BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA

CASE NO: HERC / PRO- 15 of 2020

DATE OF HEARING	**:**	**12.01.2021**
DATE OF ORDER	**:**	**15.02.2021**

IN THE MATTER OF:

For exempting the applicant/petitioner from paying the cross subsidy, additional surcharge or any other charges as reflected in Notice of Recovery dated 29.08.2019 issued by respondent no. 2 and quashing of the recovery notice dated 29.08.2019, in the interest of justice.

Petitioner

M/s. Haryana Cooperative Sugar Mills Ltd.

Respondents

1. Haryana Power Purchase Centre (HPPC), Panchkula
2. Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL), Panchkula

Present

On behalf of the Petitioners through Video Conferencing

1. Shri Kuldeep Sheoran, Advocate

On behalf of the Respondents through Video Conferencing

1. Shri Samir Malik, Advocate
2. Shri Vikas Kadian, Xen/HPPC

Quorum

Shri Pravindra Singh Chauhan	**Member (in Chair)**
Shri Naresh Sardana	**Member**

ORDER

Brief Background of the case

1. The Present Petition has been filed seeking quashing of the recovery notice dated 29.08.2019 and to grant exemption from paying the cross subsidy, additional surcharge or any other charges as reflected in Notice of Recovery dated 29.08.2019 issued by Respondent no. 2.

2. The case was earlier disposed of by the Commission, vide its Order dated 30.07.2020, with the directions that discussions be held at the level of Administrative Secretaries of the Cooperation Department and the Power Department to find a mutually acceptable resolution of the issue. Till such time, status quo may be maintained regarding the action for recovery of the amount in question.
3. The Respondent No. 1 i.e. HPPC filed Review Petition (HERC/RA-13 of 2020) against the Order of the Commission dated 30.07.2020 submitting that discussions were held at Administrative Secretary level to amicably resolve the issue. However, the issue could not be resolved.
4. The Commission vide its Order dated 24.11.2020, disposed of the said Review Petition with the directions to restore the Original Petition filed by M/s Haryana Cooperative Sugar Mills Ltd. i.e. HERC/PRO-15 of 2020.
5. Accordingly, the case has been restored to its original number and stage.
6. The Petitioner has submitted as under:-

a) That the Petitioner has entered into Power Purchase Agreement dated 18.06.2009 with Haryana Power Purchase Centre on behalf of Uttar Haryana Bijli Vitaran Nigam & Dakshin Haryana Bijli Vitaran Nigam, whereby Haryana Power Purchase centre agreed to purchase 16 MW of electricity from its plant at Rohtak. The capacity of sugar mill is 3500 TCD and power plant is 16 MW. It is generating environment friendly Green Power of 16 MW through bagasse based co-generation power plant, out of which 12 MW power is exportable to grid.

b) That respondent no. 2, vide Notice of recovery dated 29.08.2019, has called upon the applicant to pay cross subsidy, additional surcharge or any other charges as notified by the Commission from time to time on the entire quantum of energy used for self/own usage.

c) That as per Section 10 (2) of the Electricity Act, 2003, cross subsidy surcharge and additional surcharge is levied on supply of electricity by a generation company to a consumer if the supply is made by availing open access to the transmission/distribution system of the licensee. However, in the present case the electricity generated is being supplied to the Nigam and not to the consumers directly by the applicant/petitioner.

d) That even as per Section 42 of the Electricity Act, 2003, cross subsidies and other charges can be levied by the distribution licensee for developing and maintaining an efficient co-ordinated and economical distribution system in his area of supply to supply

electricity in accordance with the provisions of Act. Levy of cross subsidy or additional surcharge would arise only in the event open access is sought and in case no open access is sought, as in the present case, Section 42 will not be applicable.

e) That the applicant/petitioner is supplying the generated electricity to the Respondent no. 2 till their feeder/power house through a line installed by the Petitioner at its own cost.

f) That Section 42 of the Electricity Act, is reproduced below for ready reference :-

"Section 42. (Duties of distribution licensee and open access): *---*

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

(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 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 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.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-sections (5),(6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections".

g) That in case no. HERC/PRO-8 of 2011 titled as "Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL) VS. M/s DLF Utilities Limited having its office at DLF Gateway Tower, 7th Floor, DLF City, Phase II Gurgaon", the Commission in para No.8.6 gave the following observation and direction: -

"8.6 Summing up the Commission's views on the basis of examination of the documents in the case and after hearing the arguments of the parties are that the generation plant being run by DLFU is not a captive power plant as the end users have no share in the ownership of the plant. The energy purchase agreement between the DLFU and the building owners does not cover the tenants or the occupiers of the commercial areas. Supply of electricity cannot be termed as providing services since it is paid as quantified through the electric meters and amounts to sale. ***It is not a case of open access either since no distribution/transmission lines of the licensees are used by the respondent.*** *It is a case of maintaining a generating unit and supplying power to its*

consumers through dedicated lines as envisaged under section 10(2) of the Electricity Act, 2003. In such eventually the plant owner has to pay cross subsidy since by supplying power to a group of consumers the generating company is depriving the licensee of some of its valued customers who are contributing cross subsidy for other consumers. There is no case of payment of additional surcharge since no system redundancy has been found. Regarding payment of electricity duty it is beyond the purview of the commission and the parties can take up the issue with the Govt. for appropriate action.

The Commission disposes of the matter accordingly."

h) That as per the above said judgement / order dated 11.08.2011, the Petitioner is not liable for the payment of the Additional Surcharge and it is not depriving the licensee of its valued customers who are contributing cross subsidy for other consumers. In this case the Petitioner itself used the electricity and not depriving the licensee from the customers who are contributing the cross subsidy for other consumers.

i) That the above action of imposing cross subsidy, additional surcharge or any other charges as reflected in Notice of Recovery dated 29.08.2019 is not justified as the applicant was set up by the government for social welfare of the people especially for the farmers and at present all the cooperative sugar mills (including applicant sugar mill) were running in losses. Even otherwise the Government of Haryana has/can exempt Wheeling, Transmission, cross subsidy charge and additional surcharges for a period of 10 years from the date of commissioning, as otherwise these projects will become unviable.

j) That the following amendment was made in the Haryana Solar Policy, 2016 by the New and Renewable Energy Department (HAREDA), Government of Haryana, vide order No. 19/7/2019-5 P dated 08th March, 2019:

"The clause no. 4.3 is substituted as under:

4.3 Exemption of Wheeling, Transmission, cross subsidy charge and additional surcharges: Wheeling and Transmission Charges will be exempted for ten years from the date of commissioning for all Captive Solar Power Projects which have submitted applications to Haryana Renewable Energy Development Agency (HAREDA) for registration of project, purchased land or have taken land on lease for thirty years and have bought equipments & machinery or invested atleast Rs. one crore per Mega Watt for purchase of equipments & machinery for setting up of such Captive Solar Power

Projects till 13th February, 2019, while cross subsidy surcharges and additional surcharges are not applicable for Captive Solar Power Projects as per provisions of Electricity Act 2003. For the investment of Rs. One crore per MW, payment for equipment should be made into the bank accounts of equipment supplier before 13th February, 2019 and proof of the same is to be submitted."

k) That the Petitioner; which is a Cooperative Sugar Mill, is already suffering huge losses due to lesser rate of purchase of electricity by Haryana Power Purchase Centre. The Petitioner is under the control of the Government and any loss suffered by it amounts to loss to the state exchequer. Due to the losses being suffered, already many Cooperative Mills have been closed and the latest example of which is Bhuna Cooperative Sugar Mill.

l) That further while issuing the recovery notice, it has not been considered that the Power Plant was set up, on the instructions of the Government for generating extra revenue so that the Government can gain profit from the same.

m) That the Petitioner generates green energy by using bagasse, playing a very crucial role in developing pollution free environment.

n) That the Petitioner is now going to use Parali (crop residue) for producing the electricity, thereby preventing the burning of crop residue. On December 10, 2015, the National Green Tribunal (NGT) had banned burning of crop residue in the states of Rajasthan, Uttar Pradesh, Haryana and Punjab. Burning crop residue is a crime under Section 188 of the IPC and under the Air and Pollution Control Act of 1981.

o) That issuance of notice of recovery to the applicant is unjust, arbitrary and an afterthought because the applicant is generating Electricity since 2009 and now after passage of 10 years, it has been proposed to recover cross subsidy and additional surcharge from the applicant. Whereas, neither any notice nor any communication was ever addressed to the applicant that it is not satisfying the statutory requirement of being a Captive Generation plant. That the Petitioner gave the detailed representation/reply to the Respondents regarding the exemption of the cross subsidy, Additional surcharge or any other charges but till date no action was taken by the Respondents.

p) Further, the statutory requirement of being a Captive Generation plant were not even reflected in the Power Purchase Agreement dated 18.06.2009. Had there been any communication from the Respondent to the Petitioner conveying that it is not satisfying the statutory requirement of Captive Plant, the applicant would have rectified it long

back. Now, after a period of 10 years an exorbitant amount of recovery has been reflected in the recovery notice, which is against the principles of natural justice.

q) The following prayers have been made:-

The petition may be allowed and the respondents may be directed to exempt the Petitioner from paying the cross subsidy, additional surcharge or any other charges as reflected in Notice of Recovery dated 29.08.2019 issued by respondent no. 2 and quashing of the recovery notice dated 29.08.2019, in the interest of justice.

Reply filed by HPPC

7. HPPC filed its detailed reply on affidavit dated 12.06.2020, praying to dismiss the Petition with costs. HPPC has submitted as under:-

a) That the present Petition has been filed by Petitioner which is a "Cooperative Society". As per the Bye Laws of the Petitioner, only the Executive Committee can commence, institute, prosecute and defend all such action instituted by or against them. The relevant provision of the bye-laws is reproduced herein for ready reference:

"IX. EXECUTIVE COMMITTEE 53. The duties and power of the executive committee shall be as under:- viii) To commence, institute prosecute and do defend all such action and suit deemed necessary and proper or compromise or refer the same to arbitration."

b) The present Petition has been filed by the Managing Director of the Petitioner however, no Board Resolution or Authorization from the Cooperative Society has been filed along with the Petition. It is relevant to note that as per Bye-law clause 55, the Managing Director can only execute functions which are delegated by the Board of Directors and/or Executive Committee to the Managing Director. The present petition fails to show proof of any such delegation and has been filed with no authorization and the said petition should be dismissed on this ground alone.

c) That the present Commission is not the right forum for raising any dispute under the Power Purchase Agreement (PPA) between the Petitioner and the Respondent No. 1 (HPPC). That Clause 13 of the PPA lays down the Dispute Resolution process wherein in the event of a disagreement a meeting must be held by the designated representative of the society with the Chief Engineer of the Respondent No. 1. However, in contravention to the means of dispute resolution provided in the PPA and specifically agreed between the parties, the Petitioner has instituted the present Petition. Therefore,

the present Petition should be dismissed on ground of jurisdiction and for not being maintainable.

d) The Petitioner is a society engaged in the business of Sugar manufacturing and other businesses incidental thereto. The production facility of the Petitioner is situated at Village-Bhali Anandpur, District Rohtak in the State of Haryana. The society entered into the PPA with a desire to "produce electric energy by co-generation" mainly by using bagasse as fuel and to supply part of the electric energy generated by the society to Haryana Discoms.

e) That the Petitioner society has undertaken to install a new generation facility/ supplement to the existing co-generation facilities by installing plant and equipment so as to have a total generation capacity of 16 MW.

f) On 18 June 2009, a PPA was entered by and between the Petitioner and Respondent No.1 i.e. Haryana Power Purchase Center on behalf of Respondent No. 2 i.e. UHBVN, the Distribution Licensee of the state of Haryana.

g) That vide the PPA dated 18.06.2009, the Petitioner offered to sell, and the Respondent agreed to purchase energy up to 16 MW in accordance with terms and conditions set out in the PPA. The term/period of the PPA was for 25 years from the date of execution of the PPA, extendable for another ten years through mutual agreement. That as per clause 11.1, the PPA cannot be terminated by either party without a prior intimation of two years.

h) That the Petitioner projected itself as a Captive Power Plant which uses part of generation for its own captive usage. As a settled principle Cross Subsidy Surcharge (CSS) and Additional Surcharge (AS) is payable on electricity consumed in the area of distribution licensee except for the Generation Plants meeting the Captive Status as defined under the Electricity Act, 2003, Rules and Regulations framed there under.

However, when the generation data was extracted, it was observed that Petitioner was not meeting the criterion of being a Captive Generation Power Plant and was in-fact liable to pay CSS, AS and other charges as determined by the Commission.

In this regard, a brief overview of the generation data for the period FY 2010-11 to FY 2018-19, given here under:-

Financial Year	Total Generation	Total Own Consumption	Total import	Total export	%Own Consumption
2010-1 1	20226000	9806400	10419600	-	48.48
2011 -12	40914000	17698000	23216000	-	43.26
2012-13	34894000	13627600	21266400	-	39.05

2013-14	46995000	18106800	28888200	-	38.53
2014-15	43698000	17477400	26220600	-	40.00
01.04.15 to 15.11.15 16.11.15 to 31.3.16	38450000	15744800	22705200		40.95
2016-17	47384000	19536200	27847800	-	41.23
2017-18	57736000	25858000	31878000	-	44.79
01.04.18 to 31.10.18 1.11.18 to 31.03.19	44641000	19543202	25097798		43.78

i) That accordingly, as soon as the Respondents discovered the aforesaid actual power usage, the Respondent No. 2 issued a Notice dated 29.08.2019 to the Petitioner and called the Petitioner's attention to Rule 3 of Electricity Rules, 2005 which provides for statutory requirement for a generator to qualify as a Captive Generation Plant and the fact that the Petitioner has been acting in violation of the same since 2010-11.

j) That in light of the above, the Respondent notified the Petitioner that in such year where the Petitioner has failed to satisfy the requirement of being a Captive Generation Plant on account of self-consumption falling below 51% the Petitioner has consequently become ineligible for getting benefits extended by statute to the Captive Generation Plants and is thus liable to pay the CSS, AS and / or any other charges as notified by the Commission from time to time on the entire quantum of energy used for self-consumption. Accordingly, the effective liability towards the Petitioner was worked out as under:

FY	**Total Generation**	**Total Own Consumption**	**%Own Consumption**	**Cross Subsidy**	**Addl. Surcharge**	**ED**	**Total**	**Total Recovery**
1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9=(3*8)**
2010-1 1	20226000	9806400	48.48	0.72	0	0.1	0.82	8041248.00
2011 -12	40914000	17698000	43.26	0.58	0	0.1	0.68	12034640.00
2012-13	34894000	13627600	39.05	0.92	0	0.1	1.02	13900152.00
2013-14	46995000	18106800	38.53	0.53	0	0.1	0.63	11407284.00
2014-15	43698000	17477400	40.00	2.02	0.5	0.1	2.62	45790788.00
01.04.15 to 15.11.15	38450000	15744800	40.95	0.93	.50	0.10	1.53	15055964.92
16.11.15 to 31.3.16				0.93	.84	0.10	1.87	11041040.94
2016-17	47384000	19536200	41.23	1.57	.87	0.1	2.54	49621948.00
2017-18	57736000	25858000	44.79	1.63	.99	0.1	2.72	70333760.00
01.04.18 to 31.10.18	44641000	19543202	43.78	1.63	.99	0.1	2.72	31008544.00
01.11.2018 to 31.03.2019				0.81	.13	0.1	2.04	16611720.00
	Grand Total Amount to be recovered							284847090.00

k) That accordingly the Respondent No. 2 vide its notice dated 29.08.2019, called upon the Petitioner to deposit/remit the amount equivalent to 28,48,47,090/- (Rs. Twenty-Eight Crore Forty-Eight Lac Forty-Seven Thousand and Ninety only), as worked out above on account of applicable charges, within a period of seven (7) days from the date of issue of this communication directly to the bank account of UHBVNL. However, the Petitioner deliberately failed to comply with the said direction and has not deposited the said amount till date.

l) That the Petitioner has in fact filed this present petition in violation of the settled laws seeking exemption from payment of the CSS and AS on frivolous, baseless, erroneous and misleading grounds which are neither substantial in light of the provisions of the Electricity Act, 2003 nor run parallel or in compliance with the principles of levy of CSS, AS and other charges. The Petitioner had admitted in the petition that it has failed to follow the statutory requirement for Captive Generating plant and has still sought exemption from payment of CSS and AS. The fact that the Petition has already admitted that it has been availing the benefits of Captive Generating Plant and now seeks exemption to return those unlawfully gained benefits, makes this petition highly superfluous, redundant and futile.

m) That reference is invited to Section 2(8) of the Electricity Act 2003 wherein the Captive generating plant has been defined as below:

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

n) That the position in law is settled with respect to Captive Generating Plants. That Rule 3 of Electricity Rules, 2005 notified on 08.06.2005 provides for statutory requirements for a generator to qualify as a Captive Generating Plant, Rule 3 is produced here under:

"3. Requirements of Captive Generating Plant.-

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

(a) in case of a power plant -

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

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

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:

o) That as per the extant regulation 3 in the Electricity Rules, 2005, it is relevant to note that the determination of whether a plant is a captive generation plant or not is done on annual basis and is not done on one time basis. It is relevant to note that the Respondent has determined on annual basis the power consumption of the Petitioner and the said consumption has been below the statutory requirement of 51% from 2010-11 onwards.

p) That the responsibility of a captive generating plant is enshrined in the Electricity Rules, 2005, specifically Rule 3(2), reproduced hereinunder for ready reference:

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

q) Thus, the Petitioner fails to fulfill the criteria of being termed as 'Captive Generation Plant' and therefore, CSS and AS is leviable in accordance with the Section 10(2) read with Section 42(2) of the Electricity Act, 2003. The Haryana Electricity Regulation Commission (Terms and conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 notified on 11th January, 2012 *inter alia* provides for levy of CSS and AS in case electricity supply is secured from any other source(s) other than the distribution licensee. The Regulation exempts these charges only in case of the Captive Generation Plant carrying the electricity to the destination of his own use irrespective of usage of transmission/ distribution system of the licensee. In this regard, reliance is placed on the decision of the Supreme Court in ***Sesa Sterlite v/s Orissa Electricity Regulatory Comm. and Ors.*** dated 25.04.2014 (*2014 8 SCC 444*):

"CSS: Its Rationale

25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the

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

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

27. With this open access policy, the consumer is given a choice to take electricity from any Distribution Licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross subsidy. Thus, the State Electricity Regulatory Commissions are authorized to frame open access in distribution in phases with surcharge for: (a) Current level of cross subsidy to be gradually phased out along with cross subsidies; and (b) obligation to supply.

That it can be seen from the aforementioned observation of the Hon'ble Supreme Court that the rationale behind the levy of the CSS is more in compensatory in nature.

r) That it is also relevant to examine the Hon'ble APTEL's judgment in ***M/s Steel Furnace Association of India vs Punjab State Electricity Regulatory Commission*** (Appeal No.38 of 2013) wherein the Hon'ble Tribunal stated as under:

"44. Summary of our findings:

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

(ii) Hon'ble Supreme Court in the matter of Sesa Sterlite Ltd. has held that Cross Subsidy Surcharge ("CSS") is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. CSS is a compensation to the Distribution Licensee in view of the fact that but for the Open Access the consumer would pay tariff applicable for supply which would include an element of cross subsidy. Such cross subsidy surcharge has to be paid as determined by the State Commission even if the line of the Distribution Licensee is not used by the open access consumer."

s) That in a catena of case laws cited, it has been observed by the Hon'ble Supreme Court and APTEL the right of recovery of charges, under Open Access (OA) by the distribution licensee, in case the user decides not to take electricity/supply from the distribution licensee or procure power from a source of his choice. Sourcing of electricity from any other source other than distribution licensee attracts levy of charges under OA.

t) That the contention of the Petitioner that since it is not using the line of the Respondent, it is not liable to pay the cross subsidy surcharge and other charges is not tenable and the position with respect to the same has been settled by the Hon'ble Supreme Court in ***Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission & Ors.(2014 8 SCC 444***). The Hon'ble Supreme Court has held that Cross Subsidy Surcharge is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. CSS is a compensation to the Distribution Licensee in view of the fact that but for the Open Access the consumer would pay tariff applicable for supply which would include an element of cross subsidy. Such CSS" has to be paid as determined by the State Commission even if the line of the Distribution Licensee is not used by the open access consumer. The court held as under:

"In nutshell, CSS is a compensation to the Distribution Licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an

element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay Cross Subsidy Surcharge under the Act. Thus, Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution Licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution Licensee from the loss of cross subsidy that such Distribution Licensee would suffer by reason of the consumer taking supply from someone other than such Distribution Licensee."

u) That the Petitioner is a consumer to the extent of the power consumed by its sugar mills and the fact that it has failed to satisfy the requirement of a Captive Generating Plant makes it liable to pay the CSS and other charges. The Petitioner in the present petition contends that as per Section 10(2) of the Electricity Act, 2003, CSS and AS is levied on supply of electricity by the generating company to a consumer whereas in the present case the electricity generated is being supplied to the Respondent's department and not to the consumers directly. The Respondents submits that the Petitioner is supplying electricity for its sugar mill directly from its power generating plant, therefore levy of CSS and AS is applicable under the provisions of electricity laws.

v) That the Petitioner also contends that Section 42 is only applicable in the scenario when open access is sought and in case no open access (which the Petitioner submits is in the present case) then Section 42 will not be applicable and there arises no occasion for levy of CSS or AS. For the said submission, reliance is placed on ***Chhattisgarh State Power Distribution Co. Ltd. vs Aryan Coal Benefications Pvt. Ltd***. (Appeal No. 119 of 2009 and Appeal No. 125 of 2009 on 09.02.2010). The decision in Aryan Coal case is clearly pointed to the fact that cross-subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not, and even without obtaining open access upon payment of cross-subsidy surcharge. The relevant paras:

"16. Section 42 (2) deals with two aspects; (i) open access (ii) cross subsidy. Insofar as the open access is concerned, Section 42 (2) has not restricted it to open access on the lines of the distribution licensee. In other words, Section 42 (2) cannot be read as a confusing with open access to the distribution licensee.

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

…..

36. In the light of the above discussions, we make the following conclusions:-

i) The Aryan Plant Company being a generator which is found to be not qualified as a captive generating plant can transfer power generated by it for its own use to its own coal washeries through its own dedicated line without license or open access.

ii) The Aryan Plant Company transferring power to its own coal washeries through its own dedicated transmission line can not be treated as 'supply' as envisaged under Section 2 (70) of the Electricity Act. Therefore, the Aryan Plant Company is not bound either to avail open access or to obtain a license under the Act.

iii) Under the Act and the Regulations framed under the said Act a consumer is entitled to receive the supply of electricity from the source other than the licensee thereby making a proviso to compensate the licensee therefore, show that there are provisions for the payment of cross subsidy surcharge and by that process, it safeguards the interest of the distribution licensee in whose area the consumer is located."

In light of the above cited case-laws, it is submitted that it is a settled position in law that usage of lines of the distribution licensee is not a pre-condition for levy of CSS

or AS. The said charges are more in the nature of compensatory charges and the moment the Petitioner ceases to be a Captive Generating Plant, the Petitioner becomes liable for payment of these charges.

w) That the other submission of the Petitioner in its Petition is more in the nature of plea to the Commission to grant relaxation / exemption to the Petitioner from payment of the CSS or AS. The Respondent submits that while Regulation 59 of the HERC OA Regulations deals with the power of relaxation, Regulation 55 confers inherent power upon to commission to adopt a procedure, which is at variance with any of the provisions of these regulations in special circumstances or in public interest or to depart from such procedures. However, such power to relax should not have the effect of amending the Regulation itself. An attempt to relax the regulations will fall out if it leads to abrogation or amendment of the Regulations. Even the Hon'ble Supreme Court has held in ***Madeva Upendra Sinar v. Union of India (1975) 3 SCC 765*** that 'power to remove difficulty' may be exercised when there is a difficulty arising in giving effect to the provisions of the Act and not of any extraneous difficulty.

x) That the law in this regard is settled whereby, power of relaxation cannot be exercised by a Commission if difficulty arises due to application of the relevant Regulations. Such power of relaxation can only be utilized if difficulty arises in application of the extant Regulations. It is well settled that the power of relaxation is a species of public power to be exercised in public interest, rationally, equitably and on legitimate classification parameters. It cannot be discriminatorily applied by irrelevant or shady choice or identification of persons for grant of the benefits of relaxation.

y) The reference made by the Petitioner of the amendment to the Haryana Solar Policy, 2016 by the New and Renewable Energy Department (HAREDA) vide order no.19/7/2019-5P dated 08.03.2019 is completely out of context here and not applicable in the present case and the Petitioner's reliance on the same is highly misplaced. It is submitted that the Prayer sought by the Petitioner cannot be allowed by the Commission in light of the statue and relevant rules in place. It is submitted in demur that even otherwise such a request by the Petitioner to the Commission shows that the Petitioner is not exempted from the payment of cross subsidy charges, additional charges and is thus liable to pay the said charges as determined by the Commission.

z) That the contention of the Petitioner that it is under the control of the government and loss suffered by it is loss to state exchequer is vague in light of the fact that the

Respondent is also a state entity and on top of it a revenue-neutral entity. The exemption as sought by the Petitioner citing the exemption given to the Captive Solar Policy is highly misplaced and erroneous. It is a fact of common knowledge that DISCOMs in Haryana are already financially distressed. Therefore, seeking to impose such financial burden upon the Respondent instead, without considering the ground realities and intent would be unjust and unsustainable in law.

aa) That in light of the aforementioned submissions and contention, the Respondents submit that the present petition is suffering from gross irregularities and fundamental issues of maintainability and bad in law and is liable to be dismissed at the outset. Accordingly, it is prayed as under:-

i) To dismiss the petition filed by the Petitioner with costs;

ii) To direct the Petitioner to pay the cross-subsidy charges, additional charges etc. within a period of 15 days from the order;

iii) To hold that the cost borne by the Respondent in this petition be paid by the Petitioner; and

Proceedings in the Case

8. The case was heard through Video conferencing on 12.01.2021, as scheduled, in view of COVID-19 pandemic. The Commission heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. The main argument made by the Petitioners is that the statutory requirement of being a captive generation plant was never reflected in the Power Purchase Agreement. Had there been any communication from the Respondents to the Petitioners conveying that it is not satisfying the statutory requirement of the captive plant, the Petitioners would have rectified it long back. Now, after a period of 10 years an exorbitant amount of recovery had been calculated and conveyed through the recovery notice. This was a gross violation of the principles of natural justice. It has been submitted that the issuance of notice of recovery to the Petitioners is unjust, arbitrary and an afterthought because petitioner is in operation/generating electricity for more than 10 years. The Respondents has mainly relied upon the argument that the Petitioners have failed to satisfy the requirement of being a captive generation plant on account of self-consumption falling below 51 percent and consequently the Petitioners have become ineligible for getting benefits extended by statute to the captive generation plants.

9. The Commission, vide its Interim Order dated 12.01.2021, directed the parties to file brief summary of their submissions within two days from the date of the Order.

10. In response to the Interim Order of the Commission, HPPC filed its brief submissions on 09.02.2021. HPPC submitted as under:-

Re*: *The Petition is not maintainable: No power with the Commission to exempt payment of statutory charges applicable on similarly placed open access users.

That the Commission does not have the power to exempt an entity (either government or private) from payment of statutory charges, unless provided for, in the Electricity Act, 2003 or spelled out under a policy of the State Government. The Electricity Act, 2003 provides for Open Access Charges to be payable by consumers availing Open Access. The only exception under the Act is Captive Users. Captive users i.e. consumers using power from captive source are exempt from payment of Open Access Charges. [Please see Section 42 (2), Proviso to Section 42 (2) and Section 42 (4) read with Section 10 (2) and Section 9 of the Electricity Act, 2003]. Further, an exemption for a specific category of renewable source or any other source can only be provided for by the State Government, under the provisions of Section 65 of the Electricity Act, 2003. At present, there is no such exemption granted to the sugarcane industry and neither to co-generation power plants. Moreover, the power to relax or the inherent powers of the Commission, as provided for under the OA Regulations, must be exercised to remove any difficulties in use or implementation of the regulatory provisions, and not to grant an exemption which is not provided for in the principal legislation / the Electricity Act, 2003.

Re: ***There is no delay in raising the demand for payment of CSS and AS (Open Access Charges) and other charges.***

That there is no delay on the part of the Respondent in raising the notice / demand for payment of CSS and AS / Open Access Charges. Prior to the execution of the PPA, the Petitioner had projected that the power plant was one of self-use for sugar mills, and therefore a captive power plant. There was a necessity for the Petitioner / Captive Users to file data of units consumed annually, in order to assess whether in any year the consumption fell below 51%. Electricity Rules, 2005, under Rule 3 (2) require a captive user to submit data towards captive consumption annually and as also stipulated by practices and procedures for determination of captive status of a power plant. However,

the captive users / sugar mills in the instant case failed to file any such data on annual basis but continued availing benefit of the exemption offered to captive users under the Act. The submission of the Petitioner that it was not aware is baseless in law, as the Petitioner cannot plead ignorance of law to avail a benefit under law. The Respondents, on prudence and due diligence discovered that the Petitioner was not captive for a particular year and therefore was forced to assess the captive status of the Petitioner plant for past years, and hence the knowledge of the fact that the Petitioner are not captive came to the Respondents only recently and immediately thereupon a notice for recovery was issued by the Respondents to the Petitioner. Hence, there is no delay whatsoever on issuing the recovery notice. Rather, there is a delay on the part of the Petitioner is not bringing it to the knowledge of the Respondents its non-captive status for over 10 years.

In the alternative to the foregoing, assuming but not accepting that there has been a delay on the part of the Respondents herein, it is submitted that it was an error on the part of the Respondents / mistaken belief triggered by the conduct and action of the Petitioner, and therefore the Respondents cannot be held accountable for the delay and Petitioner cannot be permitted to take advantage of their own wrong. In this regard, reliance is placed on the decision of the Supreme Court in *Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Ltd. vs Rahamatullah Khan Alias Rahamjulla (2020 4 SCC 650)*(Para 9, 9.1, 9.2, 9.3) extracted below:-

9. Applying the aforesaid ratio to the facts of the present case, the licensee company raised an additional demand on 18.03.2014 for the period July 2009 to September 2011. The licensee company discovered the mistake of billing.

9.1. Section 56(2) did not preclude the licensee company from raising an additional or supplementary demand after the expiry of the limitation period under Section 56(2) in the case of a mistake or bona fide error. It did not, however, empower the licensee company to take recourse to the coercive measure of disconnection of electricity supply, for recovery of the additional demand.

9.2.As per Section 17(1)(c) of the Limitation Act, 1963, in case of a mistake, the limitation period begins to run from the date when the mistake is discovered for the first time. In Mahabir Kishore and Ors. v. State of Madhya Pradesh [5 (1989) 4 SCC 1] this Court held that :–.(SCC p.11, para 22)

"22. Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could with reasonable diligence, have discovered it. In a case where payment has been made under a mistake of law as contrasted with a mistake of fact, generally the mistake become known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law." (emphasis supplied)

9.3. In the present case, the period of limitation would commence from the date of discovery of the mistake i.e. 18.03.2014. The licensee company may take recourse to any remedy available in law for recovery of the additional demand, but is barred from taking recourse to disconnection of supply of electricity under sub-section (2) of Section 56 of the Act.

Re: There is a statutory obligation to pay Open Access Charges i.e. CSS and AS, by Open Access Consumers, unless captive.

That though the Petitioner have admitted that they are non-captive power plant and therefore have called upon / confirmed the liability for payment of Open Access Charges, the Respondents, only for the sake of brevity and convenience places before the Commission the following decisions of various courts and tribunals, including the Supreme Court, which confirm the said liability of statutory payment (under Section 42 (2), 42 (4), 9 and 10 read with Open Access Regulations, Regulation 21 and Regulation 22) for all Open Access consumers (including those not connected to the lines of the Respondents):

(a) Para 27,28, 30 of ***Sesa Sterlite Ltd. vs Orissa Electricity Regulatory Commission and Ors*****. (2014) 8 SCC 444,** wherein the Hon'ble Supreme Court said that liability to pay Open Access Charges, irrespective of being connected to the lines of the Distribution Licensees.

(b) Para 43 of ***Kalyani Steel Ltd vs Karnataka Power Transmission Corporation Ltd.*****2006 SCC Online APTEL 19** wherein the liability to pay CSS was held to be absolute for Open Access Consumers, unless captive.

(c) Para 87 of ***M/s JSW Steel Ltd. vs MERC, Appeal 311/2018, Order dated 27.03.2019*** wherein it was observed that the additional surcharge is not leviable so far as captive users/ consumers are concerned, and in all other cases, the liability is absolute.

Commission's Analysis and Order

11. After hearing the learned counsel for the parties and going through the record of the appeal, the findings of the Commission on the issues are as under.

12. At the onset the Commission observes that the Respondent - 1 has raised certain preliminary objections regarding admissibility of the present petition as well as the relief sought in the shape of exemption from payment of Cross-Subsidy Surcharge and Additional Surcharge. Before proceeding further in the matter, the Commission shall deal with the ibid preliminary objections. It has been submitted that the petition is not maintainable as the same has been filed by the Managing Director whereas as per the Bye Laws of cooperative societies only the Executive Committee can commence, institute, prosecute and defend all such action instituted by or against them. The Commission has considered the objection raised by HPPC and observes that Co-operative Sugar Mills are also a form of company others would include sole proprietorship, partnership, limited liability / joint stock company etc. However, such Co-operatives may not be registered under the Indian Companies Act. The relevant Regulations i.e. Regulation 23(5) of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 provides as under:-

"(5) Any pleading filed by a company registered under the Companies Act shall be with the approval of its Managing Director except that a pleading filed regarding ARR/Tariff Petition shall be accompanied by a resolution of its Whole Time Directors authorizing such filing".

In the present case the petition has been filed with the approval of the Managing Director and the only distinguishing factor is the 'form' of company i.e. the HERC Regulation (Supra) is silent regarding the authority in case a company is not registered under the Companies Act. Hence, the Commission is of the considered view that the infirmity agitated by the Respondent lacks merit as the affidavit dated 18.01.2020 filed by the MD records that he is 'duly authorized' to file the

present petition. Resultantly, the relief sought by the Petitioner herein ought to be decided on merit.

The next preliminary objection raised by HPPC is regarding the jurisdiction of this Commission on the plea that dispute under PPA has to be resolved as per the terms of the concluded PPA.

The Commission has carefully perused the ibid objection and is of the view that there is nothing available on record regarding efforts made by either party to take re-recourse to the 'Settlement of Disputes" Clause of the PPA. Further, the dispute wherein the claims raised vide the impugned recovery notice dated 29.08.2019 is from the FY 2010-11 onwards is not restricted to the narrow confines of the terms of PPA but encompasses larger issue of applicability of Cross-Subsidy Surcharge and Additional Surcharge as envisaged under the Electricity Act, 2003. Needless to add that it is a settled proposition in law that any dispute between the licensees and generating companies can be adjudicated by the State Commission. Hence, the Commission does not agree with the Respondent HPPC that this Commission lacks jurisdiction in the matter brought before it.

Before delving further in the matter. the Commission has examined the prayer of the Petitioner herein i.e. *"....respondents may kindly be directed to exempt the applicant / petitioner from paying cross subsidy, additional surcharge or any other charges as reflected in the Notice of Recovery dated 29.08.2019".*

The Commission observes that the impugned recovery notice is regarding recovery of cross — subsidy, additional surcharge and Electricity Duty (ED). The ED, as such, is levied and recovered as notified by the State Government and is not in the purview of the State Commission. Further, neither this Commission nor the Respondents have been bestowed with the powers to exempt cross-subsidy surcharge and additional surcharge, as provided in the statute, if the same is applicable. The Petitioner herein, in the hearing held in the matter was also not able to cite any relevant law / case laws or Regulations that may support their prayer for seeking exemption. To the contrary the Respondent would argue that the fact that the Petitioner has sought 'exemption' from payment of CSS and AS is an admission that these charges are payable by them. It is added that levy of CSS / AS flows from the law itself, hence, what is provided in the Electricity Act, 2003 cannot be relaxed / exempted by the Commission by way of

Regulations or even otherwise while exercising adjudicatory function unless the law itself provides for the same. Which is not the present case. Hence, the judgement of Hon'ble Supreme Court in Madeva Upendra Sinai and Ors v. Union of India (UOI) and Ors. (1975) 3 SCC 765 dealing with the issue of 'power to remove difficulty' by relaxing the Regulations cited by the Respondents is of little significance in the present matter.

Having held that this Commission has no powers to grant exemptions, as prayed for by the petitioner, to the dispensations explicitly provided in the Electricity Act, 2003. The Commission shall proceed to examine whether CSS and AS is applicable in the present case or not.

13. To begin with the Commission has examined the contention of the Respondent / HPPC that the petitioner herein projected itself as a 'Captive Power Producer'. A perusal of the PPA dated 18th June, 2009 between M/s Haryana Coop. Sugar Mills (the petitioner) and HPPC on behalf of UHBVN & DHBVN (the respondents) states that *the society (petitioner) has undertaken to install a new generation facility/supplement the existing co-generation facilities by installing plant & equipment, so as to have a total generation capacity of 16 MW, where the society is desirous to sell to HPPC & HPPC agrees to purchase all such energy upto 12 MW during the sugarcane crushing season (w.e.f. November to April of each year subject to maturity/availability of sugarcane crop) as offered by the society for sale of such power.* Further, clause 1.1 of the PPA provides that HPPC shall purchase and accept all such electrical energy up to 12 MW, with PLF 0.75 (sic) during the crushing season, generated by the society as **co-generation** (emphasis added). Additionally, clause 2.5 of the PPA provides that the two transactions i.e. import of energy by the Society from the Distribution Company and the export of energy to the HPPC would be treated as separate.

A plain reading of the relevant terms of PPA establishes the fact that power plant of the petitioner was envisaged as a co-generation project using bagasse as fuel during the cane crushing season and not as a captive power plant. Thus, more than 51% of the energy generated at a PLF of 75% was offered to the respondents. Hence, as per rule 3 of Electricity Rules, 2005 notified on 08.06.2005, the power plant is not a Captive Power Plant but an Independent Power Producer selling power from its Co-generation power plant under PPA to the respondents herein. In the reply, received in the Commission on 9.02.2021, HPPC has placed on record a letter from the Petitioner dated 09.05.2008

(No. SMF – 2008 / TAE / 13888) in support of their contention that the Petitioner had projected that the power plant was one of self-use for sugar mills, and therefore a captive power plant. The Commission has perused the said letter and observes that the letter simply states that "The plant will produce premier quality sugar with bagasse based power generation plant of 16 MWH out of which 11/12 MWH will be exported to State Grid and 4/5 MWH will be utilized by the Mills". Hence, even as per this letter only 25% of the installed capacity was envisaged for self-consumption and the balance was to be exported to the HPPC / Respondents. Thus, the said letter also does not lend any credence to the argument of the Respondents that the cogeneration power plant was a CPP.

14. In view of the above and to arrive at a logical conclusion regarding levy of CSS and AS, the Commission has considered it appropriate to deconstruct the prayer of the Petitioner seeking exemption from levy of these charges and the contention of the Respondent that the power plant of the petitioner is not a CPP hence these charges are leviable on the total own consumption of the petitioner.

Further the case laws cited by the parties are clearly distinguishable on the grounds of facts and figures and hence not relevant for deciding the issues under consideration. The DLFU case (HERC / PRO-8 OF 2011) cited by the Petitioner is not squarely applicable as in the said case the supply of power was being made to a set of consumers having no stake in the power generating plant except on the observations on payment of AS was regarding the claim of DLFU that they are a CPP wherein the Commission held that they are not. Whereas in the present case the sale of power is to the Distribution Licensees under a concluded PPA. The judgments of the Hon'ble Supreme Court in Sesa Sterlite v. OERC and Ors dated 25.04.2014 (2014 8 SCC 444) and that of Hon'ble APTEL in M/s/ Steel Furnace Association of India Vs Punjab State Electricity Regulatory Commission (Appeal No. 38 of 2013), Chhattisgarh State Power Distribution Co. Ltd. Vs Aryan Coal (Appeal No. 119 of 2009 and Appeal No. 125 of 2009 dated 9.02.2010 are also not very relevant as the Hon'ble Courts were seized of the matter regarding payment of CSS / AS when a consumer decides not to take supply of power from the Distribution Licensee of the area de hors the fact whether lines of the Licensee is used or not. In the present case the Respondents have issued a recovery notice claiming CSS/ AS on self-consumption of the Petitioner from its own Co-

generation power plant as the same fell short of 51% to qualify as a CPP. Resultantly, the statute occupying the field been examined as under:-

15. **Cross Subsidy Surcharge (CSS) & Additional Surcharge (AS)**:- The Commission observes that the operative part of the Electricity Act 2003 is covered under Section 42 of the Act as under:-

"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 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 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:"

Evidently, the law clearly provides that cross-subsidy surcharge shall not be applicable in case a generator is captive power plant which is not the case here as it has already been held that by the Commission that the power plant of the petitioner herein was not envisaged as a captive power plant.

It is also evident from the generation and consumption data placed on record that the Petitioner herein was exporting electricity to the Discoms /HPPC as well as drawing electricity from the Discom of his area of supply as a consumer. However, as per the terms of PPA clause 2.5, *"The two transactions i.e. import of energy by the Society from the Distribution Company and export of energy to the HPPC would be treated as separate. For import of energy, the Society would pay to the Distribution Company (at present UHBVN) for the power sold to the Society by the Distribution Company as per*

the tariff applicable. For the energy exported by the Society to the HPPC, the Society shall raise monthly bills as per the tariff described in clause 1.1.1". It is observed that the total own consumption would obviously include auxiliary energy consumption of the power plant as well as power requirement of the processes of the Sugar Mill. While the import from the Grid could be required for start - up power as and when required and for factory lighting during non-crushing season when there is no generation. In fact, the tariff paid by the Petitioner for import from the Grid would be the HT Industrial Tariff wherein the element of cross-subsidy is already built-in i.e. the tariff determined by the Commission is in excess of the CoS. Hence, it may not be appropriate to slot the petitioner herein as a 'Open Access Consumer' as no power is brought in by the Petitioner under Open Access Mechanism. Moreover, utilizations of power from self-generation ought not to be considered as purchase of power from sources other than the Distribution Licensee of the area. Had there been sale or purchase of power to a third party then in that case dispensations for Open Access could have triggered of.

Before concluding on the issue of CSS, the Commission has examined the HERC Open Access Regulations in vogue as under:-

*"**21. Cross subsidy surcharge**. - (1) If open access is availed by a consumer of a distribution licensee of the State, then such consumer, in addition to payment of transmission and / or wheeling charges, shall pay cross subsidy surcharge. Cross subsidy surcharges on per unit basis shall be payable, on monthly basis, by the open access consumer for the actual energy drawn through open access during the month. The amount of surcharge shall be paid to the distribution licensee of the area of supply in which such consumer is located.*

Provided that such surcharge shall not be levied on a person who has established a captive generation plant and carries the electricity to the destination of his own use.

(2) Cross subsidy surcharge shall also be payable by such open access consumer who receives supply of electricity from a person other than the distribution licensee in whose area of supply he is located, irrespective of whether he avails such supply through transmission / distribution network of the licensee or not."

It is evident from the ibid regulations that CSS is payable by a 'Consumer' if such consumer avails 'Open Access' to bring in power from a source other than the

Distribution Licensee of the are where he is located. In the present case this is not the case as the petitioner herein is not availing supply of power from any other source but meeting its requirements from its own co-generation power plants and the Distribution Licensee of his area viz. UHBVN. As a corollary it can be deduced that in case energy is supplied to the Distribution Licensee of the area no Cross – Subsidy surcharge is payable. However, if the power plant also sells power to a consumer who is permitted 'Open Access' then in such cases the associated charges including CSS and AS shall become applicable.

16. The lone issue surviving for the consideration and Order of the Commission is regarding admissibility of 'Additional Surcharge'. Section 42(4) of the Electricity Act, 2003 provides as under:-

" (4) Where the State Commission permits a consumer or a class of consumer 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"

Further, the HERC Open Access Regulations in Vogue provides as under:-

"22. Additional Surcharge. -(1) 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 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.
Provided that such additional surcharge shall not be levied in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.

(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 the details regarding the quantum of such stranded costs and the period over which these remained stranded and would be stranded. The Commission shall scrutinize the statement of calculation of such stranded fixed costs submitted by the distribution licensee and determine the amount of additional surcharge. Provided that any additional surcharge so determined shall be applicable to all the consumers availing open access from the date of determination of same by the Commission."

A perusal of the provisions of the Electricity Act, 2003 and the Regulations framed thereunder (Supra) establishes the fact that the pre-condition for levy of AS is that the Consumer should be purchasing "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". Further the AS is in the nature of surcharge on the charges of wheeling. The obvious reference is to sale of power to a third party i.e. other than the Discoms where wheeling / transmission charges are payable. However, in the present case neither the supply of electricity is from a person other than the distribution licensee of his area nor wheeling of power is involved as the Petitioner has provided, at its own cost, the required transmission line from its switch year to the Grid Sub-station (Cf. Clause 5.3 of the PPA). Further, the meters (main & check) for the purpose of billing is installed at the inter-connection point defined as the interconnection between the generation facility and the grid system of the Respondent Nigam, the delivery point is also the same (Cf. definitions 7 & 19 of the PPA). Resultantly, no wheeling of power as such to any consumer(s) is involved, hence, Additional Surcharge is not payable by the Petitioner herein.

In view of the above findings the issue of delay in issuing recovery notice supported by citation by the Respondents from the judgement of the Hon'ble Supreme Court in Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Ltd. Vs Rahamatullah Khan Alias Rahamjulla (2020 4 SCC 650) (para 9, 9.1 9.2, 9.3) becomes irrelevant in the present context.

To conclude, the Commission Orders that:

i) Cross subsidy Surcharge and Additional Surcharge is not recoverable by the Respondents i.e. HPPC / Discoms and hence the recovery notice dated 29.08.2019 is set aside.

ii) The Commission is of the view that the Power Purchase Agreement signed between the parties is sacrosanct and Clause 2.5, reproduced hereunder, should be adhered to:-

> *"2.5. The two transactions i.e. import of energy by the Society from the Distribution Company and the export of energy to the HPPC would be treated as separate. For import of energy, the Society would pay to the Distribution Company (at present UHBVN) for the power sold to the Society by the Distribution Company as per the tariff applicable. For energy exported by the Society to the HPPC, the Society shall raise monthly bills as per the tariff described in Clause 1.1.1".*

Further, separate account for import of energy by the society from the Distribution Company and export of energy to HPPC should be maintained.

iii) Levy and recovery of Electricity Duty (ED) shall be in accordance with the relevant notification of the Haryana Govtt. as may be amended from time to time. The Discoms / HPPC is recovering ED on behalf of the State Govtt. and the same is beyond the purview of this Commission.

The petition is accordingly disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 15.02.2021.

Date: 15.02.2021	(Naresh Sardana)	(Pravindra Singh Chauhan)
Place: Panchkula	Member	Member