

**BEFORE THE JOINT ELECTRICITY REGULATORY COMMISSION**

FOR THE STATE OF GOA AND UNION TERRITORIES AT GURUGRAM

CORAM:

ALOK TANDON, Chairperson

JYOTI PRASAD, Member (Law)

PETITION NO. 105 OF 2023

Date of Hearing 31.01.2024

DATE OF ORDER: 18.04.2024

IN THE MATTER OF:

Petition under Sections 86(1)(e) and 86(1)(k) read with Section 86(1)(f) of the Electricity Act, 2003 and Regulations 9.6, 9.7, 9.8 and 9.11 of the Joint Electricity Regulatory Commission for the State of Goa and Union Territories (Connectivity and Open Access in Intra State Transmission and Distribution) Regulations, 2017;

AND IN THE MATTER OF:

Vedanta Limited

...PETITIONER

Versus

AND IN THE MATTER OF:

Dadra and Nagar Haveli and Daman and  
Diu Power Distribution Corporation Limited

...RESPONDENT

Present for the Petitioner:

1. Mr Sakya Singha Chaudhuri, Adv.
2. Ms Shreya Dubey, Adv.
3. Mr Karan Jaiswal, Adv.

Present for the Respondent:

1. Ms Deepa Chawan, Adv.
2. Ms Ruchi Patil, Adv.
3. Mr Chetan Bundela, Executive Director DNHDDPDCL
4. Ms Luna Pal, General Manager, DNHDDPDCL

**Order**

The Petitioner through this petition, has sought clarification regarding levy of Additional Surcharge for open access captive consumers under Regulation 4.5 (1) of the Joint Electricity Regulatory Commission for the State of Goa and Union Territories (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017. The Commission heard both the parties at length.

A. Submissions of the Petitioner in brief are as under: -

1. That the Petitioner is a current consumer of Dadra and Nagar Haveli and Daman and Diu Power Corporation Limited ("DNHDDPCL"), having a contractual demand of 20 MVA at 66 kV Khadoli Distribution Substation and utilizing electricity for its copper production unit located in Silvassa. In order to procure half of its energy needs from renewable sources, the Petitioner is in process to establish a Captive Generating Plant (CGP) in Gadag, Karnataka. This CGP will supply power to the Petitioner's facility via Open Access on the Inter State Transmission System pursuant to a Power Delivery Agreement from the CGP. 1.
2. During the establishment of the Captive Generating Plant (CGP), the Petitioner approached the Respondent multiple times seeking clarification on the procedures for accessing open access. During these interactions, the Respondent informed the Petitioner that in addition to other fees, an Additional Surcharge ("ASC") would be imposed for captive use. The Respondent asserts that they are obliged to adhere to the prevailing regulations concerning ASC as stipulated under the JERC (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017 ("OA Regulations").
3. As per the Petitioner the stand taken by the Respondent appears prima facie inconsistent with the judgement dated 10.12.2021 passed by the Hon'ble Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. v. Mis. JSW Steel Limited & Ors. ("MSEDCL Case"), which provides clarification regarding the imposition of Additional Surcharge (ASC) on captive consumption.
4. Under these circumstances, given the acknowledgment by the Respondent regarding the imposition of Additional Surcharge (ASC), even for the provision of captive power through open access, as evidenced by their communication dated 20.04.2023 and the reliance on Regulation 4.5(1) of the OA (Open Access) Regulations, a dispute has arisen between the parties. Consequently, the Petitioner has been compelled to seek redressal from the Commission.

5. As per the Petitioner, the Respondent in its reply filed before this Commission, has sought to bring the Petitioner within the ambit of Regulation 4.5.1 of the OA (Open Access) Regulations and clarified in certain terms that it will be imposing ASC on the Petitioner.

The Relevant extracts are as follows:

*In the above background, if existing consumer sets up captive plant the long term capacity tied up by the distribution licensee shall become stranded. Further, the proposal of setting up hybrid power by the Petitioner will not relieve the Distribution Licensee from tying up power purchase arrangements to fulfil the requirement of the Petitioner during the hours of non-generation/lower generation by the hybrid plant Hence, additional surcharge is required to be recovered from all such consumers opting to source power either from third party or by setting up the plant.*

*The Act envisages non-discriminatory open access and any relaxations in terms of additional surcharge given to the captive generating unit is discriminatory in nature as it will give rise to new level of cross subsidy which is against the intent of the Act. Hence, any consumer who opts for OA should be liable to pay additional surcharge.*

*It is to be noted that the Act envisages gradual reduction in cross subsidy. However, if captive consumers are exempted from paying additional surcharge, it would result in burden on other retail consumers of the licensee, in form of increase in retail tariff, which is against the intent of the Act. Thus, it will create new level of cross-subsidization which is against the intent of the Act.*

6. The Petitioner further submits that the Captive Generating Plant will produce electricity intended for delivery to the Petitioner's facility in Silvassa, with the power drawn from the Khadoli Substation via the Inter State Transmission System (ISTS) network. The Petitioner has submitted an application for open access, and preliminary approval for open access has been granted by the National Open Access Registry on 30.01.2024, utilizing the green open access route.
7. It is asserted by the Petitioner that a consumer may procure electricity for its consumption either (i) through the distribution licensee of the respective area, subject to payment of tariffs determined by the Appropriate Commission; or (ii) by obtaining power supply from alternative sources via open access arrangements.
8. For the facilitation of open access, the legislation has established two separate mechanisms:
  - (i) the procurement of power from a captive generation plant as outlined in Section 9(2) of

the Electricity Act, 2003 ("Electricity Act 2003") in conjunction with Rule 3 of the Electricity Rules, 2005; and (ii) the procurement of power from a generating company or any other licensee besides the area distribution licensee, as permitted within the bounds of Section 42(2) of the Electricity Act 2003, pursuant to Section 42(3) of the Electricity Act 2003, subject to the discretion of the State Commission.

The relevant extracts are as follows:

*"Section 9. Captive Generation*

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

*Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:*

*[Provided further that no license shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.]*

*(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use...*

*"Section 42: Duties of distribution licensee and open access:*

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

*(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross 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 shall be allowed 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 area of supply of the distribution licensee:*

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

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

*Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.*

*(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.*

9. The Petitioner submits that in order to obtain electricity from a captive generating plant, the transmission of electricity through the grid shall be governed in a manner consistent with regulations applicable to any other generating company. Nonetheless, the captive user maintains the entitlement to exercise "open access" from the captive generating plant to the location where the electricity is utilized, in accordance with Section 9(2) of the Electricity Act

2003. The proviso to Section 9(2) specifies that this open access is contingent upon the availability of sufficient transmission infrastructure.
10. Section 42(2) of the Act grants the State Commission the authority to implement open access in stages and under specific conditions. It should be construed in conjunction with sub-section (3), which pertains to individuals seeking electricity supply from a generating company or any licensee apart from the area distribution licensee. The language used in Section 42(3) does not encompass captive consumers, as it does not include the term "captive generating plant."
  11. While Section 42(2) in conjunction with Section 42(3) applies to general consumers and necessitates State Commission approval for granting open access, Section 9 addresses captive consumers, for whom the right to open access is automatically provided by the statute. Section 9 of the Electricity Act 2003 represents a distinct provision, offering separate treatment from other consumers covered under Sections 42(2) and 42(3).
  12. A straightforward interpretation of Section 42(4) indicates that additional surcharges are applicable to consumers authorized by the State Commission to receive electricity from entities other than the area distribution licensee. Section 42(4) directly corresponds with Sections 42(2) and 42(3), a stance clarified by the Hon'ble Supreme Court in the MSEDCL case.
  13. The Hon'ble Supreme Court, in the MSEDCL Case, decisively determined that captive consumers or users constitute a distinct category separate from consumers outlined in Section 2(15) of the Electricity Act 2003. Consequently, they are not obligated to pay or be liable for Additional Surcharge (ASC) as stipulated in Section 42(4) of the Electricity Act 2003.
  14. The Hon'ble Supreme Court, in its examination of Section 9 of the Electricity Act 2003, explicitly observed that any entity constructing, maintaining, and operating a Captive Generating Plant (CGP) possesses the inherent right to open access for transporting electricity to its intended destination, contingent upon the availability of adequate transmission infrastructure as determined by the Central or State transmission utility. Hence, obtaining permission from the State Commission is not necessary for availing open access to construct, maintain, and operate a CGP alongside dedicated transmission lines. The fact that the supply of electricity from the CGP is subject to regulation akin to that of a generating company does not require permission from the State Commission for the aforementioned purposes.
  15. Furthermore, the Hon'ble Supreme Court emphasized the fundamental distinction between Sections 9 and 42 of the Electricity Act 2003. Whereas Section 42 grants the State Commission the authority to authorize consumers or a category of consumers to receive electricity supply

from a source other than their area's distribution licensee, a CGP does not require such permission to transport electricity to its intended destination. Open access is inherently provided to CGPS as a statutory entitlement. Consequently, captive consumers are inherently disparate from and not encompassed by the consumers contemplated under Section 42 of the Electricity Act 2003.

16. It is well-established law that any rule or regulation issued pursuant to the Electricity Act 2003, being a form of delegated legislation, must be interpreted and applied in accordance with the overarching statute. Legal interpretations and clarifications provided by the Hon'ble Supreme Court are binding on any rules or regulations formulated under the Electricity Act 2003. Therefore, the relevant sections of the Electricity Act 2003, namely Sections 9 and 42, must be interpreted in accordance with the directives set forth by the Hon'ble Supreme Court. Given that the Hon'ble Supreme Court has ruled that additional surcharges do not apply to captive consumers endowed with the right of open access under Section 9, no rule or regulation enacted under the Act can contravene this statutory mandate, as interpreted by the Hon'ble Supreme Court.
17. Furthermore, Regulation 4.5.1 of the Open Access Regulations not only mirrors the language found in Sections 42(2) and 42(3) of the Act, but also explicitly outlines the imposition of additional surcharges, specifically referencing Section 42(4). In light of these circumstances, it is evident that Regulation 4.5.1 does not address situations where open access has been granted under Section 9(2) of the Act. The dispute in the present case arises from the Respondent's failure or deliberate refusal to adhere to the law as it should be interpreted in accordance with Regulation 4.5.1, relevant provisions of the Act, and the judgment of the Hon'ble Supreme Court. Even the Green Open Access Rules issued by the Central Government must be interpreted in light of the legal principles governing the treatment of captive users concerning additional surcharges.
18. The Respondent in its Reply dated 13.10.2023 and reiterated during subsequent arguments, that the MSEDCL Case is considered per incuriam and sub-silentio, assertions lacking a valid basis and therefore inappropriate for consideration in the present proceedings. A pronouncement by the Hon'ble Supreme Court must be regarded as the law of the land, binding upon all courts and authorities in India. The Supreme Court's determination that the additional surcharge as per Section 42(4) of the Act does not apply to captive consumers, in accordance with the Electricity Act 2003's provisions, is binding on all courts and authorities

unless overridden by a decision from a larger bench of the Hon'ble Supreme Court. It is impermissible for any authority under the Act to depart from the Supreme Court's interpretation in light of Article 141 of the Constitution of India.

19. Furthermore, it would be inappropriate for the Commission to question the soundness and accuracy of the Supreme Court's decision and thereby enact or sustain regulations inconsistent with the Supreme Court's legal interpretation. The Commission, as an entity established under the Electricity Act 2003, lacks the authority to disregard the legal position established by the Supreme Court on the alleged basis of per incuriam. Moreover, any pronouncement by the Supreme Court, whether forming part of the ratio or merely an obiter dictum, holds equal binding force on all other courts and authorities.
20. The judgment rendered by the Hon'ble Supreme Court provides a reasoned clarification regarding the differentiation between other open access consumers and captive consumers, as well as the application of Additional Surcharge (ASC) concerning these two consumer categories. The Hon'ble Supreme Court has also succinctly delineated the intricacies and distinctive attributes of Sections 9 and 42 of the Act before concluding that ASC does not apply to captive consumers. The Respondent's reliance on Divisional Controller, KSRTC v. Mahadeva Shetty, as reported in (2003) 7 SCC 197, Municipal Corporation of Delhi v. Gurnam Kaur, as reported in (1989) 1 SCC 101, and State of UP v. Synthetics and Chemicals Ltd., as reported in (1991) 4 SCC 139, concerning the definition of per incuriam and sub-silentio, is irrelevant in the present factual and legal context.
21. The Respondent's argument that this Honorable Commission's jurisdiction is not invoked under Section 86(1)(f) of the Electricity Act 2003 as there is no disagreement between the parties. Additionally, the Respondent has cited Regulation 4.5.1 of the OA Regulations to assert compliance with these regulations.
22. The Respondent's assertion before this Commission that the Petitioner is seeking relief in advance, despite the Electricity Act 2003 not granting State Commissions the authority to provide such relief. It is important to highlight that the Petitioner is in an advanced stage of completing its Captive Generating Plant (CGP), and the imposition of Additional Surcharge (ASC) genuinely causes hardship to the Petitioner's commercial interests. The CGP, located in Gadag, Karnataka, utilizes a hybrid system of wind and solar energy. The wind unit's installation is finalized and is scheduled to commence operations by March 31, 2024, while the solar unit is expected to start operations by July 2024. In accordance with the



Commission's directives on January 31, 2024, the Petitioner has submitted an affidavit detailing the project's status and the open access applications filed, with preliminary approval granted by the National Open Access Registry on January 30, 2024.

23. The Petitioner asserted that this Hon'ble Commission possesses sufficient authority to alleviate, resolve difficulties, and make amendments under the Open Access (OA) Regulations. The indiscriminate treatment of open access consumers and the imposition of Additional Surcharge (ASC) under Regulation 4.5.1 of the OA Regulations has led to an interpretation by the Respondent that contradicts the provisions of the Electricity Act 2003, rendering the OA Regulations impractical. Moreover, such application of the OA Regulations has resulted in unnecessary complexity in facilitating open access for captive use. Unless addressed, this issue will significantly hinder the Petitioner's development of captive generation. The National Electricity Policy, 2005 also aims to promote secure, reliable, high-quality, and cost-effective power, as well as to create employment opportunities through the swift and efficient growth of the industry. Imposing ASC on captive use will only discourage participation in captive setups, rather than encouraging investment.

B. Submissions of the Respondent in brief are as under: -

1. The Petitioner has not yet applied for open access. Consequently, it is evident that the Petitioner is seeking an advanced exemption from this Hon'ble Commission regarding the matters outlined in the said Petition.
2. There exists a recognized mechanism in law for advance quasi-judicial dispensation under certain legislations, such as the Income Tax Act, 1961, the Customs Act, 1962, and the Authority of Advance Ruling established under the Central Goods and Services Tax Act, 2017 by the Goods and Services Council. However, the Electricity Act 2003 does not envisage or provide for any such advance dispensation by the Electricity Regulatory Commission. It is crucial to note that the advance dispensation or rulings mechanism provided under these other enactments is statutorily mandated. The decisions rendered therein are binding both on the applicant and the respective department. Detailed procedures for such advance consideration, including the composition of the authority and filing requirements, are delineated within the provisions of the aforementioned Acts. Such a provision is not integrated within the framework of the Electricity Act 2003.

3. The Petitioner's argument that the Statutory Regulations established by this Hon'ble Commission fail to differentiate between open access consumers and captive open access consumers. This argument, even without the Respondent addressing its merits, raises a challenge to the constitutional validity of the aforementioned Regulations. Given that the Petitioner has not even applied for open access, the relief sought by the Petitioner (without prejudice to the Respondent's jurisdictional argument) is essentially a theoretical exercise.
4. The Petitioner has cited Section 86(1)(e) and (k) read with Section 86(1) (f) of the Electricity Act 2003, as the basis for filing the current Petition. It is respectfully argued that none of the sections of the parent statute invoked by the Petitioner provide for or confer jurisdiction upon this Hon'ble Commission to entertain the present Petition seeking an advance decision. Regarding the invocation of Section 86(1)(f), it is contended that no dispute has arisen between the Petitioner and the Respondent; the Respondent has merely commented on the binding nature of the Statutory Regulations. The Petitioner has not contested this stance. The assertions made by the Petitioner in the Petition indicate its awareness of the binding nature of the Statutory Regulations. For instance, when expressing concern in the Petition about Regulation 4.5(1) failing to differentiate between Open Access Consumers and Captive Open Access Consumers, referencing the judgment of MSEDCL and arguing that Regulation 4.5(1) is inconsistent with the law established by the Hon'ble Supreme Court in MSEDCL and beyond the scope of the Electricity Act 2003. The Petitioner does not challenge the binding nature of the Statutory Regulations. Rather, it relies on the requirement for the Regulations to be interpreted in light of the Hon'ble Supreme Court's judgment. Such a constitutional challenge is not permissible through the present Petition before this Hon'ble Commission.
5. It is asserted that the Commission has not yet issued any amendments to the OA Regulations concerning the Ministry of Power (MOP) Rules. It should be emphasized that several terms and conditions within the Regulations necessitate review to align with the Rules. Therefore, any reference made to the MOP Rules at this stage would be premature. Notwithstanding the aforementioned, it is emphasized that the Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 stipulate that an additional surcharge shall not be applicable to Green Energy Open Access Consumers. Hence, it is abundantly clear from the Rules that an additional surcharge is only applicable in instances where open access is utilized without payment of fixed charges. Furthermore, it is crucial to acknowledge that Distribution Licensees bear a universal service obligation and have accordingly secured long-term power

arrangements. According to the MOP Rules, granting green open access to consumers would result in stranded capacity within the long- term commitments of Distribution Companies. The fixed costs associated with such stranded capacity would impose an additional burden on other consumers through retail tariffs.

6. That under the current Tariff Structure, the fixed charge component is relatively lower, and a portion of the fixed costs of Distribution Companies is recuperated through energy charges. Consumers who opt for green energy via open access would not be required to pay energy charges, thereby resulting in an inadequate recovery of fixed costs from such Green open access consumers. Consequently, this places an additional financial burden on the general consumers of the Distribution Companies, creating a new form of cross-subsidization, which contravenes the provisions of Electricity Act 2003. Therefore, any consumer opting for open access should be obligated to pay the additional surcharge.
7. That the precedent set in MSEDCL Case is not applicable in the present circumstances due to certain distinguishing factors, as explicitly stated in the first proviso to Section 9(1) of the Electricity Act 2003. This proviso dictates that the supply of electricity from a captive generating plant through the grid shall be regulated in a manner akin to a generating station of a generating company. Hence, the Appropriate Commission possesses the authority to regulate the supply of electricity from captive generating plants utilizing the grid. The significance and nature of this proviso cannot be overstated.
8. Section 86 of the Electricity Act 2003 stipulates that where open access has been granted to a specific category of consumers under Section 42, the State Commission is mandated to determine the wheeling charges and any Cross Subsidy Surcharge applicable to such consumers. Furthermore, Section 181 confers upon the Hon'ble Commission the authority to promulgate Regulations, including those pertaining to surcharges, cross subsidies, and additional charges. In light of these provisions, the Hon'ble Commission, exercising its powers under Section 181 of the Act, has promulgated the JERC Open Access Regulations. These regulations entail the imposition of an additional surcharge on all open access consumers.
9. The Respondent argued that distribution licensees bear a universal service obligation and are therefore obligated to secure long-term power arrangements to meet the needs of their consumers. If an existing consumer establishes a captive plant, the long- term capacity secured by the distribution licensee may become stranded. Additionally, the proposition to establish a hybrid power system by the Petitioner does not absolve the Distribution Licensee

of the obligation to secure power procurement arrangements to meet the Petitioner's needs during periods of non- generation or reduced generation by the hybrid plant. Consequently, an additional surcharge is deemed necessary to be collected from all such consumers choosing to procure power either from a third party or by establishing their own plant.

10. That the fixed charges established during the tariff assessment do not accurately represent the fixed costs due to inconsistencies in the tariff structure, and they are recuperated as part of energy charges. A consumer choosing to procure power from a source other than the distribution licensee will avoid paying the energy charges, leading to an inadequate recovery of fixed costs as well.
11. The Electricity Act 2003 envisions non-discriminatory open access, and any exemptions granted regarding additional surcharges to captive generating units are inherently discriminatory, as they would introduce a new level of cross-subsidy contrary to the Electricity Act 2003's intent. Therefore, any consumer opting for open access should bear the responsibility of paying the additional surcharge. It should be noted that the Electricity Act 2003 anticipates a gradual reduction in cross-subsidies. However, if captive consumers are exempted from paying the additional surcharge, it would impose a burden on other retail consumers of the licensee in the form of increased retail tariffs, contradicting the Electricity Act 2003's intent. Consequently, it would establish a new level of cross-subsidization, which runs counter to the Electricity Act 2003's objectives.

#### C. Commission's analysis and findings

1. The Commission has examined the entire record pertaining to this petition placed before it, the specific relevant provisions under Electricity Act 2003 and Rules & regulations made thereunder. The Commission is relying on section 2 (8), section 2 (15), section 9 and section 42 of Electricity Act 2003 and the Hon'ble Supreme Court's order in Civil Appeal No 5074-5075 of 2019 in the matter MSEDCL Vs M/s JSW Steel Ltd and Others.
2. Section 2 (8) provides that "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and include a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association;
3. Section 2 (15) provides that "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the

business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

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

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:

Provided further that no licensee shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub- section (2) of section 42.

**(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:**

**Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:**

**Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.**

5. Section 42 "Duties of distribution licensees and open access- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinate 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 <sup>3</sup>[such open access shall be allowed on payment of surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of 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 <sup>1</sup>[\*\*\*] 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:**

<sup>2</sup>[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]

(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.**

6. The Commission has noted that the Petitioner is an existing consumer of DNHDDPCL with contract demand of 20MVA at 66KV Khadoli Distribution Substation and drawing Power for its copper production unit in Silvassa. In order to meet its 50% energy requirements from renewables the Petitioner is setting up a Captive generating Plant in Gadag, Karnataka for supply of Power through open access on interstate Transmission system. The CGP, which is a Hybrid of Wind and Solar, is slated to commence partial operations in March 2024. The Petitioner has already applied for open access and first stage approval for open access has been accorded by the National Open Access registry on 30<sup>th</sup> January, 2024 under the Green Open Access route.

7. The Commission has further noted that for the purpose of open access, the statute has provided two distinct mechanism - (i) for availing supply of power from a captive generation plant under Section 9(2) of the Electricity Act, 2003 ("the Act") read with Rule 3 of the Electricity Rules, 2005; and (ii) availing supply from a generating company or any other licensee other than the area distribution licensee under Section 42(3) of the Act to the extent permitted under Section 42(2) of the Act by the State Commission.

For purposes of availing supply from captive generating plant, the supply through the grid shall be regulated in the same manner as any other generating company. However, the captive user "shall have the right to open access" from the captive generating plant to the captive users place of use for the purpose of carrying electricity under Section 9(2) of the Act. Proviso to Section 9(2) states that the open access shall be subject to adequate transmission facility.

8. The Commission further noted that under section 42(2) of the Act, it is the State Commission, which has been vested with the power to introduce open access in such phase and subject to such conditions as may be specified. The sub-section (2) has to be read in the context of sub-section (3) for persons requiring supply of electricity from a generating company or any licensee other than the area distribution licensee. The nature of open access consumers under Section 42(3) by its very language, does not include captive consumers as the term "captive generating plant" is not included in this sub-section.

While Section 42(2) read with Section 42(3) deals with general consumers and, therefore, requires the permission of the State Commission for making available open access to such consumers, Section 9 deals specifically with captive consumers for whom, the right to open access has been provided automatically by the statute. Section 9 of the Act is a specific instance of cases, which is a separate treatment from other consumers covered under Sections 42(2) and 42(3) of Act. Section 42(4) of the Act indicates that additional surcharge would be payable by such consumers who have been permitted by the State Commission from a person other than the area of Distribution Licensee. Thus Section 42 (4) is directly correlated to section 42(2) and 42(3).

9. The Hon'ble Supreme Court in the MSEDCL case has categorically held that Captive consumers/Captive users form a separate class from those consumers defined under section 2(15) of the Act and therefore shall not be subjected to or be liable to pay Additional surcharge under section 42(4) of the Act. The Hon'ble Supreme Court further observed that the Captive generation /captive use is statutorily provided / available and for which a

permission of State Commission is not required. Further, the Hon'ble Supreme Court is of the view that the plea of the appellant that captive users are liable to pay the additional surcharge leviable under subsection 4 of section 42 has no substance and has to be rejected outrightly. Right to Open access to transmit/carry electricity to the captive user is granted by the Act and is not subject to and does not require the State Commission's approval.

10. The Hon'ble Supreme Court observed that as per the scheme of the Act, there can be two classes of consumers

- I. The ordinary Consumer or class of consumer who is supplied with the electricity for his own use by a Distribution licensee/licensees and
- II. Captive consumers, who are permitted to generate for their own use as per section 9 of the Electricity Act, 2003.

There is a logic behind the levy of Additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the Distribution licensee has already incurred the expenditure, entered into purchase agreement and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the Distribution license is issued. Therefore, it was held that so far as the Captive consumers/ Captive users are concerned the Additional surcharge under sub section 4 of section 42 of the Act, 2003 shall not be leviable.

11. The Commission has noted that Respondent has vehemently opposed the contentions of the Petitioner: -

- I. That the Petitioner has not yet applied for open access. Consequently, it is evident that the Petitioner is seeking an advanced exemption from the Commission regarding the matters outlined in the Petition. There exists a recognized mechanism in law for advance quasi-judicial dispensation under certain legislations, such as the Income Tax Act, 1961, the Customs Act, 1962, and the Authority of Advance Ruling established under the Central Goods and Services Tax Act, 2017 by the Goods and Services Council. However, the Electricity Act does not envisage or provide for any such advance dispensation by the Electricity Regulatory Commission. It is crucial to note that the advance dispensation or rulings mechanism provided under these other enactments is statutorily mandated. The decisions rendered therein are binding both on the applicant and the respective department. Thus, relief sought by the Petitioner is essentially a theoretical exercise.



- II. That Regulation 9.6 of the JERC Open Access Regulations 2017 confers power on this Commission to remove difficulty and Regulation 9.8 of the JERC Open Access Regulations 2017 relates to relaxation. These Regulations do not confer power on the Commission to ignore the subordinate legislation framed under the said Act, by this Commission.
- III. That Regulation 4.5 of the JERC Open Access Regulation, 2017 provides for additional surcharge as under: -

*An Open Access Consumer, receiving supply of electricity from a person other than the Distribution Licensee of his area of supply, shall pay to the Distribution Licensee an additional surcharge in addition to wheeling charges and cross-subsidy surcharge, to meet the fixed cost of such Distribution Licensee arising out of his obligation to supply as provided under sub-section (4) of Section 42 of the Act. However, as per the "JERC (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017, a consumer is now required to pay fixed charges on reduced demand after adjusting for demand drawn through Open Access in accordance with the Regulations.*
- IV. That the Petitioner's reliance on Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022, is misplaced because these Rules have yet to be aligned by the Commission in its Open Access Regulations 2017. Thus, reliance on these Rules at this stage appears to be premature.
- V. That the judgement of the Hon'ble Supreme Court in Maharashtra State Electricity Distribution Company Ltd & Ors Vs JSW Steel & Ors is silent (sub-silento) on sections 49, 2(32), 2(40), 2(70), 2(72) of the Electricity Act, 2003. The said judgement is also silent on the ambit of the proviso to Section 9 (1) of the EA, 2003. Further, the said order held that the captive generators are not liable to pay Additional surcharge under sub section 4 of section 42 of the Electricity Act, 2003. However, the Hon'ble Supreme Court in the said order inadvertently overlooked partial Open Access consumers and Distribution Licensee fixed costs which may be considered an error in law (per incuriam).
- VI. The Electricity Act, 2003 envisions non-discriminatory open access, and any exemptions granted regarding additional surcharges to captive generating units are inherently discriminatory, as they would introduce a new level of cross-subsidy contrary to the Electricity Act, 2003's intent. Therefore, any consumer opting for open

access should bear the responsibility of paying the additional surcharge. It should be noted that the Electricity Act, 2003 anticipates a gradual reduction in cross-subsidies. However, if captive consumers are exempted from paying the additional surcharge, it would impose a burden on other retail consumers of the licensee in the form of increased retail tariffs, contradicting the Electricity Act, 2003's intent. Consequently, it would establish a new level of cross-subsidization, which runs counter to the Electricity Act, 2003's objectives.

12. The Commission has thoroughly considered the submissions of both the parties and relevant provisions of the Electricity Act, 2003 and Rules & Regulations made thereunder. The Commission is of the considered view that the contentions raised by the Petitioner are primarily based on the section 2(8), section 2(15), section 9 and section 42 of the Electricity Act, 2003 and are legally tenable. The Hon'ble Supreme Court's judgment in MSEDCL case further strengthened the contentions of the Petitioner. The said order of the Hon'ble Supreme Court has defined the Consumers under section 2(15) and the Captive Consumers who establish captive plants under section 9 of the Electricity Act, 2003, are different & distinct and they form a separate class by themselves. Consumers defined under section 2(15) shall be liable to pay Additional surcharge when they take power supply through open access. At the same time the Hon'ble Supreme Court has further held that as far as the Captive Consumers/ Captive users are concerned the additional surcharge under section 42(4) of the Electricity Act, 2003, shall not be leviable and they do not require any permission from the State Commission.

The Commission is inclined to accept the contentions of the petitioner. At the same time, it is not at all convinced with the arguments of the Respondent which are legally untenable.

In the light of the above the Commission, hereby, clarifies that the Petitioner, who has established a captive generating plant for its own use, shall not be liable to pay Additional surcharge.

Ordered Accordingly.

Sd/-  
(Jyoti Prasad)  
Member (Law)

Sd/-  
(Alok Tandon)  
Chairperson

Certified True Copy

  
(S/D. Sharma) 18/04/2024

Secretary (I/c), JERC