the peak power of 1050 MW it requires. Therefore, the petitioner would not require any power to be supplied by the local Discoms.

2.12 The Petition No. 245/MP/2012 had been filed by ESIL for transfer of load control area jurisdiction of petitioner from SLDC, Gujarat to WRLDC, Mumbai and for grant of status of a regional entity, in view of the condition laid down by the Central Transmission Utility for supply of power from EPML to petitioner. The petitioner

has been granted connectivity to the inter-state transmission system by the Central Transmission Utility i.e. Power Grid Corporation of India Limited (PGCIL). The said connectivity had been granted on a condition that petitioner shall be connected to the inter-state transmission system on a radial mode and would have to get itself disconnected from the system of the State Transmission Utility of Gujarat. A Tripartite Connection Agreement dated 25.05.2012 between PGCIL, petitioner and Essar Power Transmission Company Limited and the Transmission Agreement dated 17.08.2012 between PGCIL and petitioner, were entered into between them in view of the aforesaid condition of disconnection from the State Transmission Utility. The petitioner vide its letter dated 20.12.2012 had also intimated Gujarat Energy Transmission Corporation Limited (GETCO) about the proposed disconnection from the Gujarat State Transmission Utility network to the Central Transmission Utility network.

2.13 During the pendency of proceedings before Central Electricity Regulatory Commission, GUVNL vide its affidavit dated 17.01.2013 stated that GUVNL had entered into a PPA with Essar Power Limited for purchase of 300 MW out of the 515 MW power station. The balance 215 MW was supplied to the group companies of Essar Power Limited, including petitioner. In the aforesaid context, it was stated by GUVNL that petitioner should be required to pay Cross Subsidy Surcharge and other related charges to DGVCL for consumption of electricity sourced from other sources, as applicable under the provisions of the Electricity Act, 2003. Further, DGVCL vide its affidavit dated 15.01.2013 had stated that petitioner was required to pay cross subsidy charges on the total electricity procured from the third parties. DGVCL in the said affidavit had nowhere stated that petitioner would be required

to pay additional surcharge to DGVCL. In response to the affidavit filed by GUVNL, the petitioner vide its affidavit dated 22.02.2013 had stated that subsequent to the disconnection from the State Transmission Utility (STU), petitioner would not be scheduling the technical minimum power from Essar Power Limited, since all its power requirements would be fulfilled from the Central Transmission Utility (CTU). It was stated that subsequent to the disconnection from STU, petitioner would not be connected to Essar Power Limited. Accordingly, subsequent to the disconnection from STU, petitioner has stopped scheduling power from Essar Power Limited. The Petitioner vide its affidavit had also stated that it would pay cross subsidy surcharge and other related charges to Discoms in terms of the applicable rules and regulations. Accordingly, the petitioner had agreed to pay the cross subsidy charges to DGVCL and any other charges which would be applicable as per the provisions of the Electricity Act, 2003.

2.14 From a perusal of the aforesaid affidavits filed by petitioner, GUVNL and DGVCL, it clearly appears that all the parties therein had agreed to the fact that petitioner would have to pay cross subsidy surcharge and other charges to DGVCL, if the same are applicable to petitioner, as per the provisions of the Electricity Act, 2003. In other words, it was understood between the parties that petitioner would not be liable to pay any charge if the same is not applicable as per the provisions of the Electricity Act, 2003. In view of the same, it was observed by CERC that petitioner would be liable to pay all applicable cross subsidy charges and other charges, if any, applicable under the provisions of the Electricity Act, 2003 and as per the provisions of the regulations of this Commission. The petitioner submitted that since the cross subsidy surcharge is payable by petitioner as per the provisions of

the Electricity Act, the same is being paid by them. However, since the additional surcharge is not payable as per the provisions of the Electricity Act, 2003, it is not open for the Respondents to contend that petitioner is bound to pay the additional surcharge to DGVCL in view of the affidavit dated 22.02.2013 filed before Central Electricity Regulatory Commission. Accordingly, the petitioner submitted that additional surcharge would not be payable by petitioner to DGVCL, since the same is not applicable to it as per the provisions of the Electricity Act, 2003.

2.15 Subsequent to the order dated 08.06.2013 passed by the Central Electricity Regulatory Commission, whereby petitioner had been granted the status of a Regional Entity, petitioner disconnected itself from the 220 KV STU network on 23.06.2013 in the presence and supervision of representatives from GETCO, DGVCL and CEI. The petitioner also issued a disconnection notice dated 25.06.2013 to DGVCL, whereby it terminated the agreement dated 14.10.2009. Accordingly, petitioner was disconnected from STU and was connected to PGCIL. Therefore, the Respondents herein cannot levy any additional surcharge on ESIL, since ESIL is no longer connected to the STU.

2.16 The petitioner further submitted that as per Section 42(4) of the Electricity Act, 2003, additional surcharge can only be levied in case when distribution system and associated facilities of a transmission licensee or distribution licensee are used by another person for the conveyance of electricity on payment of charges i.e. only in the case wherein wheeling charges can be levied. Whereas, in the present case the distribution system and associated facilities of DGVCL are not being utilized by petitioner. The petitioner has been granted the status of a Regional Entity, as a result of which the connectivity of petitioner has been shifted from SLDC, Gujarat to



WRLDC. The Petitioner is therefore not connected to the STU for the purposes of procurement of power. Therefore, since the distribution system of DGVCL is not being utilized by petitioner, wheeling charges cannot be levied on petitioner. Consequently, additional surcharge can also not be levied on petitioner.

2.17 The petitioner relied upon the decision of the Hon'ble Appellate Tribunal vide order dated 29.03.2006 passed in Kalyani Steels Limited Vs. Karnataka Power Transmission in support of its contentions.

2.18 Based on above submissions, the petitioner submitted that the Commission may allow the present petition.

3. The respondent filed a reply contending interalia stating that the petition has been filed by the petitioner for a declaration that the Petitioner should not be levied additional surcharge in terms of Section 42 (4) of the Electricity Act, 2003 read with Section 25 of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra State Open Access) Regulations, 2011,

3.1 The Respondent No. 1 and other distribution licensees have filed a Petition No. 1302 of 2013 before the Commission for determination and levy of the additional surcharge on all persons in the State of Gujarat who are receiving supply of electricity from any person other than the distribution licensees of the area of supply as provided under Section 42 (4) of the Electricity Act, 2003. In the said petition, the Commission passed Order dated 4.10.2013 and listed the matter on 21.12.2013 for hearing. The present petition has been filed by petitioner subsequent to the filing of the above petition.

3.2 The present petition filed by the petitioner is misconceived and is liable to be rejected, broadly, for the following reasons:

(a) The Petitioner is an entity in the State of Gujarat and having operation in the area of supply of Respondent No. 2, DGVCL;

(b) Till recently, petitioner has been a HT consumer of DGVCL having a contracted load of 44.5 MVA and receiving electricity supply from DGVCL. DGVCL is the distribution licensee in the area of supply where facilities of petitioner is situated;

(c) The petitioner had opted for direct connectivity to the Inter-State Transmission Network of Power Grid Corporation of India Limited, the Central Transmission Utility and had filed a petition being No. 245 of 2012 before the Central Electricity Regulatory Commission. The said petition No. 245 of 2012 was decided by the Central Commission through order dated 8.6.2013. In the said proceedings, petitioner clearly and specifically undertook that the grant of direct connectivity to the Inter-State Transmission Line of Power Grid shall not in any manner affect the liability of petitioner to the payment of Cross Subsidy Surcharge and other related charges to the Respondents, namely, the State Utilities in the State of Gujarat.

(d) The petitioner represented before CERC that it would continue to be liable to pay the Cross Subsidy Surcharge and other charges to the State Utilities.

3.3 The petitioner was allowed direct connectivity to ISTS System. It is, therefore, not appropriate for petitioner to now raise the issue that it is not liable to pay additional surcharge on the basis that petitioner is not connected to the system of the State of Gujarat.

3.4 Without prejudice to the above, the claim made by petitioner that it is not liable to pay surcharge specified under section 42 (4) of the Act on the ground that it is not connected to the system of the State of Gujarat is totally misconceived and contrary to the provisions of the Electricity Act, 2003.

3.5 The obligation to pay surcharge under section 42 (4) of the Electricity Act, 2003 arises on the satisfaction of the following ingredients:

(a) The consumer has been permitted to receive supply of electricity from a person other than the distribution licensee of the area of supply. This condition is satisfied in the present case as the petitioner, which has been a consumer of DGVCL has been permitted to receive supply from a person other than DGVCL. The entire claim of petitioner is that it should be able to procure power from other sources;

(b) The consumer is required to pay additional surcharge on the charges of wheeling. In this regard the definition of wheeling takes into account the use of the facilities of any transmission licensee or a distribution licensee for conveyance of electricity on payment of charges determined under section 62 of the Act. The wheeling is not restricting to distribution licensee's facilities. It extends to the facilities of transmission licensees also. Accordingly, the use of the transmission system of Power Grid Corporation

of India Limited by petitioner for conveyance of electricity on the payment of charges which are determined by the Central Electricity Regulatory Commission under section 62 for Power Grid qualifies wheeling for the purpose of section 42 (4) of the Act. Accordingly, the liability of petitioner exist for payment of additional surcharge;

- (c) The additional surcharge is to meet the fixed cost of such distribution licensee arising out of its obligation to supply. DGVCL has an obligation to supply to petitioner in terms of section 42 (1) and 43 (1) of the Electricity Act, 2003. DGVCL has an Universal Service Obligation to supply to every consumer in its are of supply. Accordingly, the quantum of additional surcharge is the quantum of money proportionately required to be contributed by petitioner for DGVCL to meet the fixed cost arising out of such Universal Service Obligation to supply.

3.6 Regulation 25 (1) of the Open Access Regulations recognizes that the distribution licensee is entitled to receive Additional Surcharge on charges of wheeling in addition to wheeling charges. Regulation 25 (2) of the said regulation state the conditions in which the Additional Surcharge shall become applicable. It states that Additional Surcharge shall become applicable only if the obligation of licensees in terms of Power Purchase Agreement continues to be stranded or there is unavoidable obligation to bear the fixed cost consequent to contract. The aforesaid Regulation provides the process of determination of Additional Surcharge by the Commission. Thus, the GERC (Terms and Condition of Intra-State Open Access) Regulations 2011 notified by the Commission recognizes the applicability of

Additional Surcharge and provides for determination of such surcharge by the Commission.

3.7 Clauses 5.8.3 of the National Tariff Policy notified by the Ministry of Power, Government of India, recognizes the levy of Additional Surcharge.

3.8 A combined reading of the provisions of section 42 (4) of the Act, Regulation 25 of the Open Access Regulations, 2011 and Clause 5.8.3 of the National Electricity Policy clearly establish the scope and objective of the additional surcharge, namely, a person in the area of supply of a distribution licensee receiving supply of electricity from any person other than the distribution licensee, is required to pay additional surcharge, if the distribution licensee, in terms of the power purchase commitment is stranded with the obligation to bear the fixed cost. The additional surcharge has nothing to do with the fixed cost related to the network assets as the same is recovered through wheeling charges. Such additional surcharge is a compensatory charge for meeting the fixed cost of the power purchase commitment made by the distribution licensee. Considering the above objective, there cannot be a question of the petitioner having a facility in the area of supply of DGVCL contending that it is not liable to pay additional surcharge as it is not using the transmission or the distribution network of the State Utility in the State of Gujarat.

3.9 The petitioner has relied on the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 28 of 2005 decided on 29.3.2006, Kalyani Steel Limited v Karnataka Power Transmission Corporation Limited and Others to contend that additional surcharge is not leviable in view of the principles laid down in the above

judgment. The above decision of the Hon'ble Appellate Tribunal is clearly distinguishable on the facts of the case and has no application to the present case.

3.10 Without prejudice to the above, it is also relevant to mention that the above decision of the Hon'ble Tribunal in Appeal No. 28 of 2005 was in relation to the facts prevalent prior to the notification of the Open Access Regulations, 2011. Further, the decision of the Hon'ble Tribunal is also in peculiar facts of the case.

3.11 In the case of Chhattisgarh State Power Distribution Company Limited v Aryan Coal Beneficiaries Pvt. Limited 2010 ELR (APTEL) 476, the Hon'ble Tribunal considered the compensatory nature of such charges and held that the aspects such as Cross Subsidy Surcharge are not dependent on the use of the line. The principles laid down in the above case also applies to the compensatory charge under section 42 (4) of the Electricity Act, 2003.

3.12 The scheme and objective of the provisions of section 42 (4) of the Act is to provide the distribution licensee which has an Universal Service Obligation to be ready to meet the electricity requirements of any person wanting connectivity in the State as per sections 42 and 43 of the Electricity Act, 2003, to meet the stranded power purchase cost.

3.13 The objective of the provisions of section 42 (4) is completely different, namely, to compensate a distribution licensee in the area of supply where the facilities of the person consuming electricity is situated to meet the stranded cost of power purchase. The provisions of section 43 of the Electricity Act clearly state that there is an obligation on the part of DGVCL to give connectivity to any person requiring

supply of electricity within a month. Accordingly, though as at present Essar Steel may be a Regional Entity not connected to the system of DGVCL, there is an overriding statutory obligation on DGVCL to provide connectivity and effect supply to Essar Steel as and when demanded by Essar Steel. The allegations to the contrary are wrong and are denied. The construction of the provisions of the Electricity Act made by petitioner is totally misconstrued and without any basis.

3.14 In terms of the above other related charges are those provided in section 42(4) of the Electricity Act, 2003, namely, in the context of charges payable by an open access user to the distribution licensee of the area of supply.

3.15 The allegations to the contrary are wrong and are denied. Further, the issue of liability to pay additional surcharge was specifically raised by the National Regional Load Dispatch Centre. The liability to pay additional surcharge arises as per the provisions of section 42 (4) of the Electricity Act, 2003.

3.16 The liability to pay additional surcharge arises not because of the use of the distribution connectivity with DGVCL but on account of the procurement of electricity from sources other than DGVCL.

3.17 The decision of the Hon'ble Tribunal in Kalyani Steel case is clearly distinguishable. The decision to hold that additional surcharge is not payable is in the peculiar facts of the case and particularly in the context of the line in question.

3.18 Based on above submissions, the respondents submitted that the present petition is not maintainable and deserved to be dismissed.

4. The matter was heard by the Commission on 21.12.2013, 1.2.2014, 1.3.2014, 29.3.2014, 19.4.2014, 13.5.2014, 7.6.2014 and 19.7.2014.
5. Learned Senior Advocate Shri Mihir Thakore, on behalf of the petitioner, during the hearing submitted that the respondent had in Petition No. 1302 of 2013 proposed the methodology/calculation to determine the Additional Surcharge to be levied on Open Access consumers as Stranded Power Purchase cost of distribution licensees. The respondent GUVNL had also specified how to evaluate stranded power purchase cost of distribution licensee in its petition.
  - 5.1 The respondent had not submitted any proposed methodology regarding determination of the Additional Surcharge in the present petition. The respondent had not provided the data of power procurement by the distribution licensee from various sources which include NTPC, State Generating Company, UMPP projects, power procurement through Competitive Bidding Process , IPPs, etc. from which any power supply is tied up for the petitioner. The respondent had also not provided the details of transmission cost and distribution cost incurred by the distribution licensee. The Commission had directed the respondent in its order dated 4.10.2013 in Petition No. 1302 of 2013 to provide the methodology and formula, if any, to determine Additional Surcharge by the Commission but in the present petition no such formula either proposed by the respondent or stated any alternative formula for the petitioner case as the petitioner is sitting on different footing than the consumers of the existing consumers of the distribution licensees of the respondents DGVCL and others because the petitioner was earlier the consumer of DGVCL, who was compelled to surrender the existing contract demand with DGVCL and now meet the demand for power requirement



independent from the DGVCL and work as regional entity as per the CERC order dated 08.06.2013 in Petition No. 245/MP/2012. As per CERC order from 08.08.2013 the petitioner was disconnected from the Gujarat state transmission grid and also distribution networks of the DGVCL and connected with the CTU network. Moreover, from 08.08.2013 the petitioner is not having any contract demand with DGVCL. As such, DGVCL is neither required to procure power from any generators for any contract demand of the petitioner, nor required to utilize GETCO (STU) or DGVCL network to supply electricity. Therefore, there is no question of under recovery of amount for supply of power by the respondents towards power procurement, transmission or wheeling charges as a part of obligation to supply power by the respondents. The above facts prove that there is no stranded cost arising in case of the petitioner case due to open access availed by the petitioner. Therefore, the question of payment of Additional Surcharge due to stranded cost does not arise.

5.2 In the present case, the respondents have neither proposed any methodology/ calculation/formula for determination of Additional Surcharge nor any opportunity for challenging the validity of the same given to the petitioner. In absence of above, if the respondents be permitted to charge based on any formula proposed by the respondents in earlier petitionon which no opportunity to object it and challenge the validity of such formula given to the petitioner is illegal.

5.3 In para 10.4 and 10.5 of order dated 12.4.2013 in Petition No. 1302 of 2013 filed by GUVNL, the Commission had decided and recognized that to determine the Additional Surcharge, it is necessary to verify and evaluate the power procurement cost of the distribution licensees to supply the electricity to the consumers and

corresponding contract demands of consumers with the distribution licensees on behalf of whom GUVNL procure power and also necessary to provide that details to the consumers for their comments to whom the Additional surcharge determined by the Commission be levied. In the petitioner case, there is no such details submitted on record in the petition by the respondents and substantiate their claim stating that the power procurement carried out by the respondents consist the cost of power procurement for the contract demand of the petitioner. Thus, there is no opportunity for comment on the data for calculation of Additional Surcharge was given to the petitioner. Therefore, the claim of the Additional Surcharge is neither permissible nor the Commission is able to determine the surcharge which may be applicable to the petitioner.

- 5.4 The Commission in para 10.9 to 10.17 of its order dated 12.3.2014 in Petition No. 1302 of 2013 while deciding the Additional Surcharge held that the power procurement done by the distribution licensee to meet the existing demand of the consumers with the licensee and also anticipated demand of the consumers. In the case of the petitioner the question of existing demand and anticipated demand does not arise because the petitioner was earlier the consumer of DGVCL who surrendered its existing contract demand with DGVCL and also disconnected from the network of DGVCL and GETCO to supply the electricity to the petitioner. The Petitioner is now meeting its demand of power through its own captive power plant or signing the PPA with EMPL and /or through the open access. Petitioner state that EPML is captive power plant of the petitioner. There is neither any contract of the petitioner with the respondents from 8<sup>th</sup> August 2013 nor at present there is any chance to procure the energy from the respondent after disconnection

from Intra-State grid of Gujarat. Therefore, there is no stranded cost incurred by the respondents in this case. In absence of the stranded capacity and cost of the respondents, the question of determination of the Additional Surcharge and calculation of the same does not arise.

5.5 In para 10.19 to 10.24 of order dated 12.3.2014 in Petition No. 1302 of 2013, the Commission decided that the Additional Surcharge is applicable to whom and what data are necessary to determine the Additional Surcharge amount. The Commission decided that the Additional Surcharge is applicable to all the open access customers. It is to clarify that petitioner is not an open access customer of the respondents who utilize the network of the respondents. But it is open access customer of the CTU utilizing the network of CTU. Therefore, the criteria specified for levy of Additional Surcharge are not applicable to the petitioner case.

5.6 In para No. 10.23 and 10.24 of the said decision, the Commission decided that the quantum of power supply received from own Captive Generating Plant does not qualify for levy of the additional surcharge. Hence, the petitioner who is receiving the power supply from its captive power plant of EPML and other power plants qualify as exempted from levy of additional surcharge.

5.7 Further, the Additional Surcharge is leviable under Section 42 (4) of the Electricity Act, 2003 for meeting the fixed cost of the distribution licensee arising out of its obligation to supply to the consumers when allowed for open access. While determining the Additional Surcharge, it is necessary to evaluate the stranded cost of the distribution licensee. The Commission has referred the various provisions of the Act, regulations framed under it and specified what are the data relevant for

determination of Additional Surcharge and also how it will be determined for future period. It is specifically decided that the Additional Surcharge be determined based on previous six monthly data of the Financial Year and it will be applicable for next six month open access on the consumers of the respondents who utilize the network of the respondents. Therefore, the statutory provisions provides that the distribution licensee while claiming the additional surcharge it shall require to prove its claim by providing relevant data of previous six months. In absence of the data, the respondents are not eligible to receive the additional surcharge.

5.8 He further submitted that from October, 2013 to March, 2014, the petitioner was not having the contract demand with the DGVCL and procuring the power from its own sources and open access granted by CTU. Hence, the question of stranded cost of power procurement, transmission charges of GETCO and distribution licensee does not arise. Therefore, the Additional surcharge claim of the respondent, so far as it relates to the petitioner, from the period of June 2013 onward which includes the period from September 2014 onward is also not valid and permissible.

5.9 As open access in case of the petitioner, was granted by CTU and as the respondents network was not utilized by the petitioner and as the petitioner is not having contract demand with the DGVCL from June, 2013, there is no obligation of the respondent to the petitioner. Therefore, the question of the applicability of additional surcharge does not arise to the petitioner case.

5.10 At the time of consideration of LTOA demanded by the petitioner from Essar Power MP Limited by utilization of CTU network, GETCO informed that interconnection to

Essar Steel Hazira plant is stand alone i.e. on radial mode and shall not be connected to 220 Kv network at any point.

5.11 Based on the above, he submitted that thus, GETCO itself demanded that when the petitioner wants LTOA in that case, the petitioner shall not be connected with 220 kv network at any time i.e. grid of Gujarat and the same is standalone basis. The said contention is also recorded in the 27<sup>th</sup> Meeting of Standing Committee on Power System Planning in Western region. According to above condition of GETCO the petitioner was isolated from the Gujarat state Grid and not connected with Gujarat Grid and network of respondent Dakshin Gujarat Vij Company Limited. Therefore, there is no question of power supply by respondent Dakshin Gujarat Vij Company Limited.

5.12 He further submitted that the Power System Operation Corporation Limited vide letter dated 30<sup>th</sup> March 2012 informed that CTU has granted LTA of 700 MW to ESSAR Power MP Limited for transfer of power from its generation plant at MAHAN, MP to ESSAR Steel Limited at Hazira, Gujarat. As per the LTA granted by CTU, to facilitate drawal of 700MW equivalent power at Hazira through POWER GRID transmission system, it was proposed to establish 400/220kV, 21500MVA sub-station at Hazira (Essar Steel) with interconnection with Gandhar (NTPC) developed by Essar Power Limited Interconnection at Hazira (Essar Steel) with WR grid shall be on standalone basis, in radial mode and shall not be directly or indirectly connected to 220kV network of GETCO. The petitioner was required to submit relevant document/no objection certificate from DGVCL, for making connection of ESSAR Steel Limited with WR on standalone basis, i.e. radial mode.

5.13 The judgment of the Hon'ble Supreme Court relied by the respondent is not applicable to the present case on following grounds.

- i) The subject matter of the said appeal is related to judgment of Orissa Electricity Regulatory Commission order. The said judgment was passed in the case of grant of deemed licensee prayed by the appellant who was a SEZ in the licensee area of the existing licensee of WESCO of state of Orissa. The said judgment do not state that the petitioner shall require to pay the Additional Surcharge.
- ii) M/s. Vedant Aluminum Limited -SEZ, challenged the order/judgment of the Hon'ble Commission, by filing an Appeal No. 206 of 2013. The said appeal was dismissed by the Hon'ble Appellate Tribunal for Electricity by its judgment dated 3<sup>rd</sup> May, 2013. The said judgment is silent on levy of Additional surcharge.
- iii) M/s. Sesa Sterlight Limited filed a Civil Appeal No. 5479 of 2013 before the Hon'ble Supreme court and challenged the decision of Hon'ble Appellate Tribunal for Electricity in Civil Appeal No. 5479 of 2013, decided on April 25, 2014. In the said Civil Appeal Hon'ble Supreme court of India held the philosophy of Cross Subsidy Surcharge and not Additional Surcharge. The above decision of the Hon'ble Supreme Court state that Additional Surcharge is levy able against the obligation of the distribution licensee to supply the electricity to the consumer. In the present case, there is no obligation as the part of DGVCL to supply the electricity to the petitioner as the petitioner was compelled to surrender

its contract demand which was with the DGVCL. The agreement to supply electricity with DGVCL was terminated by the petitioner; therefore the question for obligation to supply of electricity does not arise. The petitioner was granted the status of Regional entity by the CERC as per order dated 08.06.2013 in Petition No. 245/MP/2012. The petitioner is thus not a consumer within meaning of the Electricity Act, 2003 on whom the additional surcharge is applicable. It is the respondent case, who should prove his case specifying that whether it has obligation to supply power to the petitioner, who was compelled to disconnect from the state grid and surrender the contract demand, how it suffered from the obligation of power supply to the petitioner in this case, which the respondent failed to prove by submitting necessary documents and evidences in support of his claim. The respondents are duty bound to substantiate its claim if any by relevant data and documents for the loss suffered by it on account of obligation to supply to petitioner.

- iv) The above decision of the Hon'ble Supreme Court is in conformity with the decision of the Hon'ble Appellate Tribunal for Electricity and order of the Orissa Electricity Regulatory Commission in which it is held that the cross subsidy surcharge is payable by the entity concerned. The above judgement is silent on the issue of Additional Surcharge applicable to regional entity or the person to whom no obligation of power supply by the distribution licensee which is a subject matter of the present petition. The argument and reliance of the respondent on the above judgement is unfounded.

- v) The petitioner is regional entity for WRLDC and different and distinct than the distribution licensee. The petitioner is not a licensee who procures the electricity from generating power plant situated in license area like in case of WESCO as decided in above Judgment by Hon'ble Supreme Court. As decided in the Hon'ble Supreme Court judgment, the petitioner is not a licensee and some units of the petitioner directly procuring electricity from generator directly in licensee area as observed in case of WESCO. The said order does not deal with the case of a consumer who avails power supply as a regional entity and not utilizing the distribution licensee or transmission licensee of the state network. Moreover, there is no discussion and finding on the Additional surcharge applicability and its amount in the above decision.
- vi) The word 'surcharge' appears in the Electricity Act, 2003 in 'Cross Subsidy Surcharge' and 'Additional Surcharge'. The discussion in above Judgment is on 'Cross Subsidy Surcharge' and utilizes the word surcharge in the above Judgment. Therefore, the reliance of the respondents on above Judgment is unfounded and not applicable to the petitioner present case.

5.14 The respondent also relied on the judgment of the Hon'ble Appellate Tribunal for Electricity dated 9<sup>th</sup> February, 2010 in appeal between Chhattisgarh State Power Distribution Company Limited V/s. Aryan Coal Beneficiation Pvt. Limited, 2010 ELR (APTEL) 476 and decision of the Hon'ble Appellate Tribunal for Electricity dated 1.8.2014 in Appeal Nos. 59 of 2013 and 116 of 2013 in the case of Maharashtra



State Electricity Distribution Company Limited v/s Maharashtra Electricity Regulatory Commission and others. The facts of the above appeals and present case are different and distinct. The decisions in above appeals pertain to cross subsidy surcharge and not Additional Surcharge. Therefore, the decisions in above appeals is not applicable in present case.

5.15 The petitioner relied upon the decision of the Hon'ble Appellate Tribunal for Electricity dated 29.3.2006 in Appeal No. 28 of 2005 of Kalyani Steel Ltd. V/s Karnataka Power Corporation Limited and submitted that when the transmission network of GETCO and distribution network of the respondents are not utilized by the petitioner and not having contract demand with the respondent DGVCL, the petitioner is not liable to pay Additional Surcharge.

5.16 Based on above submissions, he submitted that the Commission may please allow the petition and hold that the Additional Surcharge is not applicable to the petitioner.

6. Learned advocate Shri M.G. Ramchandran, on behalf of the respondent, re-iterated the facts as stated in para 3 above. He submitted that the issue arose for decision of the Commission is that if the Petitioner's facilities are connected to the network of the Central Transmission Utility (CTU) and not to the System of the State Utilities whether the Petitioner liable to pay the Additional Surcharge or not.

6.1 The issue sought to be raised by the Petitioner is no longer res integra and has been decided by the Commission in para 10.16, 10.17 10.18 and 10.26 and the Judgement and Order dated 12.3.2014 and the scope of additional surcharge

liability has also been decided in para 10.24 to 10.28 by the Hon'ble Supreme Court in the Civil Appeal No. 5479 of 2013- M/s. Sesa Sterlite Limited V/s. Orissa Electricity Regulatory Commission as well as by the principles laid down by the Hon'ble Appellate Tribunal in Chhattisgarh State Power Distribution Company Limited V/s. Aryan Coal Beneficiation Pvt. Limited, 2010 ELR (APTEL) 476 and Judgment dated 1<sup>st</sup> August 2014 in case of Maharashtra State Electricity Distribution Company Limited V/s. Maharashtra Electricity Regulatory Commission & Anr.

6.2 In the decision of the Hon'ble Supreme Court in the Sesa Sterlite case (Supra), the contention was somewhat similar to the one raised by the Petitioner in the present case and the same was rejected.

6.3 In the circumstances of decision taken in para 10.24 to 10.28 of the Hon'ble Supreme Court, the contentions of the Petitioner in the present case is liable to be rejected being contrary to the decisions of the Hon'ble Supreme Court.

6.4 The Hon'ble Appellate Tribunal has also decided on a similar contention raised in the case of cross subsidy at Para 17 of the decision in Chhattisgarh State Power Distribution Company Limited V/s. Aryan Coal Beneficiation Private Limited, 2010 ELR (APTEL) 476, it has held that Additional Surcharge is payable by the open access consumers.

6.5 In a recent decision, the Appellate Tribunal vide its order dated 1.8.2014 in the Appeal No. 59 of 2013 (MSEDCL V/s. MERC and others) and Appeal No. 116 of 2013 (MSEDCL V/s. MERC & Others) has in para 22 and para 34 decided with

regard to and the aspect of additional surcharge payable by the open access customer which apply in present case.

6.6 The Additional Surcharge is a compensatory charge and is payable when the Electricity is taken from sources other than the distribution licensee of the area where the premises of end use is situated.

6.7 The Additional Surcharge is payable by an Open Access Customer receiving supply of electricity from a person other than the distribution licensee of the area of supply as made abundantly and unequivocally clear in Section 42 (4) of the Electricity Act, 2003 as well as in the National Tariff Policy as well as in the Open Access Regulations of the Commission, to meet the fixed cost arising out of the obligation of the licensee in terms of the power purchase commitment made and continues to be stranded and other unavoidable obligations & incidents to bear the fixed cost consequent to such power purchase agreements.

6.8 The Additional Surcharge is payable if there are fixed charges commitment which the distribution licensee has to incur to the extent of capacity contracted for but not been able to avail for the purpose of distribution and retail supply of electricity. In other words, for whatever electricity in quantum (in Million Units), the consumers have to pay the fixed charges as per the contracted capacity though it has not been utilized by receiving supply from Discoms or otherwise by purchase of electricity from the distribution companies.

6.9 The stranded power purchase commitment would mean the quantum of power purchase committed under long-term contracts under which the fixed charge are

payable even though the quantum declared available is not availed/scheduled and utilized.

6.10 The capacity has been committed to be purchased by the respondents under the Long-Term Power Purchase Contracts and accordingly the generating companies declared the availability (in MUs) of the specified quantum. The Respondents had however utilized the lesser capacity out of the above available quantum, for effecting supply to the consumers and for sale to third parties leaving the balance as stranded capacity for which the respondents are required to pay the fixed charges without utilization of the power. The above stranded capacity is the basis for recovery of Additional Surcharge.

6.11 In case of a distribution licensee, there is no discretion or volition to enter into contract to supply electricity. The statutory mandate is that it should make available the electricity within one month. The Distribution Licensee is subjected to serious penalties, if, it fails in his obligation. This Hon'ble Commission has also recognized the above in terms and conditions applicable to the distribution licensees. The distribution licensees have no choice whatsoever.

6.12 In accordance with the above, the Long-Term Power Purchase to be entered into by the GUVNL are to cater the need of all the persons in the area of supply of licensees to meet their contract demand from time to time.

6.13 The distribution licensees have to be ready with power availability in the area of their licensee to meet –

- (a) the requirement of power by the consumers having contract demand in the respective area of licensee;
- (b) requirement of power by the Open Access Customers who have a contract demand with the distribution licensees to the extent of the contract demand notwithstanding that they may not fully/partially avail the power under contract demand and instead taking power through Open Access;
- (c) requirement of power to meet the connected load of Open Access customers even to the extent where such contract demand with the distribution licensees or the quantum of the contract demand is not to the extent of the connected load of such open access customers.

6.14 The distribution licensees have to be ready for meeting the increase in the connected load of the consumers from time to time. The Long-Term Power Purchase Agreement is to be entered into based on the projection of the power requirements in the State.

6.15 The objections raised by the petitioner to the effect that the Additional Surcharge can be only a proportion of the wheeling charges as the expression used is Additional Surcharge on wheeling charges has no merit. The Additional Surcharge and Cross Subsidy Surcharge are compensatory charges and not for wheeling or transmission but for allowing a person to avail Open Access instead of taking supply of electricity from the distribution licensees.

6.16 The term of wheeling charges used in Section 42 (4) has already been explained in Para 8.5.4 of the National Tariff Policy that it relates to the existing power purchase commitments. Regulation 25 of the Open Access relates to the power purchase

commitments. It is to meet fixed cost of the distribution licensee arising out of the obligation to supply. All these are irrelevant if the intention is to give a portion of the wheeling charges as Additional Surcharge. If the Additional Surcharge is related to power purchase commitment, it is related to and encompass only a part of the wheeling charges. The above interpretation is patently erroneous and is liable to be rejected.

6.17 The principles laid down by the Hon'ble Supreme Court in Sesa Sterlite matter (Supra), where the line of WESCO- the distribution licensee, was not used still the levy of Cross Subsidy and Additional Surcharge was held to be payable, the issues raised by the petitioner in the present case of non liability to pay wheeling charges to the distribution licensee leading to non levy of Additional Surcharge, is not sustainable.

6.18 The petitioner is availing open access using the transmission network of transmission licensees namely M/s. Essar Power Transmission Company Limited and (ii) PGCIL network. The PGCIL which is the CTU is a deemed licensee under section 14 of the Electricity Act, 2003.

6.19 Many of the industrial units are connected to the transmission system and yet they are consumers of the distribution licensee. The voltage at which a consumer premises are connected whether it is 132 KV or 220 KV or 400 KV and above, is irrelevant in regard to their status as a consumer and delivery of electricity to them being wheeling of electricity within the meaning of provisions of Electricity Act, 2003. It, therefore, makes no difference that the Petitioners' premise is connected directly to the CTU network. The CTU cannot sell electricity to the Petitioner's

premise. It can only convey electricity to the Petitioner's premise. The obligation under sections 42, 43 etc of the Electricity Act, 2003 is on the distribution licensee, namely, Dakshin Gujarat Vij Company Limited. The deprival of cross subsidy and the effect of the Stranded Power Purchase Cost are on the distribution licensee.

6.20 Notwithstanding that the Petitioners' premise is connected to the CTU Network and not to the STU Network or the State Distribution System, the petitioner is liable to pay the cross subsidy and additional surcharge.

6.21 For the reasons mentioned above, the petition filed by the petitioner is without any merit and is liable to be dismissed.

7. We have carefully considered the submissions made by the parties. The petitioner was previously connected to the Intra-State network of State of Gujarat and was also consumer of the Respondent No. 2 DGVCL. However, consequent upon order dated 08.06.2013 passed by the Central Commission in Petition No. 245/MP/2012, the petitioner was disconnected from the State Network on 08.08.2013 and connected to the Intra-State Network of Power Grid. The issues before us in the present case are that whether under such conditions, the petitioner is liable to pay additional surcharge as decided by the Commission from time to time? From the submissions made by the parties, the facts of the case emerge as under:

7.1 It is undisputed between the parties that the petitioner was previously a consumer of the Dakshin Gujarat Vij Company Limited. The petitioner had filed the petition No. 245/MP/2012 before the CERC to declare and transfer the load control area jurisdiction of Essar Steel India Limited from SLDC Gujarat to WRLDC, Mumbai and for grant of status of regional entity by utilization of Central Transmission Utility

network for receiving power from its own captive generating plants and other sources.

7.2 The CERC passed an order dated 8.6.2013, whereby the petition had been allowed and petitioner was granted status of regional entity. In the said order it was decided by the Central Commission that the petitioner shall require to give scheduling for its power requirement to WRLDC and it shall not require to schedule to SLDC, Gujarat. The energy accounting of petitioner be carried out by the WRLDC. It is also decided by the CERC in the said order about the Cross Subsidy Surcharge as under.

*“Metering arrangements for computation of cross subsidy charges of DGVCL*

*47. For the metering arrangement for computation of cross subsidy charges to be paid to DGVCL after the disconnection of ESIL from Gujarat Transmission System, DGVCL has suggested following metering arrangement in its affidavit dated 17.1.2013:*

*“I say that the petitioner is also required to install a electricity meter at 400 kV sub-station at Jhanor, i.e. the sending end of the CTU inter-connection network of the radial line in accordance with applicable rules. I further say that the Petitioner being in the area of operation of distribution licensee, i.e. DGVCL, is also required to pay cross-subsidy surcharge to DGVCL for the supply taken by the Petitioner from third parties as recorded at the meter at the CTU inter-connection network, In the circumstances, the incidence of cross subsidy surcharge is liable to be paid by the petitioner on the total supply of electricity being taken from third parties.”*

*The petitioner in its response dated 22.2.2013 had stated following:-*

*“In this context it is submitted that connectivity granted by Powergrid to ESIL is at Hazira end. Hence, it is submitted that it would be preferable to conduct energy recording for cross subsidy surcharge at gantry (interface of ESIL substation) of 220 kV ESIL sub-station after ICT and connecting lines of 220 kv. since, the power received at the gantry will include captive*



*power as well as power sourced from bilateral ad/or IEX/PTC, the cross subsidy can be calculated on net off basis as is being done in the current scenario."*

*DGVCL vide its submission dated 15.4.2013 had submitted the following:-*

*On the aspect of installation of energy meter on the 400 kV Essar Power Transmission company Limited's feeder at Gandhar, I say that since the Essar Power Transmission's system will intervene between the CTU system and Essar Steel's system, meters can be installed at the 220 kV side of substation for the purpose of measuring the cross subsidy and calculation of surcharge thereon.*

*The petitioner, in its response dated 18.04.2013, had stated following:-*

*It is submitted that this is in conformity with ESIL's submission in its Rejoinder affidavit dated 22.02.2013 and hence requires no response.*

*From the foregoing, it is evident that the issue of location of meters has been agreed to between DGVCL and ESIL and the issue appears to have been resolved. In any case since the issue of cross subsidy surcharge is falling within the jurisdiction of the Gujarat Electricity Regulatory Commission, parties may approach the said Commission with regard to cross subsidy surcharge."*

As per the aforesaid decision, CERC had decided that the issue is pertaining to Cross Subsidy Surcharge, if any, payable by the petitioner be decided by the GERC. Thus, in the aforesaid order it was decided by the CERC that the jurisdiction to decide the dispute of Cross-Subsidy Surcharge if any, lies with State Commission. However, in the present case, the issue is not regarding liability to pay the cross subsidy surcharge but that regarding the Additional Surcharge.

7.3 To decide the above issue, it is necessary to refer the provision of Electricity Act, 2003 which are relevant in this case. Sub Section (4) of Section 42 of the Electricity Act, 2003 which is relevant in this case reads as under.

*"...42. (1) It shall be the duty of a distribution licensee to develop and*

*maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

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

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

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

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

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

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

*carrier providing non-discriminatory open access .*

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

As per the aforesaid provision whenever the Commission permits a consumer or class of consumers to receive a supply of Electricity other than the Distribution Licensee of his area of supply such consumer shall require to pay an additional surcharge on charges of wheeling as specified by the Commission to meet fixed cost of the Distribution Licensee arising out of its obligation to supply. Thus, the aforesaid section recognizes that the Distribution Licensee is entitled to receive the additional surcharge on charges of wheeling as may be determined by the Commission to recover the fixed cost obligation to pay by the consumers.

8.4 In terms of the provisions of Section 42 (4) of the Electricity Act, 2003 and in exercise of its powers under section 181 of the said Act, the Commission has enacted the Open Access Regulations, 2011. Regulation 25 of the Open Access Regulations, 2011, provides as under:

*“.....25. Additional Surcharge*

*(1) An open access customer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-section (4) of section 42 of the Act.*

*(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.*

*(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply.*

*The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:*

*Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.*

*(4) Additional surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access:*

*Provided that such additional surcharges shall not be levied in case distribution access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.”*

Regulation 25 (1) of the said Regulations recognizes that the Distribution Licensee is entitled to receive Additional Surcharge on charges of wheeling in addition to wheeling charges. Regulation 25 (2) of the said regulations state the conditions in which the Additional Surcharge shall become applicable. It states that the Additional Surcharge shall become applicable only if the obligations of supply in terms of Power Purchase Agreement (PPA) continues to be stranded or there is unavoidable circumstances due to which the distribution licensee shall bear the

fixed cost consequent to contract with generator to meet the contracted demand of the consumers. The Regulation 25 (3) of the said regulations provides for determination of the additional surcharge by the Commission based on the six months basis and after examining detail calculation of fixed cost incurred by the Distribution Licensee towards its obligation to supply to the consumers

8.5 The above statutory provisions clearly stipulate that the Additional Surcharge can be levied, if the following conditions are fulfilled:

- i. The consumer of Distribution Licensee avails the Open Access permitted by the Commission.
- ii. Such consumer procures the electricity from a person other than the Distribution Licensee of his area of supply.
- iii. Such consumer shall be liable to pay additional surcharge on the charges of wheeling.
- iv. It is the obligation of Distribution Licensee to supply such consumer.
- v. The obligation of Distribution Licensee in terms of power purchase agreement commitment has been and continued to be stranded and the Distribution Licensee has to bear fixed cost consequent the contract.
- vi. The fixed cost related to the net work assets utilized for open access shall be recovered through wheeling charges.
- vii. The additional surcharge shall be determined by the Commission based on the 6 months data for fixed cost required to be paid by the distribution licensee to the generators due to stranded capacity of power procurement contract to supply the electricity to its consumers.

8.6 From the above provision of section 42 (4) of the Electricity Act, 2003 read with regulation 25 of the open access regulations notified by the Commission, it is clear that the Additional Surcharge is applicable to the open access consumer, who is having the contract demand with the distribution licensee and availing the open access and procures the power from other than the distribution licensee in whose area such consumer is situated. Due to open access availed by such consumers the power procurement committed by the distribution licensee with generators may become stranded and distribution licensee will be unable to schedule the energy for power procurement for providing the power supply to the consumers as per their contract demand with distribution licensee. In such condition, distribution licensee is required to pay the fixed cost to the generators. Hence, such amount is recoverable from the consumers, who do not purchase electricity from the distribution licensee as per the contract demand with such licensee and purchase electricity through open access from other sources. Thus, the aforesaid provisions provide the pre-conditions for applicability of the Additional Surcharges on open access consumers.

8.7 A bare reading of Section 42(4) of the Act and Regulation 25 of the Open Access Regulations clearly provides that the local Discoms would be entitled to levy additional surcharge only to meet its fixed costs arising out of its obligation to supply under Section 42(4) of the Electricity Act, 2003. Accordingly, the petitioner submitted that in a situation where a company is self-reliant or has already tied up with private generators for procurement of power, the Discoms would not have any obligation to supply power to the said company under Section 42(4) of the

Electricity Act, 2003; and consequently the local Discoms cannot levy any additional surcharge on the company.

8.8 It is, therefore, necessary to verify as to whether the conditions mentioned above are fulfilled in the present case or not?

8.9 In the present case, it is undisputed between the parties that the petitioner is situated in the licensee area of the DGVCL. It is also undisputed that the petitioner was granted open access by the Central Transmission Utility on long- term basis. Thus, Condition Nos. 1 and 2 of para 8.6 are fulfilled in the above case.

8.10 As regard Condition No. 3 stated in para 8.5 which pertain the obligation of licensee to supply the electricity to the petitioner is concerned, it is undisputed between the parties that petitioner filed a Petition No. 245/MP/2012 before the CERC. The CERC passed an order dated 8.6.2013, whereby the petitioner was declared as a regional entity and the control area of SLDC Gujarat Jurisdiction was transferred on 30.7.2007 to WRLDC. Thus, it is an admitted fact that after 8.6.2013 the scheduling and availability of the power to the petitioner is being controlled by the WRLDC Mumbai.

8.11 We also observe that prior to decision by CERC in Petition No. 245/MP/2012, the petitioner was receiving power supply as a consumer from the respondent DGVCL by utilization of transmission network of GETCO and associated distribution network of DGVCL. We also note that previously the petitioner was also receiving the power supply from its CGPs and other sources through the transmission network of GETCO. During the hearing of the Petition No. 245/MP/2012 before the Central Commission, the respondent GETCO and DGVCL put a pre-condition that

the petitioner should disconnect it from the GETCO Grid from which the petitioner was receiving the power supply, which is recorded in the decision of CERC in its order dated 8.6.2013. Relevant portion of CERC order dated 08.06.2013 are reproduced below:

*“---7.0 Gujarat State Load Despatch Centre (Gujarat SLDC) in its affidavit dated 15.1.2013 has submitted as under:*

*(a) ESIL should completely isolate from the State network not only the ESIL facilities but also the existing bus bar connecting ESIL facilities to Essar Power 515 MW generating station. The entire 515 MW generating station will thereafter be connected to the Ichhapur-Sachin 220 kV transmission network of GETCO and scheduling of power generated at the 515 MW generating station falling to the share of ESIL or Essar Group of Companies shall be as per the transmission capacity available on the GETCO network with the existing priority of GUVNL and the distribution companies in the State for the long term open access to the extent of their share in the 515 MW power plant.*

*(b) As a result of the isolation of ESIL completely from the State Grid, ESIL will not be under the control of SLDC Gujarat in regard to any of the aspects of scheduling, dispatch, drawl of electricity, measures to be taken for in case of high frequency or low frequency, under drawl or over drawl, backing down or non- supply of electricity during emergency and implementation of UI Mechanism, energy accounting and settlement of UI and other charges. All these aspects will have to be controlled by WRLDC alone. ESIL will have to be treated as a regional entity independent of the State of Gujarat and in the same manner as in other State entities like Goa, Daman, Maharashtra, Madhya Pradesh etc. SLDC of Gujarat will have no responsibility whatsoever in dealing with ESIL or any aspect of variation in the drawl of power by ESIL should have any implication whatsoever to the dealing of the State of Gujarat with the regional entities....*



*(d) After transfer of control area to WRLDC, ESIL cannot be called an embedded customer of the State of Gujarat. For all intents and purposes, ESIL is completely a separate bulk consumer to be dealt as an independent State entity and not as a part of Gujarat. In other words, ESIL should be deemed as an identified independent State for the purpose of scheduling, dispatch, energy accounting, control of frequency etc. Having isolated from the Gujarat Network, there should not be any implication of ESIL drawal of power on Gujarat or Gujarat entities.’...*

8. *“Gujarat Urja Vikas Nigam Limited (GUVNL) in its affidavit dated 18.1.2013 and supplementary affidavit dated 1.4.2013 has submitted as under:.....*

*b.... In addition, the petitioner should be required to pay the cross subsidy surcharge and other charges related to DGVCL for consumption of electricity sourced from Essar Power and EPMPL as per the applicable provisions of the 2003 Act. ----*

*d. ESIL may be considered as a separate entity for the purpose of scheduling of power, UI mechanism and energy accounting consequent to the facilities of ESIL being connected through a radial line to the CTU network in Jhanor and with no other connection either to the State Grid of Gujarat or to the Distribution system in the area of DGVCL. This is imperative because in case the drawal by ESIL from the CTU network is treated as drawal by Gujarat, any overdrawal by ESIL shall get reflected under the composite drawal of Gujarat and over-drawal beyond prescribed limits by ESIL shall be treated as violation of limits of overdrawal volume by Gujarat under the UI Regulations. Similar is the case with any under- drawal by ESIL and likelihood of exceeding under drawal limits by Gujarat with related consequence. It has been submitted that the connected load of ESIL being a steel plant having characteristics of huge variations in drawal including spike drawal, Gujarat cannot be considered as accountable for such variations in*

*drawal by the petitioner and for any consequential technical/financial/commercial implications....”*

9. *Dakshin Gujarat Vij Company Limited (DGVCL) in its affidavits dated 17.1.2013 and 15.4.2013 has submitted as under:*

*(a) DGVCL is one of the distribution licensees in the State of Gujarat and the petitioner is located in the area of operation of DGVCL with a contracted capacity of 44.5 MVA with DGVCL. There is an outstanding due of Rs.2118.44 crore out of the total amount of Rs.2331 crore raised by DGVCL on the petitioner as penalty for the violation of the condition No.22 of the MoM dated 1.2.2010 which needs to be paid by the petitioner before seeking surrender of contract demand DGVCL and connection to the CTU network for taking supply from third parties.*

*(b) The petitioner is required to install an electricity meter at 400 kV sub- station at Jhanor, i.e. the sending end of the CTU inter-connection network of the radial line in accordance with applicable rules. The petitioner being in the area of operation of DGVCL, is also required to pay cross subsidy surcharge to DGVCL for the supply taken by the petitioner from the third parties as recorded at the meter at the CTU inter-connection network.....”*

From the above, it is clear that the respondents have before the Central Commission admitted as under:

- 1) The petitioner Essar Steel, should completely isolated from the State network and for all practical purposes, it should be treated as a regional entity independent of the State of Gujarat like any other State.
- 2) After transfer of control area to WRLDC, the petitioner cannot be called as embedded customer of the State of Gujarat;
- 3) The only other issue raised was cross subsidy surcharge, provisions of the

meter and outstanding dues of DGVCL.

Thus, from 08.08.2013 i.e. the date of isolation of Essar Steel from the State Grid, it ceases to be a consumer of the respondent No. 2.

8.12 The Central Commission has in its order dated 08.06.2013 further observed as under:

*".....27. It is pertinent to mention that as per Gujarat Electricity Regulatory Commission (Terms and Conditions of Intra-State Open Access) Regulations, 2011, long term access is allowed to a consumer to the inter-State transmission system. Regulation 13 of the said regulations is extracted as under:*

***"13. Procedure for Long-Term Access***

*(1) Involving inter-State transmission system: Notwithstanding anything contained in clauses (2) and (3) herein below, procedure for inter-State long-term Access shall be as per Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 or its statutory re-enactments as amended from time to time:*

*Provided that in respect of a consumer connected to a distribution system seeking inter- State long-term access, the SLDC, before giving its consent to the CTU as required under the Central Commission's Regulations, shall require the consumer to submit the consent of the distribution licensee concerned. ".....*

***B. Control Area Jurisdiction over the petitioner***

*28. Having coming to the conclusion that the RLDC is permitted under the Grid Code to exercise jurisdiction over a bulk consumer subject to fulfillment of certain conditions, next we proceed to examine the case of*

the petitioner. It is noticed from the minutes of the 27<sup>th</sup> meeting of Standing Committee on Power System Planning of Western Region held on 30.7.2007 that M/s Essar Power MP Ltd had sought long term open access for 1100 MW i.e. 700 MW to the petitioner and 400 MW to MP. GETCO had taken a stand in the said meeting that inter-connection to the petitioner shall be on a stand alone basis i.e. on radial mode and shall not be connected to 220 kV network at any point. Accordingly, the LTOA was agreed and LTOA intimation was given by PGCIL's letter dated 18.4.2008. In the intimation, the petitioner has been shown as a drawee utility and point of drawal of power has been indicated as the PGCIL's sub-station at Hazira. Regarding the transmission strengthening requirement (dedicated part), the following has been mentioned:

<p><i>d. Transmission strengthening requirement (Dedicated part)</i></p>	<p><i>(i) Pooling station (near Sipat)- Mahan TPS 400 kV D/C (triple) (ii) Gandhar (NTPC)- Hazira (Essar Steel) 400 kV D/C (iii) Establishment of 400/220 kV, 3x500 MVA sub-station at Hazira (Essar Steel) M/s Essar Power MP Ltd shall ensure availability of above identified system strengthening scheme at its own cost before commencement of Long-Term Open Access.</i></p> <p><i>Note: Interconnection at Hazira (Essar Steel) with WR grid shall be on stansalone basis, i.e .on radial mode and shall not be directly or indirectly connected to 220 kV network of GETCO</i></p>
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29. Thus it is apparent from the above that ESIL was given connectivity as drawee entity of EPMPL and this connectivity was subject to its disconnection form Gujarat System (GETCO). There was technical reason for this decision that through GETCO system, it was not possible to draw more than 300 MW and requirement of ESIL was 700 MW. In case both GETCO system and ISTS connectivity were given, then through the load flow study it was evident that GETCO system was getting overloaded as most of power flowed through GETCO system. Hence the decision to disconnect ESIL from GETCO system was made a pre-condition for supply through ISTS in a radial mode. Based on this

*decision, LTA and connectivity was given on 23.12.2008 to EPMPPL with 700 MW to ESIL as drawee entity. That being the case, the petitioner will no more be connected to the State system and will be connected to the ISTS only. Moreover, it is noticed from the letter of WRLDC dated 30.3.2012 regarding charging of 400 kV D/C Gandhar Hazira Transmission line and 400/220 kV GIS sub-station at Hazira that disconnection from the State System has been made a pre-condition for connectivity to the WR system. The relevant paragraphs of the letter are extracted below:*

*"1. CTU has granted a LTA of 700MW to ESSAR Power MP Ltd. for transfer of power from its generation plant at MAHAN MP to ESSAR Steel Ltd. at Hazira, Gujarat. As per the LTA granted by CTU to facilitate drawal of 700MW equivalent power of Hazira through POWERGRID transmission system, it was proposed to establishment 400/220kV, 2\*500MVA sub-station at Hazira (Essar Steel) with interconnection with Gandhar (NTPC) through 400 kV D/C developed by Essar Power Ltd. Interconnection at Hazira (Essar Steel) with WR grid shall be on standalone basis, i.e. radial mode and shall not be directly or indirectly connected to 220 kV network of GETCO.*

*2. at present ESSAR Steel Ltd. is a consumer of DGVCL, Gujarat. You are therefore requested to subject relevant document/no objection certificate from DGVCL, for making the connection of ESSAR Steel Ltd., with WR on standalone basis i.e. radial mode.*

*3. Control Area jurisdiction of ESSAR Steel Ltd., Hazira shall be in accordance with clause 6.4.2 of Chapter-6 of IEGC-2010. Accordingly load dispatching requirement need to be fulfilled either with SLDC/WRLDC."*

*It is evident from the above letter that WRLDC itself was of the view that load dispatching requirement need to be fulfilled either with SLDC or with WRLDC. Even WRLDC has insisted on the petitioner to submit relevant no objection certificate from DGVCL for making the connection of ESIL with the WR on radial mode. DGVCL has given commitment to provide No Objection for connection of ESIL with WR on radial basis. Once the petitioner is disconnected*

*from the system of the concerned distribution licensee and is directly connected to the WR system in radial mode, it has no connection with the State System and therefore, it naturally follows that its scheduling and energy accounting is undertaken by WRLDC. It is gathered from the replies of GETCO, DGVCL and GUVNL that there is no objection to the direct connectivity of ESIL with the WR system, except the settlement of commercial issues like clearance of outstanding dues and payment of cross subsidy surcharge for not using the system of DGVCL as determined by the State Commission.”*

Thus, the GERC Regulations permits a consumer to seek long-term access to the ISTS, subject to the consent of Gujarat SLDC and the distribution company concerned, in this case DGVCL. Connectivity has been provided by CTU to ESIL after following the due process and Gujarat SLDC and DGVCL have given their consent. Although ESIL is located physically in DGVCL's area, after disconnection from Gujarat Transmission system, the status of ESIL does not remain strictly as a embedded consumer of DGVCL as DGVCL/GETCO physical asset would not be used for supply of electricity to ESIL.

8.13 Further, it was submitted by the petitioner that the Power Systems Division of Central Power Research Institute, Bangalore had in December 2011 carried out the load flow study prior to obtaining open access through CTU. Extracts from the report dated 11.12.2011 of load flow study is reproduced below:

**Observation:**

*It is observed that through GANDHAR 400 kV Bus is connected to MRSS-2 envisaging a power drawal of 700 MW, the study results however shows that the power drawn from GANDHAR 400 kV Bus is only 211.06 MW and 124.5 MVAR at 405 kV. The remaining power requirement of the plant is drawn from 220 kV Ichapur which is 577.6 MW at 216 kV. This the case study results*

*indicate unavoidable overloading in the line connecting BPOL2 and 220 kV Ichapur and consequently which can overload other adjacent 220 kV lines in the 220 kV grid of GETCO. The overloading would further worsen in case of failure of other machines in the captive generation of ESSAR as the tendency of the network is to draw power from 220 kV Ichapur rather than 400 kV. Similar conditions would happen in case of failure of the 400 kV line interconnecting GANDHAR and MRSS-2.*

*Conclusion:*

*This case study reveals that the plant load of 1100 MW along with an export of 160 MW at Ichapur is 1260 MW of which 45% is drawn from 220 kV Ichapur, 38% from the BPOL and EPOL and balance of 17% from GANDHAR 400 kV Bus. Thus the tendency of this network is to draw the power from 220 kV Network and the available captive generation rather than drawing power from 400 kV. As could be seen from the result, the power drawn from 220 kV Ichapur is 576 MW which will overload the existing 220 kV Zebra conductor which will further overload the adjacent 220 kV GETCO lines and the overloading will worsen in case of further generator tripping at BPOL, EPOL or tripping of the 400 kV line. Hence the 220 kV network requires isolation if 400 kV GANDHAR is to be connected at MRSS-2.*

*This case study is considered as the Base case Scenario for this report. Other scenarios listed below will be based on the base case scenario.*

- a) Base case with 700 MW addition through Gandhar 400 kV at MRSS-2 and 220 kV Ichapur and 220 kV Sachin disconnected.*
- b) Base case with 700 MW addition through Gandhar 400 kV with Single line from Gandhar to MRSS-2.*
- c) Base Case with 700 MW, 270 MW addition at MRSS-2 along with BPOL.*
- d) Base Case with 700MW, 270 MW addition at MRSS-2 without BPOL.*
- e) Base Case with 700 MW, 270 MW addition at MRSS-2, 150 MW addition at MRSS-1.*
- f) Base Case with only 700 MW from GANDHAR.*

*g) Base Case with only 270 MW*

*3.2 Base case with 700 MW addition through Gandhar 400 kV at MRSS-2 and disconnection of 220 kV Ichapur, 220 kV Sachin.*

*This case study is made by connecting Gandhar 400 kV bus to MRSS-2 through a double circuit line of 110 km 400 kV Twin Moose conductor and two numbers of 500 MVA transformer and the disconnection of the line interconnecting EPOL2 to MRSS-1B fe. 220 kV Ichpaur and 220 kV Sachin will not be included in the network. This study follows the 3.1 Base Case Study to check the Power flows and drawal of Power from 400 kV GANDHAR and the captive generation at EPOL & BPOL.....*

*.....Conclusion and Recommendation:*

*The eight studied based on the load flow results indicates a major outcome in the first scenario that the 400 kv Gandhar and 22okv Ichapur and 220 kv Sachin all could not be connected to the plant as the 220 kv Ichapur is getting overloaded and could overload the 220 kv GETCO line adjacent to 220 kv Ichapur.*

*Other Scenarios are based on additional generation and reducing the cost of fuel by shut down BPOL with alternative generation of 700 MW at MRSS-2 and 150 MW at MRSS-1. EOPL is only available to meet the export demand for 220 kv GETCO and will not be available for the plant loads and could be analyzed for profitability of running EPOL from commercial point of view.....”*

The above load flow study show that the 400 kv Gandhar and 22okv Ichapur and Sachin sub-station could not be connected to the plant as the 220 kv Ichapur is getting overloaded and could overload the 220 kv GETCO line adjacent to 220 kv Ichapur. Hence, the petitioner is required to disconnect from the existing connectivity with GETCO which is a State Transmission Utility. Thus, the petitioner who was earlier a consumer of DGVCL was compelled to disconnect from the



GETCO grid as the petitioner desired to procure / wheel the power from the Essar Mahan Power Ltd. and from its own GCP as well as from other sources. As such, the respondent and GETCO put up a condition that the petitioner should disconnect from the existing connectivity with grid of GETCO and the same was confirmed by the petitioner vide its letter dated 20.12.2012.

8.14 The petitioner submitted that the Power System Operation Corporation Limited had on 30<sup>th</sup> March 2012 informed that CTU has granted a LTA of 700 MW to ESSAR Power MP Limited for transfer of power from its generation plant at MAHAN, MP to ESSAR Steel Limited at Hazira; Gujarat. As per the LTA, granted by CTU, to facilitate drawal of 700MW equivalent power at Hazira through POWERGRID transmission system, it was proposed to establishment 400/220kV, 21500MVA sub-station at Hazira (Essar Steel) with interconnection with Gandhar (NTPC) through 430 kV D/C. developed by Essar Power Limited. Interconnection at Hazira (Essar Steel) with WR grid shall be on standalone basis, is radial mode and shall not be directly or indirectly connected to 220 kV network of GETCO.

8.15 Once the petitioner who was earlier the consumer of DGVCL was allowed to connect with the CTU network with a pre-condition that it should disconnect from the GETCO Grid, it is unable to receive the power supply from the DGVCL because he is no longer connected with the network of DGVCL and GETCO. Therefore, once the consumer (petitioner), who was compelled to surrender the contract demand and also compelled to connect with the inter-state transmission network by disconnecting the existing connectivity with GETCO, the petitioner no more remains as a consumer of the DGVCL. Hence, there is no questions of obligation to supply by the distribution licensee namely DGVCL.

8.16 The petitioner has further submitted that the power required of its steel plant is about 850 MW average and 1050 MW peak. Against this, it has tied up capacity of about 1400 MW as detailed below:

Sr. No.	Particulars	MW
i)	Bhander Power (Group CPP)	370.5
ii)	CPP – I	30.0
iii)	CPP – II	19.0
iv)	CPP – III	10.00.
v)	Essar Power (Hazira)	270.00
vi)	Essar Power MP Limited	700.00
	Total	1399.5

As such, it does not require any support from the respondents and therefore, there is not contract demand with the respondent. Also, seems the load control jurisdiction has been shifted from SLDC, Gujarat to WRLDC, scheduling etc is being done by the WRLDC as a regional entity and any in advertent over demand has to be treated as per the CERC regulations. As such, the respondents have no obligation to supply the power to the petitioner.

8.17 We also note that earlier case the petitioner was the consumer of the DGVCL and receiving the supply from various sources that is its own CGP, DGVCL, Traders and also through energy exchanges. The aforesaid supply was received by the petitioner with utilization of the DGVCL/GETCO network. However, after order dated 08.06.2013 in Case No. 245 /MP/2012 the petitioner was required to purchase the electricity without utilizing DGVCL and GETCO grid. As per the CERC

order the petitioner was disconnected from the intra-state grid and connected with the CTU inter-state grid. Therefore, the question of supply of electricity by the DGVCL as an obligation does not arise.

8.18 Further, the respondents to claim additional surcharge from the petitioner, it is essential for the respondents to establish that certain capacity contracted by the respondents was standard due to Open Access availed by the petitioner. In this connection, it is necessary to refer the Commission's order dated 12.03.2014 in Petition No. 1302 of 2013. Relevant para of said order read as under:

“ .....

*11. In view of above observations, we decide that the present petition succeeds. The petitioner is eligible to recover the additional surcharge as per the provisions of the Electricity Act, 2003, National Electricity Policy, Tariff Policy and GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011. The Additional Surcharge determined based on the data for period April, 2013 to September, 2013 of the petitioner works out to Rs. 0.42 per kWh. The additional surcharge of Rs 0.42 per kWh shall be applicable to the consumers of the co-petitioner, viz. MGVCL, UGVCL, PGVCL and DGVCL, who avail power through open access from any source other than their respective DISCOMs and for the open access transaction commencing from 1<sup>st</sup> April, 2014 to 30<sup>th</sup> September, 2014. The Additional Surcharge shall be levied on the quantum of electricity scheduled by such consumers. The Additional Surcharge shall be levied on the actual quantum of electricity drawn through open access by such consumers.”*

From the above, it is clear that the Commission has determined the rate of additional surcharge for the consumers of distribution licensees, for the period from 01.04.2014 to 30.09.2014. In the present case, the petitioner was

disconnected from the State Grid from 08.08.2013 and from that date it ceased to be a consumer of the respondent. As such, there is no question of any capacity remaining standard due to open access availed by the petitioner. Therefore, the petitioner is not required to pay the additional surcharge.

8.19 The respondents relied on the decision of the Hon'ble Supreme Court of India in case of M/s. Sesa Sterlight Limited in Civil Appeal No. 5479 of 2013 claiming that the issue of additional surcharge has already been decided by the Hon'ble Supreme Court and as such, the claim of the petitioner is not valid. The said decision of Hon'ble Supreme Court of India pertains to the consumer situated in the SEZ area and was to decide as to whether cross subsidy surcharge is payable by such entity or not. In the said Civil Appeal, the Hon'ble Supreme Court of India has decided the philosophy of Cross Subsidy Surcharge and not Additional Surcharge. The above decision of the Hon'ble Supreme Court state that Additional Surcharge is leviable against the obligation of the distribution licensee to supply the electricity to the consumer. In the present case, there is no obligation to DGVCL to supply electricity to the petitioner, as the petitioner surrendered its contract demand which was with the DGVCL. Since agreement to supply electricity with DGVCL was terminated by the petitioner, the question for obligation to supply electricity does not arise. The petitioner was granted the status of Regional entity by the CERC as per order dated 08.06.2013 in Petition No. 245/MP/2012. The petitioner is thus not a consumer within meaning of the Electricity Act, 2003 on whom the additional surcharge is applicable. Thus, the facts of the present case are different and distinct from the judgment referred by the respondent.

8.20 The respondent had also relied on the decision of the Hon'ble Tribunal in the case of Chhattisgarh State Power Distribution Company Limited V/s. Aryan Coal Beneficiaries Pvt. Limited, 2010 ELR (APTEL), 476. It is, therefore, necessary to refer the relevant portion of the said judgment with considering the nature of Cross Subsidy Surcharge, it has been held as under:

*“17.....The cross-subsidy surcharge, which is dealt with under the proviso of to Sub-Section 2 of the Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensees' line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid Tariff applicable for such supply which would include an element of cross-subsidy of certain other categories of consumer. 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.----  
-”*

In the aforesaid judgment, the Hon'ble APTEL had decided about the applicability of cross subsidy surcharge and not Additional Surcharge. Hence, the ratio decided in the above judgment is not applicable in this case.

8.21 The respondents had also relied on the decision of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 59 of 2013 and 116 of 2013 in the case of Maharashtra State Electricity Distribution Company Limited V/s. Maharashtra Electricity Regulatory Commission and Others. It is, therefore, necessary to refer the relevant portions of the said judgment which are reproduced below:

*“...5 The main issues raised by the Appellant in these Appeals are as under:*

*(A) Reduction in contract demand as contemplated in circular dated 23.01.2012*

*(B) Banking provision granted to wind energy generators.....*

*.....8. On the basis of the rival contentions of the parties, the following questions would arise for our consideration:*

- i) Whether the State Commission has erred by holding that the consumers availing power through open access from wind energy generators can continue to maintain the full contract demand with the Distribution Licensee in violation of its own Regulations and provisions of law?*
- ii) Whether the law automatically relieves the distribution Licensee from its universal service obligation to supply quantum of open access granted even though the consumer has chosen to maintain its full contract demand with the distribution licensee?*
- iii) Whether the State Commission has erred in allowing banking facility to the wind energy generators without there being any provision for the same in the Regulations and renewable energy tariff orders?*

*10. The first two issues regarding maintaining of full contracted demand of an open access consumer with the distribution licensee are interconnected and are being dealt with together.....*

*.....22. Section 42 (2) of the Electricity Act provides for open access in the distribution system on payment of wheeling charges and surcharge as specified by the State Commission and the surcharge to be utilized to meet the requirement of cross subsidy within the area of supply of the Distribution Licensee. However, the surcharge shall not be levied in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. According to Section 42(2) of the Act, the open access*

*consumer is also liable to pay additional surcharge as may be specified by the State Commission to meet the fixed cost (stranded cost) of the Distribution Licensee arising out of his obligation to supply. Therefore, if there is a stranded cost which the Distribution Licensee has to bear out his obligation to supply to open access consumer, the Distribution Licensee can submit its claim for additional surcharge in its petition for ARR and tariff for consideration of the State Commission while deciding the wheeling charges, surcharge and additional surcharge for open access consumers. Thus, the law has provided a remedy for recovery of stranded cost of the Distribution Licensee out of its obligation to supply to an open access consumer. Therefore, if the Appellant Distribution Licensee finds that it has to bear some fixed cost (stranded cost) due to its obligation to supply to the open access consumer, it can always approach the State Commission with supporting data and claim additional surcharge in its ARR/tariff. Whenever such claim is raised by the Appellant, the State Commission shall consider the same and decide as per law.....*

*..24.The third issue is regarding continuation of banking facility for wind energy generators.*

*...34.Summary of our findings*

*(i) Maintaining of full contract demand with the distribution licensee by consumer availing power through open access from wind energy generators. The combined reading of the Open Access Regulations, 2005 and Supply code Regulations, 2005 clearly shows that only the open access consumer has the option to reduce or terminate its contract demand with the Distribution Licensee. The Distribution Licensee on its own cannot terminate or reduce the contract demand to the extent of quantum of open access. There is also no deemed reduction of contract demand of a consumer which obtains open access. This issue is also covered by judgment of this*

*Tribunal in Appeal no. 34 of 2006 and Appeal no. 1 of 2006. The open access consumer who maintains full contracted demand with the Distribution Licensee is liable to pay for demand charges which should cover the fixed cost of the Distribution Licensee. In case the Distribution Licensee is not able to recover full fixed cost for the power arranged for such consumer then the Distribution Licensee has liberty to put up a case with supporting documents for the recovery of same for consideration of the State Commission to appropriately compensate the Distribution Licensee so that the burden is not passed on to other consumers.*

*Further, the law has provided a remedy for recovery of stranded cost of the distribution licensee out of its obligation to supply to an open access consumer. Therefore, if the Appellant Distribution Licensee finds that it has to bear same fixed cost (stranded cost) due to its obligation to supply to the open access consumer, it can approach the State Commission with supporting data and claim additional surcharge in its ARR/tariff. Whenever such claim is raised by the Appellant, the State Commission shall consider the same and decide as per law.*

*(ii) Continuation of banking facility for wind energy generators*

*We do not find any infirmity in the State Commission continuing banking facility based on the various orders passed from November, 2003 to October, 2011. As regards financial implication of banking facility on the Distribution Licensee, the Appellant is at liberty to approach the State Commission with supporting documents before the State Commission for levy of charges for banking and the State Commission shall consider the same and decide as per law. ....”*



The above decision of the Hon'ble APTEL relates to the issue of banking of energy from wind energy generator who supplies energy to consumers and reduction in contract demand of the consumers availing wind energy under open access. The said judgments are with reference to the consumers who avail the open access and also are the consumers of the distribution licensees. While in case of the petitioner, he is not having contract demand with the distribution licensee. In the said judgment there is no issue of Additional Surcharge before the Hon'ble Appellate Tribunal for Electricity. The Hon'ble APTEL had in para 22 observed that *"the open access consumer is also liable to pay additional surcharge as may be specified by the State Commission to meet the fixed cost (stranded cost) of the Distribution Licensee arising out of his obligation to supply. Therefore, if there is a stranded cost which the Distribution Licensee has to bear out his obligation to supply to open access consumer, the Distribution Licensee can submit its claim for additional surcharge in its petition for ARR and tariff for consideration of the State Commission while deciding the wheeling charges, surcharge and additional surcharge for open access consumers."*

Thus, above finding of the Hon'ble APTEL is with regard to general observation regarding applicability of Additional surcharge to the consumers in whose case there is an obligation of the licensee to supply and there is stranded cost which require to bear by the distribution licensee. The above twin test of applicability of Additional Surcharge decided by Hon'ble APTEL are not fulfilled in the present case as discussed in earlier para of this order. Therefore, the facts of the case and legal positions are different in the present case and as such above judgment of the Hon'ble APTEL is not applicable in this case.

8.22 The petitioner had relied on the judgment passed by the Hon'ble Appellate Tribunal for Electricity Tribunal in order dated 29.03.2006 in Kalyani Steel Limited V/s. Karnataka Power Transmission Limited in Appeal No. 28 of 2005 about Additional Surcharge and its applicability as under :

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

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

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

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

*(2) of Section 42 reads thus:*

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

*PROVIDED that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:*

*PROVIDED FURTHER that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the areas of supply of the distribution licensee:*

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

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

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

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

*“(76) “wheeling” means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62”*

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

*40. In the present case and on the admitted facts, no part of the distribution system and associated facilities of the first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to appellant’s plant. Therefore, the definition as it stands, the appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission.....*

-----44 *The sixth point has already been answered in favour of the appellant holding that it is not liable to pay additional surcharge.*

-----46. *In the result, we allow the appeal in part while remitting the same to the third Respondent for its consideration in the light of the recent Electricity Policy and Tariff Policy notified under Section 3 of The Electricity Act 2003 with respect to various aspects, while holding that the appellant is not liable to pay (i) transmission or wheeling charges or (ii) additional surcharge nor it is liable to meet the transmission loss for the Open Access applied for, but liable to pay surcharge, cross subsidy surcharge, reimburse all maintenance expenses including cost of replacement and also all charges prescribed for standby supply that may be drawn by it so long as the contract is kept live.*

From the above decision of Hon'ble Appellate Tribunal for Electricity, it is clear that when no part of the distribution system and associate facility of the transmission utility is utilized by the consumer, he is not liable to pay wheeling charges and additional surcharge under section 42 (4) of the Electricity Act, 2003 for open access in respect of which it has applied and if availed. In the present case it is proved that the petitioner is neither supplied from the distribution network of DGVCL and/or of the transmission network of GETCO associated with it. Therefore, there is no question of payment of Additional Surcharge in this case.

8.23 Based on the above observations, we decide that in the present petition, the respondents failed to prove that they have an obligation to supply the electricity to the petitioner. Thus, there is no obligation to supply the respondents to the petitioner. Therefore, no stranded cost is required to be borne by the respondents.

We therefore decide that the petitioner is not liable to pay the Additional Surcharge as per the provision of section 42 of the Electricity Act, 2003 read with GERC (Terms and Condition of Intra-state Open Access) Regulations, 2011.

9. In view of above observations, we decide that the present petition succeeds. The petitioner is not liable to pay additional surcharge in terms of section 42 (4) of the Electricity Act, 2003 read with clause 25 of GERC (Terms & Conditions of Intra State Open Access) Regulations, 2011.
10. We order accordingly.
11. With this order the present petition stands disposed of.

**Sd/-**  
**[Dr. M. K. IYER]**  
**Member (Finance)**

**Sd/-**  
**[SHRI PRAVINBHAI PATEL]**  
**Chairman**

Place: Gandhinagar.

Date: 13/01/2015.