

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

APPEAL NO. 84 OF 2015

Dated: 20th November, 2015

**Present: Hon'ble Mr. Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:

1. Gujarat Urja Vikas Nigam LimitedAppellant No.1
Sardar Patel, Vidyut Bhavan Race Course,
Vadodara-390007.
 2. Dakshin Gujarat Vij Company Limited,Appellant No. 2
Nana Varachha Road,
Kapodara, Surat-395006.
- Versus
1. Gujarat Electricity Regulatory CommissionRespondent No.1
First Floor, Neptune Tower,
Opposite Nehru Bridge,
Ashram Road, Ahmedabad-380009.
 2. Essar Steel India LimitedRespondent No.2
Essar House, Opp – Gujarat College
Ellisbrige, Ahmedabad-380006.

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s) : Mr. Ramji Srinivasan, Sr. Adv.
Ms. Neeha Naghal
Mr. Nitesh Guypta
Mr. Vikrant Pachnanda
Mr. Rishabh Kapur
Mr. Kunal Nanavati

Mr. Mahesh Agarwal for R-2

Ms. Suparna Srivastava

Ms. Anuska Arora

Mr. Shubham Arya

Mr. S.R. Pandey for R-1

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal is filed by the Appellants M/s. Gujarat Urja Vikas Nigam Limited (hereinafter referred to “**Appellant No.1**”) a company incorporated under the provisions of Companies Act, 1956 and undertakes the functions of bulk purchase of electricity from generator and other sources and bulk supply of electricity to the Distribution Licensees in the State of Gujarat and M/s. Dakshin Gujarat Vij. Company Limited (hereinafter referred to “**Appellant No.2**”) is the Distribution Licensee and has been vested with the functions of distribution and retail supply of electricity in the southern areas of the State of Gujarat, against the Impugned Order dated 13.01.2015 passed by the Gujarat Electricity Regulatory Commission (hereinafter referred to “**State Commission/Respondent No.1**”) in Petition No. 1362 of 2013 regarding levy of Additional Surcharge under Sub-Section 4 of Section 42 of the Electricity Act, 2003 read

with Regulations 25 of the Gujarat Electricity Regulatory Commission (Terms and Conditions of Inter State Open Access) Regulation 2011 on Essar Steel India Limited (hereinafter referred to “**Respondent No.2**”).

2. The Appellants are aggrieved by the Impugned Order dated 13.01.2015 where by the State Commission has allowed petition filed by the Respondent No.2 – Essar Steel India Limited holding that the Distribution Licensee, Appellant No.2 herein is not entitled to claim Additional Surcharge from Respondent No.2 as per Section 42(4) of the Electricity Act, 2003.
3. The Appellants are aggrieved by the Impugned Order dated 13.01.2015 passed by the State Commission due to the following aspects:-
 - (i) The State Commission has not considered the charges in respect of Additional Surcharge to compensate the Distribution Licensee – Appellant No.2 for the entities in the area of its license not taking power from the Appellants but taking partly/fully from the third party sources, as the Respondent No.2 is drawing power fully from the third party but is located within the area of the Distribution Licensee – Appellant No.2.

By doing so, there is loss to the Distribution Licensee – Appellant No.2, including in the form of Stranded Power Purchase Cost due to its universal supply obligation which needs to be compensated by way of Additional Surcharge. The Appellants' main contention is since the Respondent No.2 is connected to the Intra State Transmission System and is availing open access to such Intra State Transmission System or otherwise is an embedded Customer of the Distribution Licensee in some way and the location of the premises of the Respondent No.2 where the electricity is being consumed is located within the licensed area of the Distribution Licensee – Appellant No.2 and the fact that for the third party sourcing, the entity would have, in the ordinary course, taken electricity from this Distribution Licensee.

- (ii) The State Commission has not considered that in terms of Section 42 and 43 of the Electricity Act, 2003, the Appellant No. 2 has the duty to supply electricity at the request of any person within its area of license by providing suitable connection within one month including those who may not be presently connected to the distribution/transmission system of the State. The

Appellant No. 2 has the Universal Service Obligation and is required to arrange for power purchases to meet such obligation to all. The Appellants further stated that they cannot refuse such an obligation on any ground, to anyone and in their views, the Additional Surcharge is the compensatory charge arising out of the power purchase cost getting stranded out of the quantum of power purchases approved by the State Commission.

- (iii) The Appellants further alleged that the State Commission has proceeded on the wrong basis that the pre-condition for levying Additional Surcharge is connectivity to the distribution system or transmission system in the state of Gujarat. In the opinion of the State Commission, Essar Steel India – Respondent No.2 is connected with the Inter State Transmission System of Powergrid Corporation of India Limited and is further using the network of transmission licensee, namely Essar Power Transmission Company Limited and is, therefore, wheeling/conveying power through open access.

(iv) The reasons given in the Impugned Order dated 13.01.2015 for the above are:

(a) The Respondent No.2 does not have a contract demand from Appellant No.2, the Distribution Licensee which is a pre-condition for claiming Additional Surcharge.

(b) Appellant No.2 agreed to disconnect Essar Steel from the Intra State System of the State and directly connected to the Inter State System of Powergrid.

(c) Essar Steel – Respondent No.2 is not availing open access to the transmission and / or distribution system of the State of Gujarat.

(d) Respondent No.2 is self-reliant, having tied up with the power generators for direct procurement without any participation by the Appellants.

(e) Respondent No.2 is not really an embedded customer of the Appellant No.2 in the Intra State System.

4. The contention of the Appellants in the present Appeal is that Respondent No.2 has a manufacturing facility within the area of license of the Appellant No.2. Respondent No.2 was the consumer of the Appellant No.2 with a contract demand of 44.5 MVA and was

being earlier supplying electricity by the Appellant No.2 and was using the network of the Gujarat State Transmission Utility. Thereafter, the Respondent No.2 became desirous of taking direct connectivity to the Inter-State Transmission network of the Power Grid Corporation of India Limited (hereinafter referred to “Powergrid”) and filed Petition No. 245 of 2012 before the Central Commission seeking such connectivity to the Powergrid transmission system including that the Respondent No.2 should be treated as independent entity in regard to scheduling and dispatch.

5. The Central Commission vide its Order dated 08.06.2013 allowed the Petition No. 245 of 2012 filed by the Respondent No. 2 subject to certain conditions contained in the order as under:

“49. In the light of the above discussion and after considering the views of Central Electricity Authority, the following directions are issued for compliance by all concerned:

- (a) The load control area jurisdiction of ESIL shall be shifted from Gujarat SLDC to WRLDC, Mumbai after disconnection of ESIL from Gujarat Transmission system.***
- (b) ESIL shall be granted status of a Regional Entity of Western Regional Grid.***
- (c) Scheduling and energy accounting of ESIL shall be carried out by WRLDC in accordance with the prevailing Regulations.***

- (d) All telemetry, voice and data communication in accordance with the IEGC shall be provided by ESIL to the satisfaction of WRLDC before commencement of scheduling of ESIL.**
- (e) ESIL shall comply with various provisions of Connectivity Regulations, Grid Code, UI Regulations and other relevant regulations of the Commission and maintain its drawal as per schedule.**
- (f) All instructions of WRLDC shall be complied with by ESIL in accordance with the 2003 Act and Grid Code and any instance of non-compliance by ESIL would be viewed seriously and dealt with in accordance with law.**
- (g) RLDC may like to satisfy about the effectiveness of the system of load shedding scheme in case of Generator outage and suggest suitable operation protocol to the petitioner to make this system responsive for safer grid operation. Petitioner shall provide necessary arrangements at its own cost.**
- (h) ESIL shall be granted status of Designated ISTS Customer (DIC) and since it is connected at 400 KV node of CTU network and not connected with state system, it will be considered as a separate (drawal) zone in accordance with the principles adopted for generating stations directly connected at 400 KV ISTS under the Sharing Regulations as amended from time to time. Till computation of POC charges for next application period, Gujarat Withdrawal Zone charges and losses shall be applied in case of ESIL.**
- (i) Staff of the commission shall process the case for necessary amendment to the Grid Code to clarify the position of bulk consumers which are connected only to inter-State transmission system and the major portion of its long term power is coming from a generator located outside the state in which bulk consumer is located.**
- (j) M/s. ESSAR steel Ltd. shall remain liable to pay all applicable cross subsidy charges including surcharge and**

other charges, if any, applicable under the provisions of the 2003 Act and as per the provisions of the regulations of State Regulatory Commission. Necessary meeting arrangement shall be in accordance with the arrangement as already agreed to between ESIL and DGVCL.

(k) The issue of dues of DGVCL needs to be sorted out by DGVCL and ESIL bilaterally.”

6. The Appellants have submitted that the mechanism of the Additional Surcharge is to compensate the adverse effect of the exit of consumers on finances of the Distribution Licensee in terms of recovery of the fixed cost. Such adverse effect is due to a consumer in the area not taking supply from the Distribution Licensee but to avail it from other sources. Such adverse effect due to the stranded capacity is irrespective of whether the line of Distribution Licensee or any other licensee in the State is being used or not. As per the Appellants, there is no pre-condition of the use of intra state network or levy of wheeling charges i.e. use of the licensee's line for compensation in the form of Additional Surcharge for such adverse effect.

7. The Appellants have relied on the decision of the Hon'ble Supreme Court in Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission (2014) 8 SCC 444 where the Hon'ble Court had

considered the scheme and objective of surcharge on both aspects, cross-subsidy surcharge and Additional Surcharge and held that the mechanism of such surcharge is meant to compensate the Distribution Licensee for the exit of a consumer. The extracts of the judgment in Sesa Sterlite Ltd. case referred to by the Appellants in the submissions read as under:

***“13. Without prejudice to the aforesaid preliminary submission, Mr. Divan argued that even on merits such a decision was palpably contrary to law. IN this behalf his submission was that since under Section 42 of the Electricity Act, 2003, cross-subsidy surcharge is applicable to the distribution licensee of the area of supply only when the “distribution system” of such distribution licensee is “used” for supply of electricity. Therefore, without a clear finding of fact on appreciation of evidence, that the supply-line of SEL-VAL is connected to WESCO and that WESCO’s “distribution system” is “used” for supply of electricity, the State Commission could not have held that VAL has to pay cross-subsidy surcharge to WESCO for open access drawal of power from SEL. In this context, the attention of the Court was drawn to the National Tariff Policy dated 6.1.2014, Clause 8.5, the Orissa Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005 [(Regulation 13(1)(ii)] and to the Orissa Electricity Regulatory Commission (Determination of Open Access Charges) Regulations, 2006 [Regulation 2(j)]. It was submitted that from a bare perusal of the relevant clauses of these Regulations, it is clear that CSS can be levied on “open access customers” i.e. “a consumer who has availed of or intends to avail of open access.*”**

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

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

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

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

29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provisions 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.**

30. Therefore, in aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer, would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low end 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.

(4) Application of the Cross-Subsidy Surcharge principle

31. In the present case, admittedly, the appellant (which happens to be the operator of an SEZ) is situate within the area of supply of WESCO. It is seeking to procure its entire requirement of electricity from Sterlite [an independent power producer (IPP)] (which at the relevant time was a sister concern under the same management) and thereby is seeking to denude WESCO of the cross-subsidy that WESCO would otherwise have got from it if WESCO were to supply electricity to the appellant. In order to be liable to pay cross-subsidy surcharge to a distribution licensee, it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is situated and it is not necessary that such consumer should be connected only to such distribution licensee but it would suffice if it is a “Consumer” within the aforesaid definition.”

8. The Appellants have also relied on the decision of this Tribunal in the case of Chhattisgarh state Power Distribution Company Limited Vs. Aryan Coal Beneficiaries Pvt. Limited 2010 ELR (APTEL) 476 and the relevant extracts of this judgment quoted by the Appellants are as under:

“17. The cross-subsidy surcharge, which is dealt with under the proviso to Sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee’s line. It is 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 the

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.”

9. The Appellants have also referred to the National Tariff Policy dealing with the line of cross-subsidy surcharge and Additional Surcharge for open access as under:

“8.5.3 the surcharge may be collected either by the Distribution Licensee, the Transmission Licensee, the STU or the CTU, depending on whose facility are used by the consumer for availing electricity supplies. In all cases the amounts collected from a particular consumer should be given to the Distribution Licensee in whose area the consumer is located. In case of two licensees supplying in the same area the licensee from whom the consumer was availing supply shall be paid the amount collected.”

10. Based on the above, the Appellants have submitted that the Additional Surcharge is payable to the Distribution Licensee by a person having premises within the area of Distribution Licensee when it receives supply of electricity notwithstanding that no part of the Distribution Licensee network is used. The Additional Surcharge being the compensation to the Distribution Licensee for the person not availing the electricity from this Distribution Licensee is still payable. But for sourcing electricity from third party, the Respondent No.2 would have taken a quantum of power from Appellant No.2 the

Distribution Licensee and to that extent, there would not have been stranded capacity in the hands of Appellants No.2.

11. The Appellants have submitted the reason for cross-subsidy surcharge and Additional Surcharge may be different but they are both compensatory surcharges and such compensation would be payable irrespective of whether its line is used or not.
12. **The main issue for our consideration is whether the Additional Surcharge is leviable on Respondent No.2 by the Appellant No.2?**
13. We have heard at length the Learned Counsel Mr. M.G. Ramachandran for the Appellants, Ms. Suparna Srivastava, Learned Counsel for the State Commission and Learned Senior Counsel Mr. Ramji Srinivasan for Respondent No.2 and arguments put forth and our observations are as follows.
14. The Appellants argued that the reliance placed by the State Commission on the decision of this Tribunal in Kalyani Steel Limited Vs. Karnataka Power Transmission Corporation Limited & Ors. in Appeal No. 28 of 2015 decided on 29.03.2006 is not correct for the reasons that subsequent decision of the Hon'ble Supreme court in Sesa Sterlite Limited case declaring the principle of law is a binding

precedent and further in Kalyani Steel Limited case, the Tribunal had considered a dedicated transmission line and no part of system of any licensee was being used. In the present case, Respondent No.2 is utilizing the transmission system of Power Grid Corporation of India Limited/Central Transmission Utility and Essar Power Transmission Company Limited mentioned in the conditions of the Appellants.

15. The Appellants have urged that the State Commission had proceeded on an erroneous basis that there is no wheeling of power as the Respondent No.2 is not utilizing the transmission or distribution system and, therefore, is not liable to pay Additional Surcharge. Any line of a transmission licensee, whether intra-state or inter-state, whether Central Transmission Utility, State Transmission Utility or of Distribution Licensee, used for conveyance of electricity from any point from the place of generation until the installation of consumer would amount to wheeling of electricity within the meaning of Section 42 (4) read with section 2(76) of the Electricity Act, 2003.
16. The Appellants have argued that the Respondent No.2 in the proceedings before the Central Commission in Petition No. 245/MP/2013 itself stated that grant of direct connectivity to the Inter State Transmission Line by the Power Grid corporation of India

Limited shall not in any manner affect the liability of Respondent No.2 to the payment of cross-subsidy surcharge and other related charges to the Appellants when the Appellants raised the issue of payment of cross-subsidy surcharge and Additional Surcharge by Respondent No.2. The Appellants in the present Appeal have referred all the contents of the Order dated 08.06.2013 passed by the Central Commission as under:

“8. Gujarat Urja Vikas Nigam Limited (GUVNL) in its affidavit dated 18.1.2013 and supplementary affidavit dated 1.14.2013 has submitted as under:

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(b) Before implementing the scheme as proposed by the petitioner, Essar Power and its group companies namely, ESIL and Bhandar Power Ltd. should confirm that the transfer of load control area jurisdiction shall not adversely affect GUVNL rights under the PPA. Moreover, this company should also pay all the amounts outstanding to GUVNL. In addition, the petitioner should be required to pay the cross subsidy surcharge and other charges related to DGVCL for consumption of electricity sources from Essar Power and EPMPPL as per the applicable provisions of the 2003 Act.

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9. Dakshin Gujarat Viz Company Limited (DGVCL) in its affidavits dated 17.1.2013 and 5.4.2013 has submitted as under:

(a) DGVCL is one of the distribution licensees in the State of Gujarat and the petitioner is located in the area of operation of DGVCL with a contracted capacity of 44.5 MVA with DGVCL. There is an outstanding due of Rs.2118.44

crore out of the total amount of Rs.2331 crore raised by DGVCL on the petitioner as penalty for the violation of the condition NO.22 of the MoM dated 1.2.2010 which needs to be paid by the petitioner before seeking surrender of contract demand DGVCL and connection to the CTU network for taking supply from third parties.

- (b) The petitioner is required to install an electricity meter at 400 kV sub-station at Jhanor, i.e. the sending end of the CTU inter-connection network of the radial line in accordance with applicable rules. The petitioner being in the areas of operation of DGVCL, is also required to pay cross subsidy surcharge to DGVCL for the supply taken by the petitioner from the third parties as recorded at the meter at the CTU inter-connection network.**
- (c) There is no proceedings regarding penalty pending before the Appellate Tribunal for Electricity and the only proceeding is pending before Chief Electrical Inspector. It has been submitted that unless all claims raised by DGVCL are settled by ESIL, there is no question of giving No Objection by DGVCL. As regards the installation of metes, it has been submitted that since Essar Power Transmission's system will intervene between the CTU system and ESIL's system, meters can be installed at the 220 kV side of the sub-station for the purpose of measuring the cross subsidy and calculation of surcharge thereon.**

10. The petitioner in its rejoinder has submitted as under:

- (a)**
- (d) The petitioner has confirmed that transfer of load control area jurisdiction shall in no way adversely affect GUVNL's right under its PPA with EPOL. The petitioner has further confirmed to pay cross subsidy surcharge and other related charges to the distribution companies in terms of the applicable rules and regulations. It has been submitted that any disputed claim by GUVNL: on ESIL shall be subject to the grievance redressal mechanism under the**

applicable law. If the prayer of the petitioner to be treated as a regional entity is accepted, the petitioner shall be subject to the rules and regulations for settlement of disputes between regional entities.

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“6. The surcharge under section 38: The surcharge on transmission charges under section 38, the manner of progressive reduction of such surcharge and the manner of payment and utilization of such surcharge to be specified by the Central Commission under sub-clause (ii) of clause (d) of sub-section (2) of section 38 shall be in accordance with surcharge on the charges for wheeling, the manner of progressive reduction of such surcharge and the manner of payment and utilization of such surcharge as may be specified by the Appropriate Commission of the State in which the consumer is located under sub-section (2) of section 42 of the Act.

From the above provision it emerges that the CTU network can carry the power to a consumer subject to the open access provided by the State Commission under section 42 of the Act and subject to the payment of surcharge as determined by the concerned State Commission in whose area of supply the consumer is located. Similar provision also exists in case of transmission licensee under section 40 of the Act. There is therefore no embargo under the Act and the Electricity Rules which prevents a consumer to take direct supply of electricity from the network of the CTU or from any inter-State transmission licensee. That being the case, there is absolutely no basis to say that a consumer is bound to be connected to the system of a distribution licensee for taking supply directly from a generating company by utilizing the ISTS. When a consumer is directly connected to the ISTS, its scheduling and energy accounting has to be done by the concerned RLDC under section 28(3)(a) of the 2003 Act and such consumer is liable to comply with the directions of the

RLDC under section 28(3) of the Act and pay the surcharge specified by the State Commission under section 42 of the 2003 Act.”

17. In support of their present Appeal, Appellants have already relied on the decision of this Tribunal order in the Appeal No. 59 of 2013 (Maharashtra State Electricity Distribution Company Limited Vs. Maharashtra Electricity Regulatory Commission & Anr.) and Appeal No. 116 of 2013 (Maharashtra State Electricity Distribution Company Limited Vs. Maharashtra Electricity Regulatory Commission & Ors.) and referred to following part of the order:

“22. Section 42 (2) of the Electricity Act provides for open access in the distribution system on payment of wheeling charges and surcharge as specified by the State Commission and the surcharge to be utilized to meet the requirement of cross subsidy within the area of supply of the Distribution Licensee. However, the surcharge shall not be levied in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. According to Section 42(2) of the Act, the open access consumer is also liable to pay Additional Surcharge as may be specified by the State Commission to meet the fixed cost (stranded cost) of the Distribution Licensee arising out of his obligation to supply. Therefore, if there is a stranded cost which the Distribution Licensee has to Appeal no. 59 of 2013 and Appeal no. 116 of 2013 Page 26 of 41 bear out his obligation to supply to open access consumer, the Distribution Licensee can submit its claim for Additional Surcharge in its petition for ARR and tariff for consideration of the State Commission while deciding the wheeling charges, surcharge and Additional Surcharge for open access consumers. Thus, the law has provided a remedy for recovery of stranded cost of the

Distribution Licensee out of its obligation to supply to an open access consumer. Therefore, if the Appellant Distribution Licensee finds that it has to bear some fixed cost (stranded cost) due to its obligation to supply to the open access consumer, it can always approach the State Commission with supporting data and claim Additional Surcharge in its ARR/tariff. Whenever such claim is raised by the Appellant, the State Commission shall consider the same and decide as per law.

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34. Summary of our findings

- i) Maintaining of full contract demand with the distribution licensee by consumer availing power through open access from wind energy generators. Summary of our findings Appeal no. 59 of 2013 and Appeal no. 116 of 2013 Page 39 of 41 The combined reading of the Open Access Regulations, 2005 and Supply code Regulations, 2005 clearly shows that only the open access consumer has the option to reduce or terminate its contract demand with the Distribution Licensee. The Distribution Licensee on its own cannot terminate or reduce the contract demand to the extent of quantum of open access. There is also no deemed reduction of contract demand of a consumer which obtains open access. This issue is also covered by judgment of this Tribunal in Appeal no. 34 of 2006 and Appeal no. 1 of 2006. The open access consumer who maintains full contracted demand with the Distribution Licensee is liable to pay for demand charges which should cover the fixed cost of the Distribution Licensee. In case the Distribution Licensee is not able to recover full fixed cost for the power arranged for such consumer then the Distribution Licensee has liberty to put up a case with supporting Appeal no. 59 of 2013 and Appeal no. 116 of 2013 Page 40 of 41 documents for the recovery of same for consideration of the State Commission to appropriately compensate the Distribution Licensee so that the burden is not passed on to other consumers. Further, the law has provided a remedy for recovery of stranded cost of the***

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

18. In response to the above on behalf of the Respondent No.2, Senior Learned Counsel, Mr. Ramji Srinivasan argued that no Additional Surcharge is leviable on Respondent No.2 because there is no obligation on the part of the Appellants to supply electricity to Respondent No.2 and the network of the Appellant No.2 is not being used and further stated that w.e.f. 24.06.2013, Essar Steel ceased to be a consumer of the Appellant No.2 and is connected to the Central Transmission Utility and Western Regional Load Dispatch Centre. As the Appellant No.2 has no obligation to supply electricity to Respondent No.2, therefore, no stranded capacity for which the Additional Surcharge can be claimed. Learned Senior Counsel further stated that Respondent No.2 had undertaken capacity addition since it required 700 MW and the capacity available with STU only 300 MW and further stated that Respondent No.2 was compelled to disconnect from the STU network and had relied on the following

paras of the order dated 08.06.2013 passed by the Central Commission in support of above:

“29. Thus it is apparent from the above that ESIL was given connectivity as drawee entity of EPMPPL and this connectivity was subject to its disconnection from Gujarat System (GETCO). There was technical reason for this decision that through GETCO system, it was not possible to draw more than 300 MW and requirement of ESIL was 700 MW. In case both GETCO system and ISTS connectivity were given, then through the load flow study it was evident that GETCO system was getting overloaded as most of power flowed through GETCO system. Hence the decision to disconnect ESIL from GETCO system was made a pre-condition for supply through ISTS in a radial mode. Based on this decision, LTA and connectivity was given on 23.12.2008 to EPMPPL with 700 MW to ESIL as drawee entity. That being the case, the petitioner will no more be connected to the State system and will be connected to the ISTS only. Moreover, it is noticed from the letter of WRLDC dated 30.03.2012 regarding charging of 400 kV D/C Gandhar Hazira Transmission line and 400/220 kV GIS sub-station at Hazira that disconnection from the State System has been made a pre-condition for connectivity to the WR system. The relevant paragraphs of the letter are extracted below:

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

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

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

It is evident from the above letter that WRLDC itself was of the view that load dispatching requirement need to be fulfilled either with SLDC or with WRLDC. Even WRLDC has insisted on the petitioner to submit relevant no objection certificate from DGVCL for making the connection of ESIL with the WR on radial mode. DGVCL has given commitment to provide No Objection for connection of ESIL with WR on radial basis. Once the petitioner is disconnected from the system of the concerned distribution licensee and is directly connected to the WR system in radial mode, it has no connection with the State System and therefore, it naturally follows that its scheduling and energy accounting is undertaken by WRLDC. It is gathered from the replies of GETCO, DGVCL and GUVNL that there is no objection to the direct connectivity of ESIL with the WR system, except the settlement of commercial issues like clearance of outstanding dues and payment of cross subsidy surcharge for not using the system of DGVCL as determined by the State Commission.”

19. It has also been argued by Respondent No.2 that they are not consumer of Appellant No.2 and Appellant No.2 has no universal service obligation as per Section 43(1) of the Electricity Act, 2003 to supply electricity to the premises of Respondent No.2 though the same may be located in the Distribution Licensee area of Appellant

No.2 and Respondent No.2 has made arrangement for 1381.50 MW which is adequate for its requirement and is not dependent on Appellant No.2 to supply electricity and further argued that decision of the Hon'ble Supreme Court in Sesa Sterlite Limited is only on the aspect of cross-subsidy surcharge and not on the Additional Surcharge though there are some observations as to Additional Surcharge and the principles on which Additional Surcharge liability are to be considered are different from the basis on which cross-subsidy liability are decided. Respondent No.2 referred to the decision of this Tribunal in Kalyani Steel Limited Vs. Karnataka Power Transmission Corporation Limited & Ors. in Appeal No. 28 of 2005 decided on 29.03.2006 and based on the above, it has been stated that under Section 42(4) of the Electricity Act, 2003, Additional Surcharge is payable only if wheeling charges are payable and not otherwise. On behalf of Respondent No.1, the State Commission, the Learned Counsel submitted that there is a difference between application of cross-subsidy surcharge and Additional Surcharge and that the various decisions relied by Appellants including Sesa Sterlite Limited case is in regard to the cross-subsidy and not Additional Surcharge. According to the State Commission, the Additional

Surcharge is payable when the person is a consumer of the Distribution Licensee and Respondent No.2 not being connected to the system of Appellant No.2 or STU so in the opinion of State Commission, the Respondent No.2 cannot be considered as consumer of the Appellants and it is not liable to pay Additional Surcharge.

20. Our observations are detailed in the succeeding paragraphs.
21. The matter in dispute regarding applicability of levy of Additional Surcharge emerges from the provisions contained in Section 42 & 43 of the Electricity Act, 2003 read with Regulation 25 of the Open Access Regulation, 2011, issued by the State Commission which inter-alia, provides as under:

Section 42 & 43 of the Electricity Act, 2003

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

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

other operational constraints:

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

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

(3) Where any person, whose premises are situated within the area of supply of a distribution license, (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 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.

.....

43. Duty to supply on request:

- (1) Every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:**

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate commission:

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

- (2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):**

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price determined by the Appropriate Commission.

- (3) If a distribution licensee fails to supply the electricity within a period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.”**

Regulation 25 of Open Access Regulations, 2011, provides as under:-

“.....25. Additional Surcharge

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

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

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

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

Provided that any Additional Surcharge so determined by the Commission shall be applicable only to the new open access customers.

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

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

22. Regulation 25 (1) of the said Open Access Regulations, 2011 recognizes that the Distribution Licensee is entitled to receive Additional Surcharge on charges of wheeling in addition to wheeling charges. Regulation 25(2) of the said Open Access Regulations, 2011, state that conditions in which the Additional Surcharge shall become applicable, that only if the obligations of supply in terms of Power Purchase Agreement continues to be stranded or there is unavoidable circumstances due to which the Distribution Licensee shall bear the fixed cost consequent to contract with generator to meet the contracted demand of the consumers. The Regulation 25(3) of the said Open Access Regulations, 2011 provides for determination of Additional Surcharge by the State Commission after examining fixed cost incurred by the Distribution Licensee to its obligation to supply to the consumers.

From the provisions contained in Section 42(4) of the Electricity Act, 2003 read with Regulation 25 of the Open Access Regulations, 2011 notified by the State Commission, it is clear that the Additional

Surcharge applicable to the open access consumers, who is having the contracted demand with the Distribution Licensee and availing the open access and is an embedded consumer of the Distribution Licensee.

In the present case, the Respondent No. 2 is self reliant and has already tied up with private generator for procurement of power and as such the Appellants should not have any obligation to supply power to the said company under Section 42(4) of the Electricity Act, 2003.

Though, it shall be the duty of the Distribution Licensee and its universal service obligation to provide requisite demand by any consumer but in the present case the point of consideration would be limited. Whether the Respondent No.2 is to be treated as a consumer of the Distribution Licensee?

23. While disposing of the petition filed by the Respondent No.2 before the Central Commission, the central commission vide its order dated 08.06.2013 allowed the Respondent No.2 to get disconnected from Intra-State Transmission System and to use the Inter-State Transmission system of Power Grid Corporation of India Limited and the transmission system provided by the Essar Steel Power

Transmission Company Limited. Para 28 of the Central Commission's order dealing with this subject read as under:

“B. Control Area Jurisdiction over the petitioner

28. Having coming to the conclusion that the RLDC is permitted under the Grid Code to exercise jurisdiction over a bulk consumer subject to fulfillment of certain conditions, next we proceed to examine the case of the petitioner. It is noticed from the minutes of the 27th meeting of Standing Committee on Power system Planning of Western Region held on 30.07.2007 that M/s. Essar Power MP Ltd had sought long term open access for 1100 MW i.e. 700 MW to the petitioner and 400 MW to MP. GETCO had taken a stand in the said meeting that inter-connection to the petitioner shall be on a standalone basis i.e. on radial mode and shall not be connected to 220 kV network at any point. Accordingly, the LTOA was agreed and LTOA intimation was given by PGCIL's letter dated 18.4.2008. In the intimation, the petitioner has been shown as a drawee utility and point of drawal of power has been indicated as the PGCIL's sub-station at Hazira. Regarding the transmission strengthening requirement (dedicated part), the following has been mentioned:

<i>(d) Transmission strengthening requirement (Dedicated part)</i>	<i>(i) Pooling station (near Sipat) – Mahan TPS 400 kV D/C (Triple) (ii) Gandhar (NTPC) – Hazira (Essar Steel) 400 kV D/C (iii) Establishment of 400/220 kV, 3x500 MVA sub-station at Hazira (Essar Steel) M/s. Essar Power MP Ltd. shall ensure availability of above identified system strengthening scheme at its own cost before commencement of Long-Term Open Access. Note: Interconnection at Hazira (Essar Steel) with WR grid shall be on standalone basis, i.e. on radial</i>
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	<i>mode and shall not be directly or indirectly connected to 220 kV network of GETCO</i>
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24. A reference is also made to the definition of the consumer under Section 2(15) of Electricity Act, 2003 which read as under:

"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."

25. We have considered the rival contentions of the parties. The main issue in the case is whether the Respondent No.2 is liable to pay the Additional Surcharge under Section 42(4) of the Electricity Act, 2003 read with Open Access Regulations, 2011 of the State Commission for the reasons stated that the premises of Respondent No.2 is located within the licensed area of the Appellants and ceased to be connected to Intra-State Network and not a consumer of the Appellants.
26. The Appellants stated that connectivity to the Intra-State Network is not a pre requisite for levy of Additional Surcharge. In this regard

reliance has been placed by Appellants on the decision of the Hon'ble Supreme Court in the case of Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission (2014) 8 SCC 444. In the said judgment, we observed that the decision of the Hon'ble Supreme court had referred to cross-subsidy surcharge and its rational and there is no reference of Additional Surcharge.

27. To deal with the subject of applicability of Additional Surcharge on Respondent No.2 as alleged by the Appellants, the following points are deliberated:-

- (i) It is undisputed between the parties that Respondent No.2 is situated in the licensed area of the Distribution Licensee. It is also undisputed that the Respondent No.2 was granted open access by the Central Transmission Utility on long term basis.
- (ii) It is undisputed between the parties that the Respondent No. 2 filed a petition before the Central Commission and the Central Commission passed an order dated 08.06.2013 declaring Respondent No.2 as a regional entity and the control area of Gujarat State Load Dispatch Centre was transferred to Western Region Load Dispatch Centre. Thus, it is admitted fact that subsequently the scheduling and availability of power to the

Respondent No.2 is being controlled by Western Region Load Dispatch Centre.

- (iii) Prior to this, the Respondent No.2 was receiving power supply as a consumer from Distribution Licensee by utilization of State Transmission Network and associated distribution network of the Distribution Licensee. It is in view of the fact that the Respondent No.2's power requirement enhanced and rightly the Central Commission observed that they can avail the CTU network and sourced the power from private generator. It is also observed that during the pleadings before the Central Commission, both the parties agreed for such an arrangement. After analyzing detailed order of the Central Commission, it is observed that the Appellants have before the Central Commission admitted that the Respondent No.2 should completely isolate from the state network and for all practical practices, it should be treated as regional entity independent to the State of Gujarat and the Respondent No.2 ceases to be a consumer of the Appellant No.2.

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

“(76) ‘wheeling’ means the operation whereby the distribution system and associated facilities of a

transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62.”

In the present case, no part of distribution system and associated facilities of the Appellants is sought to be used by the Respondent No.2 for transmission of power through CTU, from injecting point to the Respondent No. 2's plant. Therefore, as per definition under Section 2(76) of the Electricity Act, 2003, Respondent No.2 is not liable to pay wheeling charges on Additional Surcharge for the open access. In terms of Section 42 of the Electricity Act, 2003, the payment of Additional Surcharge on the charges of wheeling would not arise at all.

29. After transfer to control area from Gujarat State Load Dispatch Centre to Western Region Load Dispatch Centre, the Respondent No.2 cannot be called as embedded customer of the Distribution Licensee of the State of Gujarat.
30. Even after examining of the judgment of Hon'ble Supreme Court of India as well as of this Tribunal as referred to by the Appellant in respect of their Appeal, in our opinion it is clearly established that none of the provisions attract levy of Additional Surcharge by the Appellants on Respondent No.2.

31. We are fully in agreement with the findings recorded by the State Commission in the Impugned Order. The issue is consequently decided against the Appellants and the present appeal merits dismissal.

ORDER

In view of the above, the Appeal No. 84 of 2015 is hereby dismissed and the Impugned Order is hereby affirmed. No order as to costs.

Pronounced in the open court on this **20th day of November, 2015.**

(I.J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

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REPORTABLE/NON-REPORTABLE